1235

S. N. DAR, B. A. LL. B.,
Vakil High Court,
SRINAGAR (Kashmir)

S. N. DAR, B. A. LL. B.,
Vakil High Court

THE JAMMU & KASHMIR UNIVERSITY
LIBRARY.

DATE LOANED

Class No. [redacted] Book No. [redacted]

Vol. _____ Copy _____

Accession No. [redacted]

DONATED

By

PANDIT SHAMBOO NATH DAR.

(1901 — 1969)

ADVOCATE,

and former President

SRINAGAR MUNICIPAL COUNCIL

S. N. DAR, B. A. LL. B.,
Advocate High Court,
SRINAGAR (Kashmir)

THE JAMMU & KASHMIR UNIVERSITY
LIBRARY.

DATE LOANED

Class No. [redacted] Book No. [redacted]

Vol. Copy

Accession No. [redacted]

THE

ALL INDIA REPORTER

1936

L. DAR, B. A. LL. B.,
Vakil High Court,
SRINAGAR (Kashmir)

PATNA SECTION

WITH PARALLEL REFERENCES TO

(1) I. L. R. 15 PATNA
(2) 17 PATNA LAW TIMES
(3) 37 CRIMINAL LAW JOURNAL
(4) 159 TO 165 INDIAN CASES
(5) 1935 CRIMINAL CASES

CITATION : A. I. R. 1936 PATNA

Printed by D. G. Ranade at the All India Reporter Press, Nagpur

And published by

V. V. CHITALEY, B.A., LL. B., ADVOCATE,

AT THE ALL INDIA REPORTER OFFICE,

NAGPUR, C. P.

1936

(All rights reserved)

K. UNIVERSITY LIB.
K. DIVI[illegible]
Acc No. [illegible]
[illegible]

TO

THE LEGAL PROFESSION

IN GRATEFUL RECOGNITION OF

THEIR WARM APPRECIATION AND SUPPORT

PATNA HIGH COURT

1936

Books Checked

S. N. DAR, B. A. LL. B.
Vakil High Court,
SRINAGAR (Kashmir)

Chief Justices :

The Hon'ble Sir Courtney-Terrell, Kt., Bar-at-law.

" Mr. Alfred William Ewart Wort, Bar-at-law (*Ag.*).

Puisne Judges :

The Hon'ble Mr. Alfred William Ewart Wort, Bar-at-law.

" Sir Thomas Stewart Macpherson, Kt., M.A., I.C.S., Bar-at-law, C.I.E.

" Mr. S. Fazl Ali, Bar-at-law.

" " Khwaja Muhammad Noor, B.L., C.B.E., Khan Bahadur.

" " John Francis William James, M.A., I.C.S., Bar-at-law.

" " Shankar Balaji Dhavle, I. C. S.

" " C. M. Agarwala, Bar-at-law.

" " S. P. Verma, Bar-at-law.

" " Francis George Rowland, I. C. S.

" " J. A. Saunders, I. C. S. (*Addl.*).

" " F. F. Madan, I. C. S. (*Addl.*).

EDITORIAL COMMITTEE

DEWAN BAHADUR G. S. RAO, Ex. Judge, High Court, Bombay.
DR. SUDISH CHANDRA ROY, M.A., LL.B.. Ph. D., Bar-at-law, Calcutta.
SIR M. V. JOSHI, Kt., K.C.I.E., Ex-Law Member, C. P. Government, Nagpur.
MR. E. VINAYAKA RAO, B.A., B.L., Advocate, High Court, Madras.
MR. V. V. CHITALEY, B.A., LL.B., Advocate, High Court, Nagpur.

EDITORIAL STAFF

MR. R. K. MANOHAR, B.A., LL.B., Advocate, Bombay (O.S.) and Nagpur.
MR. S. G. GADGIL, B.A., LL.B., Advocate, Bombay and Nagpur.
MR. G. B. JOSHI, B.A., LL.B., Pleader, Nagpur.
MR. D. D. DATAR, B.Sc., LL. B., Pleader, Nagpur.

REPORTERS

Privy Council

Dr. A. Majid, M.A., LL. D., of Gray's Inn, Bar-at-law, London.

Allahabad

Mr. Saila Nath Mukerji, B.A., B.L., High Court Vakil, Allahabad.

Bombay

Mr. S. C. Joshi, M.A., LL.B., Advocate, High Court, Bombay.
Mr. B. D. Mehta, B.A., LL.B., Advocate, High Court, Bombay.

Calcutta

Mr. Praphulla Chandra Ghose, B.A., B.L., Advocate, High Court, Calcutta.
Mr. Monindra Nath Mukerji, B.L., Advocate, High Court, Calcutta.
Mr. Surajit Chandra Lahiri, M.A., B.L., Advocate, High Court, Calcutta.
Mr. Baidyanath Bannerji, M.A., B.L., Advocate, High Court, Calcutta.
Mr. A. K. Bhattacharjee, Bar-at-law, Calcutta.

Lahore

Mr. Amolak Ram Kapoor, B.A. (Hons.), LL.B., Advocate, High Court, Lahore.
Mr. Anant Ram Khosla, B.A. (Hons.), LL.B., Advocate, High Court, Lahore.
Mr. Kedar Nath Chopra, B.Sc., LL.B., Advocate, High Court, Lahore.

Madras

Mr. P. R. Srinivasa Iyengar, M.A., B.L., Advocate, High Court, Madras.
Mr. N. Srinivasa Iyengar, M.A., B.L., Advocate, High Court, Madras.
Mr. C. R. Krishna Rao, B.A., B.L., Advocate, High Court, Madras.

Nagpur

Mr. E. M. Joshi, Bar-at-law, Nagpur.
Mr. R. K. Manohar, B.A., LL.B., Advocate, Bombay (O.S.) and Nagpur.

Oudh

Mr. Surendra Nath Roy, M.A., LL.B., Vakil, Lucknow.

Patna

Mr. Subal Chandra Muzumdar, M.A., B.L., Advocate, High Court, Patna.
Mr. Laxmidhar Mahanty, B.A., B.L., M.L.C., Vakil, Circuit Court, Cuttack.
Mr. Jagat Bandhu Kar, B.A., B.L., Pleader, Circuit Court, Cuttack.

Peshawar

Pandit Raghunath, B.A., LL.B., Vakil, Peshawar.

Rangoon

Mr. Sydney Loo-Nee, Bar-at-law, Rangoon.
Mr. K. C. Sanyal, M.A., B.L., Advocate, Mandalay.

Sind

Mr. Hakumatrai, M. Eidnani, B.A., LL.B., Advocate, Karachi.
Mr. P. K. Vaswani, M.A., LL.B., Bar-at-law, Karachi.

NOMINAL INDEX

Abdus Salam v. Emperor 108
Acharaja Singh v. Emperor 410
Adikandi Sahu v. Banchhu Malik 340
Aditya Prasad v. Ishwar Singh 28
*Ajablal Rai v. Emperor 20
Alijan Mian v. Jatan Thakur 422
Ali Khalifa v. Emperor 103
Alimunnissa Bibi, Mt. v. Abdul Aziz 527
Amal Krishna v. Kedarnath Banerjee 306
Anchahi, Mt. v. (Firm) Birjmohan Lall 177
Apurba Krishna v. Ram Bahadur 191
B, a Pleader of Gaya, *In the matter of* SB 418
Bachalal v. Emperor 56
*Bahore Mahton v. Juro Sahu 78
*Bahuria Ram Sakhi Kuer v. Bindeswari 41
Baijnath Prasad v. Muneshwar 63
Bajrangi Raut v. Lala Janki Parshad 637
Balabux Marwari v. Inder Kumar Tewari 539
Balbahadur Missir v. Narbada Prasad 2
Baldeo Narayan v. Emperor 38
Baldeo Singh v. Mt. Dheno Goalin 109
Banarsi Lal v. Borho Sahu 253
Banwari Lal v. Badri Ram 150
Barari Co-operative Bank, v. Singheswar 256
Barhamdeo Singh v. Kari Singh 498
*Bechan Mahton v. Emperor 37
Benares Bank, Ltd. v. Masudan Lal 444
Bengal Coal Co. Ltd. v. Brijdeo Narayan 408
B. N. Ry. Co. v. Janki Das 70
B. N. W. Ry. Co. Ltd., v. Janki Prasad 362
Beni Singh v. Ram Saran Singh 443
Berry Mahapatra v. Emperor 321(1)
Beyas Narain Singh v. Dasrath Singh 382
Bhaglu Mahto v. Ramautar Sah 442
Bhagwan Das v. Akbar Hussain Khan 571
Bhagwati Saran Singh v. Rai Kishunji 370
Bhagwat Sahay v. Ram Sukrit Ram 313
Bhagwat Singh v. Emperor 481
Bhairo Mahto v. Rajkishore Singh 309
Bhan Kumar v. Ajhodhya Prasad 268
Bharosa Singh v. Jhauri Sao 428
Bhubneshwar Prashad v. Emperor 501
Bhupat Mandal v. Kartik Jha 170
Bhup Narayan v. Hira Lal 185
*Bilat Rout v. Mahbub Safi 303
Bisambhardeo Narayan v. Hitnarayan 49
Brajnandan Singh v. Ramnath Mali FB 472
Brijnath Dutt v. Barda Kanta 562
Brindaban Prasad v. Banku Bihari Mitra 595
Chand Mul v. Naku Manjhi 508
Chandreshwar Prasad v. Arunendra Mohan 626
Chhatra Kumari Debi v. Mt. Parbarti Kuer 600
Chitan Singh v. Gosaindas Manjhi 230
Chuni Lal v. Ram Ranvijoy Prasad Singh 558
Commissioner of Income-tax, Bihar and Orissa v. Dhakeshwar Prasad 295
Commissioner of Income-tax, Bihar and Orissa v. Humayun Raza 532
D, a Pleader, *In the matter of* SB 423
Daiwati Kuer, Mt. v. Mt. Tunki Kuar 474
Damar Mahton v. Jagdip Mahton 535
Damodar Das v. Bindeshwari Singh 76
*Darbar Saheb v. Bare Lal Kandarp Nath 275
Debnath Mahata v. Jagadish Chandra Deo 563
Deonandan Jha v. Emperor 534
Deo Narain Sahu v. Ganesh Ram 604
Deo Narain Singh v. Mt. Lila Kuer 96
De Souza, S. M. v. Secy. of State 542
Dewan Singh v. Emperor 36
Deyal Singh v. Promatha Nath 493
Dhaneshwari Kuar v. Chandradhari Singh 317
Dhanoo Lal v. Sardapat 305
Dhanu Pathak v. Sona Koeri SB 417
Dharam Nath v. Mangla Pershad Singh 65
Dinanath Mahatha v. Jyoti Prasad Singh 400
Dineshwari Kuer v. Ram Narain Singh 546
District Board, Darbhanga v. Suraj Narain 198
Doman Mia v. Gunaram Mahata 39
Dukha Lal v. Mt. Manabati SB 341
Dular Chand Ram v. Kamakhya Narain 110
Dwarka v. Patna City Municipality 282
*Elahi Bux v. Emperor 152
Emperor v. Azhar Mian 425
——— v. Chaturbhuj Narain 350
——— v. Hardwar Sah 486
**——— v. Lalji Rai 11
——— v. Raghunandan Saran Das 639
*Forsyth, R. B. v. B. N. Ry. Co. 307
**Gabriel Christian v. Chandra Mohan FB 45
*Gallimore, C. v. Gallimore FB 15
Ganauri Mia v. Emperor 248
Ganguly, S. N. v. Emperor 172
Gauri Shanker v. Sheotahal Gir 434
*Gauri Shankar Sahay v. Emperor 499
Ghadsiram v. Sambalpur Municipality 101
Ghanshyam Das v. Kishturibala Debi 33
Ghasiram v. Otla Gaurai (Firm) 485
Giridharilal Marwari v. Emperor 579
Gobardhan Mahton v. Sita Ram Singh 491
*Gobardhan Mukharji v. Saligram Marwari 123
Gobardhan Sahu v. Lalmohan Kharwar 611
Gobind Ojha v. Sita Ram 321 (2)
Gochuran Singh v. Ramballabh Das 357
Gopalji Jha v. Gajendra Narayan 226
Gopi Nath Varma v. Manaur Husain 40
Gudar Sao v. Emperor 533
Hanuman Sahay v. Emperor 531
Harihar Prasad v. Bhubneshwari Prasad 270
Hari Mahto v. Emperor 46
Haripada Gupta v. Babu Lal Mahto 266
Hari Prasad v. Emperor 608
Harlal Kamti v. Jhari Singh 93
*Hira Kurmi v. Madan Sao 175
Horil Kuer, Mt. v. Rajab Ali 34
Inderdeo Narayan v. Durga Prasad Singh 59
Inderdeo Tiwari v. Ram Ran Bajay Prasad 164
Jadunandan Singh v. Shankar Sahu 310
Jagarnath Lal v. Lal Babu 447
Jagdeo Narain Singh v. Tula Singh 54
Jagdeo Prasad v. Bhagwan Hajam 135
Jageshwar Singh v. Modnarain Singh 426
Jagtaran Kuer, Mt. v. Mt. Gaitri Debi 430
Jainandan Ram Tewari v. Ruria Uraon 590
Jai Narain Lal v. Kashilal 511
Jamna Das Bisesar Lal v. Mani Ram 439
Jamuni, Mt. v. Bholaram 561
Janaki Nath v. Asad Reza 211
*Jang Bahadur Singh v. Chhabila Koiri 23
Janki Das v. Kalu Ram 250
Jhakar Sahu v. Raj Kumar Tewari 102
**Johabaj Khan v. Srikrishna Dey FB 29
Jokhiram Sagarmal v. Chaman Choudhry 104
Joti Lal Sah v. Sheodhayan Prashad Sah 420
Jugesh Chandra Bose v. Maqbul Hussain 384
Jugeshwar Singh v. Emperor 346
Jyoti Prashad Singh v. Bharat Shah Babu 543
Jyoti Prasad Singh v. Rajendra Narayan 287
K, a mukhtar of Aurangabad SB 337
Kallar Choudhury v. Mt. Kamod 300
Kalyan Mul Mathur v. Emperor 577

Kamakhya Narain v. Inderman Ram 265
Kameshwarsingh v. Ambler State and Stone Co., Ltd. 468
Kameshwar Singh v. Bacha Koiri 446
Kameshwar Singh v. Emperor 413
Kameshwar Singh v. Mahabir Pasi 402
Kameshwar Singh v. Mahabir Pasi 403
Kanhya Lal Missir v. Mt. Hira Bibi 323
Kapileswar Maharana v. Abdul Rahman 490
Kedar Nath v. Bhagwat Prasad 404
Keshab Prusti v. Ananta Mahanty 621
Kesho Ram v. Ram Lal Sahu 312
Khartar Shah v. Shyamlal Singh 616
Kinei Majhi v. Gobind Prasad Singh 44
Kirtyanand Sinha v. Ramanand Sinha 456
Krishna Chandra v. Rajendra Narayan 465
Kuchwar Lime and Stone Co. Ltd. v. Secy. of State 372
Kukur Sahu v. Bibi Salihan 406
Lachhiram Baldeodas v. Commissioner of Income-tax 476
Lachminarayan Das v. Chairman, Cuttack Municipality 322
Laikunnissa, Mt. v. Durga Das 114
Lal Babu v. Rang Bahadur Singh 506
Lal Behari Singh v. Mahabir Mahton 414
Lal Narain Singh v. Ugeshwardhari Singh 107
*Latur Rai v. Bhagwan Das 80
Lilku Mahto v. Amar Mahto 602
Madhusudhan Das v. Mathurananda Das 225
Mahabir Das v. Sadho Choudhuri 505
Mahabir Prasad v. Brij Mahan Prasad 553
Mahabir v. Dhanushdhari 409
Mahabir Prasad v. Mahammad Yehia 390
Mahabir Prasad v. Mt. Jaidayi Bibi 190
Mahadeb Marwari v. Sailaji Kanta Mitra 416
*Maheshwar Charan v. Dineshwari Charan 386
**Mahomed Alam v. Babulal Marwari FB 18
*Mahomed Sadiq v. Harakh Narain 583
Mahomed Yusuf v. Mohamad Waheed 147
Mangar Koiri v. Emperor 512
Mangtulal Bagaria v. Daya Shanker 572
*Marim Bibi, Mt. v. Surajmal 591
*Mathura Singh v. Rama Rudra Prashad 231
Mithu Pandey v. Suraj Kumar 319
Mohan Lal (Firm) v. Udai Ram-Sewa Ram 140
Moharmani Kuer v. Bhankumar Chand 176
Moti Singh v. Deoki Singh 66
Mukhram Mahto v. Kesho Prasad 258
Mukhram Rai v. Chandradeep Rai 68
Mukund Jha v. Dhorup Narain Jha 77
Munga Lal v. Sagarmal 629
Munshi Mahton v. Jugeswari Prasad Singh 133
Munshi Sahu v. Bhupal Mahton 274
Munshi Singh v. Peyara Singh 151
Naga Rai v. Buchi Rai 285
Nanak Prasad v. Mt. Kaseda Kumri 260
Nanhkoo Mahton v. Emperor 358
Narain Pasi v. Nanhu Mistri 433
Narayan Thakur v. Kamalrani Debi 167
*Narottan Das v. Krishna Prasad 289
Narsingh Narain v. Rameshwar Singh 360
*Nasiruddin v. Hakim Muhammad 119
Naurang Lal v. B. B. & C. I. Ry. 84
Nawalal Jha v. Emperor 162
*Nilkantha Narayan v. Debendra Nath 115
Nimaicharan Das v. Surendra Nath Ghosh 606
Nisam Singh v. Ramchandra Sao 429
Nitai Lal v. Gobinda Bhushan 142
*Pancham Singh v. Rai Promotha Nath 450
Panchi Mandal v. Gena Mander 161
Parbati Kuer v. Baijnath Prasad 200
Parmeshwar Dayal v. Brindaban Chandra 106
Pirthi Singh v. Ramsaran Mahto 556
Pratap Udai Nath Sahi v. Baraik Lal 615
Puna Bibi, Mt. v. Keshab Rai Ji Thakur 411
Radha Mohan v. Kamaldhari 243
Raghubir Mahto v. Ganeshdutt Ojha 128
Raghunandan Gir v. Deoraj Gir 85
Raghunath v. Surajmal Nagarmal, Firm 6
Raghunath Singh v. Emperor 537
Raghuni Prasad v. Emperor 249
Rajendra Narayan v. Lalmohan 462
*Ram Ajodhya Tewari v. Firangi Tewari 3
Ramanand Ganpat Rai v. Rakhal Mandal 496
Ram Chandra-Faraya Lal v. Dharman 437
*Ram Das v. Ram Babu 194
*Ramdayal Sen v. Chakrapani Nandi 60
Ramdhani Mahton v. Emperor 536
Rameshwar Prasad v. Kunj Behari 125
Rameshwar Prasad Singh v. Basdeo Singh 126
Ramgolam Singh v. Charan Mahton 57
Ramjas Marwari v. Purulia Municipality 145
Ramji Das v. Mahamaya Prasad Singh 158
*Ramkeshwar Das v. Baldeo Singh 588
*Ramkinkar Banerji v. Commissioner of Income-tax, Bihar and Orissa 267
Ramlal v. Secy. of State 257
Rampat Sahu v. Bhajju Sahu 160
Ram Prasad v. Beni Madho 26
Ramrachhya Singh v. Damar Singh 356
Ram Ranjan Ray v. Haku Mian 52
Ramsagar Gope v. Emperor 622
Ramsaran Pandey v. Iswar Pandey 10
Ramsundar Sahu v. Sakhi Sahoo 132
Ras Behari Mandal v. Jagadish Chandra 111
*Rekha Thakur v. Ramnandan Rai 7
S, a Pleader, Raghunathpur, *In re* SB 1
Sankatha Rai v. Khaderan Mian 503
*Sankru Mahto v. Bhoju Mahato 548
Sanmon Tewari v. Emperor 581
Sarat Chandra Das Mahapatra v. Emperor 607
Sarju Singh v. Bhagwat Prasad 393
Sarup Lal v. Emperor 636
Sashi Bhusan v. Dalip Narain 75
Satyabadi Sahu v. Mani Sahu 619
*Satyadeva Narayan Sinha v. Tirbeni Prasad 153
*Secy. of State v. Amarnath 339
————v. Kameshwar Singh 87
————v. Lodna Colliery Co., Ltd., 513
Sheobalak Prasad v. Jugal Kishore Narain 568
Sheogobind Rai v. Deonarayan Ahir 631
Sheonath Prasad v. Benares Bank Ltd., 62
Shivadulari Kuer, Mt. v. Bhagwati Charan 593
Shiva Prasad Singh v. Ramjas Agarwala 345
Shiya Janki v. Kirtanand Singh 173
Sitaram Sinha v. Jogendra Narayan Sinha 171
Sonu Lal v. Ramnandan Singh 552
Sorabji Dadabhai v. B. N. Ry. Co. Ltd. 393
Sri Krishna Prasad v. Emperor 438
Sri Mahabirji v. Ramnath Kasarwani 634
Sripati Samanta v. Lalji Sahu 361
Srish Chandra Nandy v. Ramji Bechar Das 179
Sudhakar Misra v. Nilkantha Das 129
*Sukni Chamain, Mt. v. Emperor 245
Suraj Dusadh v. Emperor 627
**Surendra Kumar v. Srichand Mahata FB 97
Surpat Singh v. Gena Jha 315
Surpat Singh v. Shital Singh 480
Tejmal v. (Firm) Jokiram Surajmal 112
Thakur Prasad v. Emperor 74
Thakur Prasad v. Emperor 122
Thakur Prasad v. Babui Harpeari 401
Yakub Christian v. Patras Munda 570
Zainab Bibi, Mt. v. Muhammad Ayub 136

SUBJECT INDEX

Absence of Star denotes Cases of Provincial or Small Importance.
** Indicates Cases of Great Importance.*
** * Indicate Cases of Very Great Importance.*

Accounts—Customer on application getting overdraft after furnishing surety—Surety undertaking to guarantee overdraft and also to hold himself liable for dues of customer, bank's charges, etc.—Statement of accounts signed by customer but not by surety — Held that there was account stated between customer and bank, and customer was liable to pay—Surety also held liable to pay under his own contract 444

Administration—Receiver in administrative suit — His appointment does not divest estate from owner 572*f*

***Administrator** — Letters of administration—Alienation prior to grant is not binding on estate—Estate mortgaged prior to grant for paying court-fees for getting letters of administration—Hence mortgage is binding on estate 41*a*

Adverse Possession—Mere non-payment of rent does not by itself create adverse possession 287*c*

——Co-sharer — Ouster — Knowledge on part of person ousted is essential — Non-receipt of rent is not proof of ouster — Burden of proof is on person setting up adverse title 136*b*

——Proof of—Possession referable to lawful title will not be deemed to be derived from usurpation 136*d*

——Partition suit — Parties divided in status but not in properties—Defendant in exclusive possession of disputed land for over 12 years—Art. 127 or Art. 144, Lim. Act, held applied and defendant held got title to land 68*b*

——Tenant-in-common — Other tenants in possession—Tenant not ousted by them —Tenant is deemed in possession though living at great distance and without any concern with property 66*b*

Appeal—Difference between judgment on appellate side and final order on appeals —Former may include latter but latter is not same as former 465*c*

——New point should not be allowed at late stage 260*b*

——Lower appellate Court allowing question of jurisdiction to be raised—Court must secure material to be able to adjudicate on the point—It may direct original Court to take further evidence 260*e*

——Limitation—Appeal preferred against minor — Appointment of guardian not preliminary requisite for filing appeal—Period of limitation to be calculated when appeal is actually preferred and not when guardian is appointed 153*c*

——Order allowing deposit and setting aside execution sale—Second appeal does not lie 119*a*

——Wrong decision on jurisdiction does not give right of appeal 119*c*

——Suit for enhancement of rent—Lower Court holding that no prevailing rate existed—High Court held could not interfere with finding 54*b*

Arms Act (11 of 1878), *S. 19 (f)* — Weapon found in room in house belonging to joint family—Room not proved to be in exclusive possession of any member—No member other than head of family can be said to be in possession of weapon 512

***Attachment** — Warrant of attachment issued without notice under O. 21, R. 22 (1), Civil P. C. — Reasons not recorded under O. 21, R. 22 (2)—Warrant is not illegal — Resistance to execution of warrant is offence within Penal Code 37

Award—Application for passing decree in accordance with—Arbitrators need not be made parties 161*a*

Bengal Alluvion and Diluvion Regulation (11 of 1825), *S. 4, Cl. 2*—River between villages suddenly changing course—No custom proved that river should be taken as boundary between villages—Land being clearly recognizable shall remain the property of its original owner 637*a*

Bengal Court of Wards Act (9 of 1879), *Ss. 13 and 14*—Estate held under Court of Wards is not legal entity—Manager of Court of Wards does not represent it —— Only person entitled to bring suit on behalf of estate is proprietor— Suit in name of manager is not maintainable 198*d*

Bengal Court of Wards Act
——*S. 55*—Prohibition laid down in S. 55 does not extend to litigation already in progress when Court of Wards assumes charge of estate 114
Bengal Embankments Act (2 of 1882)—Cases under Act should be heard by experienced Magistrates 413*c*
——*S. 79*—Accidental breach filled up — Collector not averse to repair but sanction not obtained—Offence technical and order under S. 79 is not proper 413*b*
——*S. 89*—District Magistrate cannot set aside order of Subordinate Magistrate except on appeal 413*a*
Bengal Estates Partition Act (5 of 1897), *S. 5 (4)*—Tenancy—Partition — Different proprietors severally possessing shares—There is undivided share of estate—Several shares should be allotted first—Then there should be division of joint estate 226*a*
——*S. 77*—Partition — Civil Courts are reluctant to interfere with jurisdiction of Revenue Court—When interference is invoked facts of each case should be scrutinized — Civil Courts not empowered to issue injunction to Batwara Courts — Power of civil Courts is limited in matters coming under S. 77 226*c*
——*S. 77*—Revenue Court having jurisdiction for partition proceedings — Mere error in exercising jurisdiction does not render proceedings void, nor does it entitle civil Court to correct it 226*b*
Bengal Ferries Act (1 of 1885), *S. 6 (b)*—Private right interfered under authority of statute—Aggrieved party has no remedy if none provided — Remedy provided — Aggrieved party can get only that remedy in manner stated — Government taking plaintiff's ferry under S. 6—No arbitrary, careless or oppressive action in taking — Plaintiff held had no cause of action 87*a*
——*S. 17*—Scope of — S. 17 refers to assessment of and not to recovery of compensation 198*b*
——*S. 17*—Magistrate investigating income of ferry to ascertain average profit—Finding mustajir bidding not only on income of ferry but also on expectation of getting illegal tolls—Magistrate held could ignore illegal income—His order held not revisable by civil Court 87*d*
Bengal Land Registration Act (7 of 1876), *Ss. 52 and 55*—Application for registration of name under the Act—Officer deciding objection must come to conclusion only as to possession of one or other party 167*a*
Bengal Land Registration Act
——*Ss. 55 and 62*—Land Registration Officer has jurisdiction to make reference under S. 55 to civil Court—Mere fact that he exercises his discretion in irregular manner does not affect jurisdiction of civil Court 167*c*
——*S. 62*—Order of civil Court on reference under the Act is final—*Obiter* 167*b*
——*S. 78* — Co-sharer in possession of larger share than his registered share in some mouzas of estate and less share in others—He is not debarred from suing for rent due to him so long his total interest does not exceed his registered share 414*d*
Bengal Land Revenue Sales Act (11 of 1859), *Ss. 2 and 3*—Kistabandi and kist—Meaning of—Kistabandi dates are according to fasli era—Latest dates fixed in January, March, June, September, whether are kistabandi dates — R. 1, Bengal Tauzi Manual—Definition of word "kist" 260*c*
——*S. 31*—S. 31 does not bar suit for recovery of surplus sale proceeds by actual proprietor against recorded proprietor 370*a*
——*S. 31*—Suit for surplus sale-proceeds by actual proprietor—Cause of action is for money had and received for plaintiff's use 370*b*
——*Ss. 31 and 60* — Entry in register does not create title 370*d*
——*Ss. 33 and 25*—Land sold for arrears of revenue—Appeal to set aside sale filed beyond time—Appeal filed out of time is no appeal in law—Suit to set aside sale is not entertainable 260*a*
——*S. 33*—Suit to set aside sale — Jurisdiction of Collector to sell land challenged—Decision depends on nature of estate being liable for arrears of land revenue on date when it was sold 260*d*
Bengal Sonthal Parganas Justice Regulation (5 of 1893), *S. 27*—Rules under—Santhal Parganas Manual, Judicial Rule, R. 35—R. 35 is inconsistent with Art. 182, Limitation Act—Hence it is ultra vires 104*c*
——*S. 27*—Rules under — Sonthal Parganas Manual, Judicial Rules, R. 36—'Proceeding' need not be execution proceeding—Execution may be continuation of transfer proceeding and as such an exception to R. 36 as being pending proceeding 104*d*
Bengal Sonthal Parganas Settlement Regulation (3 of 1872), *S. 25-A*—S. 25-A covers cases in which Settlement Officer refused to record name of claimant to zamindari 171*a*
Bengal Survey Act (5 of 1875), *Ss. 41 and 62*—Order determining boundary line

Bengal Survey Act
dispute passed—Suit for confirmation of possession, on allegation that plaintiff has been in possession from before order, is barred by S. 62 185*d*
——*S. 41* — Adoption of boundary line given in Record of Rights of neighbouring mauza amounts to determination of boundary 185*e*
——*S. 62* — Entry in Record of Rights relating to boundary between the mauzas is governed by S. 62 185*f*

Bengal Tenancy Act (8 of 1885), *S. 21* — Act applies only to ordinary agricultural relationship of zamindar, tenure-holders and raiyats under them — It does not apply to contracts whereby Railway Company grants license of land owned by it for purposes of cultivation—Licensee does not acquire occupancy rights in land given to him 362*c*
——*S. 22*—S. 22 applies to transferable holding even with the landlord's consent 285*c*
——*S. 22 (2)*— One of co-sharers purchasing holding in execution of rent decree in presence of other co-sharers — Such lands are not liable to partition 317
——*S. 30 (a)* — 340 tenants with same area of land of same quality and with same privileges paying various rents — No prevailing rate held existed within S. 30 (a) 54*a*
——*S. 30 (h)* — Rent — Enhancement — Landlord found entitled to enhancement of Re. 0-3-9 per bigha — Enhancement of only Re. 0-1-0 allowed on principle of economic depression — Rent already low—Principle held did not apply—(*Obiter*) 54*c*
——*S. 38*—Suit for rent by landlord—Tenant is entitled to raise plea for abatement of rent—Principle of S. 38 applies to such plea 414*a*
——*S. 38*—"Permanent" must be read with reference to circumstances of each case — Deterioration must be such as would continue from year to year 414*b*
——*S. 38*—Suit for rent—Tenant taking plea of reduction of rent — Court should not give effect to plea to greater extent than is warranted by written statement **414***c*
——*Ss. 38 and 52* — Istimrari mukarrari tenant cannot claim reduction under S. 38, but he can do so under S. 52—*A I R 1935 Pat 194=156 I C 407, Reversed* **SB** 341*a*

Bengal Tenancy Act
——*S. 38*—S. 38 applies only to occupancy tenants **SB** 341*c*
——*Ss. 50 (2), 103-B (3), 104-H and 115*—Suit under S. 104-H—Entry in favour of tenant in Record of Rights challenged—Tenant can avail of presumption under Ss. 50 (2) and 103-B (3) 446*a*
——*S. 52*—S. 52 is general and applies to all tenancies including a tenant holding under an istimrari mukarari lease **SB** 341*d*
——*S. 52*—S. 52 applies to all cases where there is deficiency in area of holding or tenure from whatever cause **SB** 341*e*
——*S. 70*—Order under S. 70 is not decree 125
——*Ss. 106 and 109*—Suit for rectification of entry in Record of Rights does not bar suit for declaration of title and possession 606
——*S. 115*—Word "thereafter" clearly signifies "after the particulars have been finally recorded after recourse to all the provisions contained in Chap. 10 for the attainment of finality in this respect" 446*b*
——*S. 153*—Refusal to revise by District Judge—High Court can exercise powers of revision in proper case 402
——*S. 153 (a)*—Mafi claimed as being given to party as Brahmins—Plea not established — Amount claimed less than Rs. 100—S. 153 (a) held bar to appeal 65
——*S. 155*—Lease with covenant not to alienate — Transferee from lessee is not tenant and so not entitled to benefit of S. 155 493*e*
——*S. 169* — Two months' period prescribed in S. 169 is for benefit of landlord rent decree-holder 164*a*
——*S. 170*—S. 170 does not bar claims under O. 21, R. 58, Civil P. C., where decree obtained by landlord is not rent decree but money decree 480*a*
——*S. 170*— S. 170 does not exclude claim under O. 21, R. 100, Civil P. C.—Person claiming land adversely to judgment-debtor can sue for declaration that decree is not binding on him 480*b*
——*S. 171*—Suit for arrears of rent—One of co-tenants paying entire decretal amount and then filing contribution suit against other co-tenants—It is doubtful if such person is entitled to claim charge 571*c*

Bihar and Orissa Food Adulteration Act (2 of 1919), *Ss. 3 and 10* — Proceedings alleged to have been irregular by

Bihar and Orissa Food Adulteration Act
reason of absence of complaint by local authority—Irregularity is cured by S. 537, Criminal P. C. 636*a*
——*S. 3*—Magistrate can take cognizance of offence punishable under Act, wherever offence may be discovered 145*d*
——*S. 3 (4)*—Offence under S. 3—Tins of mustard oil found to have been manufactured and delivered from mill owned by accused — Court can apply presumption under S. 3 (4) that oil is manufactured by accused 145*c*
——*S. 4 (b)*—S. 4 (b), Excep. (ii)—Before applying S. 4 (b) Court must determine whether foreign matter has been added fraudulently — Mere presence of foreign matter in small quantity is not necessarily offence 636*c*
——*S. 10*—Prosecution under the Act—Question that prosecution was started without order or consent of local authority or that the Act has not been brought into force in the area by Government notification should be raised and determined in Courts of facts—They cannot be raised in revision 636*b*
Bihar and Orissa Municipal Act (7 of 1922), *S. 82 (2)*—Resolution by Commissioners is sufficient authority to compel platform owners to take licenses 101*b*
——*S. 107 (2)*—One month's notice is condition precedent to alteration of assessment—Merely because objection is considered by commissioners on merits is no bar to suit 322*b*
——*S. 180 (2)*—Platforms whether new or old cannot be retained without license 101*a*
——*S. 194*—It is for Municipality to decide as to condition of building and as to whether demolition or repairing is to be made—Decision cannot be questioned in civil Court 282*c*
——*S. 194 (2)*—Notice to demolish—Non-compliance — Person cannot urge before Court that requisition to demolish was unnecessary 282*a*
——*S. 194 (2)*—Notice under S. 194—Non-compliance—Objection filed late but inquired into and report obtained from engineer — Prosecution for original non-compliance with notice held contrary to law 282*d*
——*Ss. 285 and 286*—Articles not intended for sale within Municipality cannot be legally seized under S. 286 145*a*
Bihar and Orissa Municipal Act
——*Ss. 285 and 286*—Articles described in S. 285 cannot be inspected merely because they are in Municipal limits *in transitu*—Articles seized and their condition warranting complaint under S. 3, Food Adulteration Act—Commissioners can make complaint before Magistrate 145*b*
——*S. 377*—Suit for declaration that alteration in assessment is illegal and injunction for levying same—S. 377 does not apply 322*a*
Bihar and Orissa Public Demands Recovery Act (4 of 1914), *S. 26* — Certificate has no greater force than that of simple money decree 572*e*
——*S. 46*—Scope of—Suit for declaration that sale does not affect plaintiff does not come under S. 46 572*c*
Bihar and Orissa Tenancy Act (2 of 1913), *S. 61 (2)*—No conflict between presumption under S. 61 (2) and that deriving from Record of Rights — Reclamation by tenant with implied consent of landlord—Tenant cannnot be ejected 340
Bihar Tenancy Act (8 of 1934), *S. 26 (o)*—S. 26 (o) will not take away right vested in party by decree passed before Act comes into force 173*d*
Bihar Tenancy (Amendment) Act (1935), *S. 26-N* — Sale before 1923—Consent of landlord is presumed even if purchaser is one of co-sharers 285*a*
Central Provinces Tenancy Act (11 of 1898), *Ss. 46 and 47*—Acquisition of land in possession of recorded tenant—His heir is not person interested within meaning of S. 18, Land Acquisition Act 542*a*
Chota Nagpur Tenancy Act (6 of 1908), *S. 6*—Settlement of cultivation—No difference between planting orchard on land settled and gathering fruits of orchard already in existence 265
——*S. 11*—Rent suit—Issue of limitation decided in plaintiff's favour — Defendants have no right of appeal to Deputy Commissioner 356
——*Ss. 21, 22 and 139 (4)*—Suit by landlord for ejecting occupancy tenant for using land in a way detrimental to tenancy is entertainable exclusively by Deputy Commissioner under S. 139 (4)—It is doubtful whether suit lies in civil Court for injunction restraining such use of land —*Quaere* 142*b*
——*Ss. 46 and 47*—Whether judgment-debtor takes objection or not, holding cannot be sold although it can be mortgaged 561*b*

Chota Nagpur Tenancy Act
——*S. 46*—No provision that mortgage beyond five years is illegal 63*c*
——*Ss. 64 (3) and 67*—Person reclaiming land though by trespassing on another's—He acquires occupancy rights in reclaimed land 39
——*S. 74-A (as amended in 1920)* — Pradhani is custom of locality and when new pradhani is formed and treated as ancient pradhani it will be governed by same custom 563*b*
——*S. 74-A (as amended in 1920)* — Saleability of pradhani tenancy is inconsistent with S. 74-A—Custom of such sale cannot be given effect to 563*c*
——*S. 76*—Pradhani village — Proprietor and pradhan—Record of pradhan's customary rights—Rights of proprietor are subject to rights of pradhan and of the raiyats—Pradhan given power to control reclamation of waste land — Proprietor held could not give permanent lease without consent of pradhan 508
——*Ss. 87 and 258*—Decision of Judicial Commissioner in suit under S. 87—Subsequent suit for possession will not be barred even though incidentally it may have to be shown that entry in Record of Rights is not correct 611
——*S. 181*—Decree transferred to civil Court—Limitation applicable to execution application is S. 181 and not liberal limitation obtaining on civil side 615*c*
——*S. 182*—'Any other prescribed Court,' meaning—*Quaere* 615*a*
——*Ss. 208, 210 (3)* — Act is complete Code in itself 615*d*
——*Ss. 208 and 74-A (as amended in 1920)*—Pradhani tenancies as recorded in Satwalipis are not liable to be sold in execution of decree for rent 563*a*
——*Ss. 212 and 214 (b)*—Scope of S. 214 (b)—Court accepting amount due after expiry of 30 days and ordering sale to be set aside—Such order being without jurisdiction is ultra vires—S. 214 (b) is no bar to civil suit to set aside such order 590
——*S. 257*—Each of two landlords receiving his share of rent by arrangement—Surrender of half holding to one landlord is valid 52*b*

Civil Procedure Code (5 of 1908), *S. 11 and O. 21, R. 58*—Execution proceedings—Objection by *A*—Court positively deciding *A* to be representative of judgment-debtor—Decision held res judicata—Whether it was incumbent on *A* to take action contemplated by O. 21, R. 58, when case

Civil P. C.
was subsequently struck out partly satisfied on compromise petition of parties was beside point 616
——*S. 11*—Suit for rent in respect of land alleged to be within plaintiff's patti—Suit dismissed — Subsequent suit for rent or alternatively for assessment of fair rent in respect of same land but alleging that it fell within separate patti of plaintiff—Suit held barred by res judicata 511*a*
——*S. 11*—Execution—Doctrine of constructive res judicata does not apply to execution proceedings 496*c*
——*S. 11*—Question once decided—Same Judge giving contrary decision on same question in same proceeding—Re-opening of question is barred 447*c*
——*S. 34*—Interest pendente lite can be granted without plaintiff asking for it 191*a*
——*S. 34*—Money suit—Plaintiff cannot as matter of right claim interest for period during which suit has been pending 191*d*
——*S. 35*—Order for costs is discretionary 513*k*
——*S. 35, O. 41, R. 22*—No cross-objection merely on order for costs 513*l*
——*S. 38*—Only passing decree or obtaining one on transfer gives jurisdiction 615*b*
——*S. 38*—Execution of final mortgage decree—Application for final decree found time barred — Executing Court held not entitled to investigate whether application for final decree was time barred 93*b*
——*S. 47*—Mortgage decree on portion of holding—Holding sold for arrears of rent under Public Demands and Recovery Act—Purchaser is not representative of judgment-debtor in mortgage decree 561*a*
——*Ss. 47, 151, O. 32, R. 7 (2), O. 47, R. 1*—Adjustment of decree effected by next friend of minor decree-holder, during execution proceedings, without sanction of Court sought to be set aside—S. 47 bars fresh suit—Proper remedy is by application for review or by invoking inherent jurisdiction of Court 506*a*
——*S. 47*—S. 47 should be liberally construed 289*c*
——*S. 47*—Undivided share of judgment-debtor attached—Judgment-debtor dying during pendency of attachment—Execution case dismissed for want of prosecution—Order of dismissal set aside—Attachment held to have revived—Nephews of judgment-debtor in possession of property held to be representatives within meaning of S. 47 126

Civil P. C.
——*S. 60, Proviso (f)*—Right of personal service 10*b*
*——*S. 80*—Notice to Secretary of State necessary condition precedent—No claim against Secretary of State though impleaded—Notice must still be given 339
——*S. 100*—Whether new tenancy has been created is mixed question of fact and law 411*b*
——*S. 100*—Legal necessity is question of fact 275*c*
——*S. 100*—Finding of fact however gross and inexcusable is binding 140*b*
——*S. 100*—Law point not dependent on question of fact can be raised 104*b*
——*S. 100*—Question whether evidence supporting point exists is question of fact —Court's conclusion that no evidence exists or evidence is not evidence supporting point—Question is of law 96*b*
——*S. 100*—Finding of no neglect or misconduct is not one of law 84*c*
——*S. 100*—Question of fact cannot be re-opened 7*b*
——*S. 102*—Suit for recovery of money value of bhaoli produce of mahua trees is suit for money and not suit for rent—No second appeal lies from such suit 102
——*S. 109 (a)*—Order made in revision under S. 115, Civil P. C., is not order made on appeal — No leave for appeal under S. 109 (a) 465*b*
——*S. 109 (c)*—Application under O. 21, R. 100, Civil P. C., in anticipation of delivery of possession — Court deciding it under Rr. 99 and 101 of O. 21, Civil P. C. —Case not fit for appeal to Privy Council under S. 109 (c) 465*a*
——*S. 110* — Judgment of affirmance—Suit for possession—Trial Court holding that plaintiff was entitled to recover possession and defendant's payment of certain sum was forfeited—High Court, on appeal, affirmed judgment as regards main question but reversed it as regards sum—Judgment held was judgment of affirmance and applicant must show substantial question of law 553
——*S. 111*—Decision of single Judge—Leave to appeal to Division Bench refused —Appeal to Privy Council is prohibited by S. 111 106
*——*S. 115, O. 33, R. 1 and O. 22, R. 3*—Application for leave to sue as pauper —One applicant dying during pendency of application — His legal representative is entitled to be brought on record—Court not granting time for substitution of heirs of deceased applicant acts with material irregularity 591*a*
*——*S. 115*—Action can be taken under S. 115 even without application by party aggrieved 591*b*
——*S. 115, O. 9, R. 13*—Summons duly served on defendant—Suit transferred at defendant's instance to another Court—Ex parte decree—District Judge in appeal restoring case to file on sufficient ground —Plaintiff claiming interference on ground that Courts below did not decide question of limitation as it was case of defendant having been served—Case held to be one of non-service and circumstances held did not justify interference in revision 490
——*S. 115*—Trial Court directing prosecution under S. 476, Criminal P. C.—Appellate Court not satisfied with case of prosecution can direct withdrawal of complaint —High Court will not interfere under S. 115 with its order 382*a*
——*S. 115, O. 14, R. 2* — Interlocutory order although within discretion of lower Court, can be set aside when discretion is not exercised judicially—Court summarily rejecting prayer for trying preliminary issue on point of law—No opinion expressed as to whether question of law would be sufficient to dispose of case—High Court would interfere in revision 250*b*
——*S. 115*—Application under S. 115 for setting aside order directing court-fees to be paid under S. 7 (iv) (c), Court-fees Act —Remedy by way of appeal open to plaintiff—No likelihood of irreparable loss if order is not set aside—High Court will not interfere 190
——*S. 115*—High Court will not interfere where another remedy is open — Party losing on reference under S. 55, Bengal Land Registration Act, entitled to bring suit under S. 59 of the Act—High Court will not interfere in revision 167*d*
*——*S. 146* — S. 146 authorises person claiming under another to apply for what other could—Appellant claiming substitution in deceased plaintiff's place under plaintiff's living daughter—Appellant held could apply for substitution of daughter's name but not for his own 123*b*
——*S. 151 and O. 41, R. 23*—Trial Court deciding suit on merits and on preliminary point—No remand under O. 41, R. 23 491*a*
——*S. 151 and O. 41, R. 23*—Remand to begin de novo trial again — Remand is

Civil P. C.
under S. 151—No appeal lies from such order 491*b*
——*O. 1, R. 3*—Suit for decree against Hindu joint family property—It is not necessary for plaintiff to state that he is suing defendant as karta — Suit against karta without mention of other members ——Decree is not liable to be set aside merely because members are not joined—But members can raise question whether decree binds joint family property 258*b*
——*O. 1, R. 10*—Transposition of defendant as plaintiff should always be adopted if necessary for complete adjudication and to avoid multiplicity of proceedings 107
——*O. 6, R. 17*—Appellant seeking amendment of plaint in appeal on ground of mistake in typing—No explanation offered why mistake was not discovered earlier—Amendment will not be allowed 191*c*
——*O. 9, R. 3*—Suit for recovery of money—Defendant several times taking adjournment—Plaintiff ready to go on with case—On day of hearing, plaintiff filing hazri—Neither party responded to call when case called out—Case dismissed for default—Court held acted with material irregularity 437
——*O. 14, R. 2*—Question whether Court should grant or reject prayer to try preliminary issue of law—Court should observe harmony between general principle that cases should not be tried piece-meal and the wholesome provisions of O. 14, R. 2 250*a*
——*O. 14, R. 2*—O. 14, R. 2 is mandatory—Only discretion left with the Court is to form and express opinion if case can be disposed of on issue of law only 250*c*
——*O. 21, R. 2 (3)*—O. 21, R. 2 (3) is mandatory — Payment not certified will not be recognized 253*a*
——*O. 21, R. 2 (3)*—O. 21, R. 2 (3) contemplates certification before objection is taken to execution on basis of adjustment 253*c*
——*O. 21, R. 2 (3)* — Agreement between judgment-debtor and decree-holder that balance of decree would be paid by instalments and that decree-holder will not be entitled to interest amounts to adjustment — It cannot be recognized unless certified 253*d*
——*O. 21, R. 6* — There is no power of transfer of decree obtained in Panchayat Court to civil Court for execution 150
——*O. 21, R. 17*—Time and place of verification omitted — Defect held trivial and application not bad thereby 62*a*

Civil P. C.
——*O. 21, R. 17*—Person signing verification as agent need not produce power along with application—Application signed by person authorized is in order—Production of power ordered by Court—Non-production—Application may be dismissed — Valid application not rendered invalid thereby 62*b*
——*O. 21, R. 22* — Decree against father and son — Son dying before execution — Execution taken out against father personally and not as heir of son — Notice under O. 21, R. 22 is not necessary 253*b*
——*O. 21, R. 50*—Ex parte decree against firm mentioning also individuals constituting it—Execution—Objection by partners *A* and *B* that they were not personally liable — *A* and *B* proceeding under O. 9, R. 13 to set aside ex parte decree — Proceeding dismissed on decree-holder contending that decree was against firm—Decree-holders held could not subsequently contend that decree was against individuals 496*a*
——*O. 21, R. 58, Ss. 47 and 115*—O. 21, R. 58 applies to all cases in which judgment-debtor makes objection in representative capacity and not in his personal capacity— Judgment-debtor alleging that land attached is held by him on behalf of deity — His objection falls under O. 21, R. 58 and not under S. 47 — Order is not appealable 256
*——*O. 21, R. 89* — Decree for specific performance of contract for sale, against tenant of property sold under another execution — Application by holder of former decree for setting aside execution sale — Specific performance decree not executed by applicant when deposit for application made — Applicant held had no title when making deposit 119*e*
——*O. 22, Rr. 2, 3 and 4* — Right to sue survives—Test mentioned—The test whether a right to sue survives in the surviving plaintiffs or against the surviving defendants is whether the surviving plaintiffs can alone sue or the surviving defendants could alone be sued in the absence of the deceased plaintiff or defendant respectively 548*a*
*——*O. 22, Rr. 2, 3 and 4*— Representatives of deceased party already on record and the right to sue or to be sued surviving to them— No application for substitution is necessary 548*b*
——*O. 22, R. 3* — R. 3 does not apply to assignee of deceased—Person's application

Civil P. C.
for substitution of his name in deceased plaintiff's place— Claim based on transfer during plaintiff's lifetime— Applicant held not entitled to substitution 123*a*
——*O. 22, Rr. 3 (1) and 9 (2)* — Appeal by deceased sole appellant abating — No application by legal representatives under O. 22, R. 3 (1) for substitution of their names — Court cannot substitute their names and proceed with appeal — Proper procedure for them is application under O. 22, R. 9 (2) 266
——*O. 22, Rr. 4 and 11* — Suit on basis of hand-note — Appeal for grant of pendente lite interest not granted in suit — One of respondents dying — Legal representative not brought on record in time — Appeal abates as a whole 191*b*
——*O. 22, R. 10* — Leave should not be unreasonably refused 420*c*
*——*O. 22, R. 10*—'Party' refers to party on record — Legal representative of deceased party not coming forward— Transferring interest to another — Transferee cannot continue suit 123*c*
——*O. 30, R. 1*—Plaintiff describing himself as "Firm *X*, situate in *Y*, through *B*, proprietor of said firm"—Plaint signed by *B*—Plaintiff cannot be deemed to be suing in firm's name but in his own name — *Obiter* 140*a*
——*O. 32, R. 7* — Powers of next friend acting for minor are not wider after decree — O. 32, R. 7 or principle therein applies to agreements in execution proceedings 506*b*
——*O. 32, R. 11*—Appeal— Guardian for minor respondents dying during pendency of appeal—Court not appointing guardian-ad-litem under O. 32, R. 11—Appeal does not abate — Decree passed by such Court must be set aside and case remanded to it for re-trial — But respondents held not liable for costs of appellants in second appeal 570
——*O. 34, R. 6* — Compromise decree in mortgage suit — No mention of personal remedy in preliminary decree itself but reference made to petition of compromise which provided it — Execution cannot be questioned on ground of absence of decree under O. 34, R. 6 568*a*
*——*O. 34, R. 14*—Money decree ordered to be paid in instalments on judgment-debtor executing security bond hypothecating property— Default in instalments — Such property can be sold in execution of decree—Fresh suit is not necessary 289*a*

Civil P. C.
——*O. 39, R. 2* — Desirability of modifying R. 2 (3) 235
——*O. 41, R. 6 (2)*—Application under — Executing Court cannot reject it summarily 443*a*
——*O. 41, R. 10*—Party owning property —But not paying costs awarded by lower Court—Held he should furnish security for costs of appeal 433*a*
——*O. 41, R. 10* — Security for costs — Power is discretionary — Ordinarily poverty of appellant is no ground for demanding security— But in certain cases it may be ground for so demanding 433*b*
——*O. 41, R. 11*—Elaborate questions of fact and also question of law falling to be decided — Such case calls for appellate judgment — Court should not dismiss appeal summarily 505
——*O. 41, R. 21*—Appeal decided ex parte against respondent — His application for re-hearing supported by affidavit — Affidavit alleging that applicant approached friend familiar with Court work who introduced him to another — Latter person frequent visitor to High Court—Applicant handing him over some money and necessary papers — Allegations held not proper ground for re-hearing appeal 128
——*O. 41, Rr. 22 and 33* — Cross-objection nothing more than old appeal by cross-objector — Cross-objector having no community of interest with appellant — Cross-objection is not maintainable—O. 41, R. 33 does not allow such objection 604
——*O. 41, R. 27* — Appellate Court has power to admit additional evidence if necessary for arriving at decision 600*a*
——*O. 41, R. 27*—Appellate Court admitting additional evidence should give reasons therefor— Opposite party not objecting to such evidence — Papers admitted public documents — Admission is not objectionable to same degree as private documents — Procedure is not bad though Court fails in giving reason for admission 57*b*
——*O. 47, R. 1* — Suit for recovery of bhaoli rent on basis of takhmina papers— Defendant alleging payment in full—Court allowing plaintiff to withhold village papers and decreeing suit on ground of defendant's failure to produce receipts of payment of rent — Decree confirmed on appeal—Defendant subsequently producing in support of his contention copy of batai khasra filed by plaintiff in another suit and which could not be pro-

Civil P. C.
duced during trial after due diligence—Review held could be granted — Suit being instituted without reasonable cause defendant held entitled to damages — Judge should be cautious in such cases of suits based on takhmina papers 595
——*O. 47, R. 7*—Order granting review—Appeal when competent 310*b*
Commission—Application for evidence on commission — Interrogatories filed by applicant—Court directing opposite party to file cross-interrogatories in four days — Party objecting to commission instead — Court ordering issue of commission on applicant's paying Rs. 200 to opposite party as costs—Order held within Court's jurisdiction 33
Companies Act (7 of 1913), *S. 209 (2)* — Meeting of creditors is condition precedent for getting liquidator removed 468*d*
——*S. 215 (2)*—Voluntary winding up — Creditors have no power under S. 215 to say that winding up is irregular or void — S. 215 is limited to assistance to winding up 468*a*
Company — Liquidation — Voluntary — Creditors applying for appointment of official liquidator — Application does not comply with provisions of Act and so does not lie — Court has no power to waive irregularities 468*b*
——Liquidation — Voluntary— Creditor challenging it—He cannot apply for supervision order 468*c*
Compromise — Record of compromise—Procedure — Compromise should be recorded at once — Passing of decree based on compromise may be postponed but not actual recording of compromise 401
Contract — Consideration — Parties not managing their estates in severalty but agreeing to common management — Such giving up of their rights is sufficient consideration 456*a*
——Construction— Natural justice cannot be invoked to relieve one party of hardship not provided for **S B** 341*b*
——Definition of contract is built on definitions of all elements forming contract 153*e*
Contract Act (9 of 1872), *S. 16* — Undue influence — Probate proceedings — Grant made subject to payment of court-fees — Lawyers advancing money on mortgage of estate — Mortgage held not made under undue influence 41*b*
*——*S. 16 (3)* — Bond by father — Suit against son — No attempt to show that

Contract Act
lender dominated father — Denial that father was under necessity to borrow at time of execution — Held, to shift burden on creditor to prove absence of undue influence, creditor's position to dominate borrower must be proved — Hence relief under S. 16 could not be given to son 78*a*
——*S. 70* — Benefit done to another not gratuitously — Benefit enjoyed voluntarily —There should be option of refusing benefit—No law entitles any one to start litigation for appointment of guardian of minor—Such person cannot call upon minor to recoup costs of litigation — S. 49, Guardians and Wards Act, makes provision for costs of such litigation 194*e*
Contribution — Doctrine of — Liabilities arising out of joint wrong—Equities of case not in plaintiff's favour— Doctrine cannot be enforced 49*b*
——Suit for — Suit dismissed against one defendant—Appeal—His name not appearing in memo of appeal — Court granting decree against him by applying O. 41, Rr. 20 and 33, S. 151, Civil P. C.— Provisions held not applicable — Hence claim against defendant disallowed 49*c*
——Apportionment— Contribution decree —Appeal by some defendants —Plaintiff's prayer to increase proportionately contribution amount against others if appeal of any defendant granted—Prayer held could not be granted without hearing absentee defendants not preferring appeal—Further that plaintiff should not be allowed to throw additional burden at late stage of second appeal 49*d*
Co-operative Societies Act (2 of 1912), *S. 43*—Rules under, R. 12—Disputed liability of member to repay money to society is dispute touching business of society 225
Co-sharer — Mortgage by one to another — Mortgage redeemed — Mortgagee co-sharer claiming raiyati rights in lands as against mortgagor co-sharer — Mortgagor co-sharer held could bring suit for joint possession and mesne profits 231*a*
Costs — Suit against principal and pro forma defendants—Former admitting but latter unsuccessfully contesting suit — Latter can be appropriately saddled with costs 151*a*
——Appeal—Principle involved — Appeal and second appeal lies 151*b*
——Mortgage suit — Costs cannot be awarded personally except against mortgagor 153*d*

Criminal Trial
vating that land without giving latter notice to quit that land — He inflicting more injuries than necessary on cultivating persons— No right of private defence arises 481*a*
——Evidence—Defence obtaining copy of prosecution witness's statement — Statement favourable to accused — Witnesses not questioned on point during trial— Jury's verdict of guilty—Defence held could not utilise statement to invoke High Court's revisional powers and interfere with verdict 46*c*
**——First information report lodged at two places—One earlier than other—Later report is not statement during investigation but independent of first information report and hence is admissible 11*a*
——Forgery—Complainant need not be confined to witnesses stated in complaint 531*a*
*——Joint trial—Person escaping from lawful custody with rescuers' help—Intention of all is to secure release—Various acts bringing about escape form part of same transaction within S. 239 (d), Criminal P. C.—Hence joint trial of all is legal 20
——Jury — Misdirection — Case under S. 366—Father of girl lodging information to police--He not suspecting till then that daughter taken away for illicit intercourse as girl serving as maidservant at accused's —Hence suspecting no foul play—Court asking jury during direction to consider explanation in arriving at conclusion— Court's statement held no misdirection 46*a*
——Jury—Misdirection — No failure of justice by misdirection—Appellate Court is not bound to set aside verdict 46*b*
——Jury—Verdict of guilty—Jury recommending accused to mercy—Recommendation held did not imply that they believed accused not guilty. 46*c*
*——Practice—Map index—Admissibility —Indices should be exhibited with map 11*f*
——Presumption of innocence—Presumption ought not to be too easily displaced— In considering whether it is displaced or not it may be right to have regard to accused's position in life—But wealth, position or age cannot be said to immune him from consequences of actions if in fact they are criminal 626*b*
——Presumption—Presumption is that if acts bear out explanation compatible with innocence, he is innocent, unless explanation is proved to be false—Circumstances being such that only one inference can follow, he should be convicted—Accused found to be corruptly giving access to others for copying records—Keys of record room in custody of accused found with another person —Explanation given by him as to possession of key by the stranger found to be false—Accused held guilty under S. 409, Penal Code 108
——Proof of guilt—Avoiding police inquiry is not necessarily indication of guilt 425*b*
——Prosecution citing 9 witnesses on certain point—Examining only 3—Presumption adverse to prosecution held could not be drawn from that fact 46*d*
*——Retracted statements— Statements before committing Magistrate — Witness examined in Sessions—Previous statement becomes substantive evidence under S. 288, Criminal P. C.—Statement modified or resiled in Sessions Court—Conviction on previous statement is unsafe unless circumstances indicate truth of statement 11*c*
——Retracted statement — Reliability— Test—Mere repetition is not — Circumstances showing truthfulness—Statement should be accepted as true 11*d*
——-Revision—Reference to High Court— High Court will not interfere with decisions on 'facts upon evidence except for special reasons — Principle applies with greater force when proceeding is pending — Proceeding instituted and carried on regularly—Reference on ground of difference on question of credibility of witnesses —High Court would not interfere in revision 626*a*
——Revision—Object of criminal act is question of fact—Concurrent finding of lower Courts should not be disturbed 38*b*
*——Sentence—Admonition—Person trying to overawe witness for other side— Organizing assault party and taking part in assault on such witness—In criminal trial against such 'person by the witness, winning over prosecution witnesses by bribing—Order of admonition against such person does not meet ends of justice 175
——Sentence—Case under S. 366, I. P. C. —Accused sentenced to 4 years' R. I.—Abducted girl travelling willingly with accused's servant subsequent to offence— Lighter sentence held sufficient 46*f*
——Trespass and riot—Joint trial—Person found in possession of another's shop after riot—No finding as to whether per-

Criminal Trial
son is put in possession by rioters or whether object of riot was to transfer possession—Joint trial of person accused for trespass with those accused of rioting is not proper 248*a*
Custom—Proof of—Unreasonable custom is not considered provable in law 637*b*
Decree—Adjustment — Judgment-debtor agreeing to do something in future—Application to record adjustment—Decree can be extinguished—Such agreement need not be in writing 619
——Execution—Decree entered as satisfied through decree-holder's mistake—No execution can be taken out for sum left out 416
——Setting aside—Fraud — Suit to set aside ex parte decree—Court coming to finding as to non-service of summons or notice in previous suit—Court can go into merits of suit to determine as to whether there was motive for wilful or fraudulent suppression of summons or notice to prevent defendant from placing his case before Court 135
Deed—Construction—Jamognama reciting direction as to scale of nazrana—Landlords held not bound to accept nazrana in lieu of enforcing their right of forfeiture 493*g*
——Construction—Documents in vernacular—In construing documents in vernacular it is not safe to rely upon English precedents 450*b*
——Lease—Construction—Each lease or kabuliat must be construed on its own language and with reference to its own circumstances 450*d*
——Construction—Transaction whether lease or license—Essence of matter is whether there was intention to transfer interest in land—Land belonging to Railway Company given to defendants for cultivation for one year—Word 'license' used throughout document embodying transaction—Document expressly mentioning that nothing therein should be construed to create any right, title or interest in land—Defendants held to have been mere licensees—Deed held not to have transferred any interests in the land 362*b*
——Construction—Compromise decree—Reference to property not subject of dispute in compromise—Operative part of decree not dealing with such property but dealing with subject-matter of dispute only—Compromise operates as bare agreement 300

Deed
——Construction—Discrepancy between designation of property in body and description by boundary—Former should prevail 287*b*
——Construction—Question does not depend upon use of any particular term—Lease termed as 'bemiadi' patta—Other terms of lease considered—Lease deed held created permanent lease 275*a*
***Divorce Act (4 of 1869)**, *S. 17*—Jurisdiction of High Court to confirm decree arises immediately on reference by District Court—Petitioner's appearance is not essential—Guilty party applying for confirmation—High Court's jurisdiction is not destroyed **FB** 15
Etoppel—Estoppel by representation—Suit for ejectment after notice—Defendant setting up raiyati lease—Plaintiff representing himself to be tenure-holder—Held no question of estoppel by statute arose—Plaintiff held bound by his representation **SB** 417
——*C* taking oral lease of land from *A* and erecting house thereon — *B* purchasing house after obtaining from *A* order permitting him to do so—Suit by *A* for ejecting *B*—*A* held not estopped to eject *B*—Permission by *A* held to be similar to license to sublet in cases of covenant not to assign or sublet 133
——Tenant borrowing money from plaintiff and paying off encumbrances—Subsequent transfer of half holding to wife and son—Surrender of half to cosharer landlord who settled it with plaintiff—Plaintiff's suit for possession of his share—Suit resisted by wife and son—Validity of their title held depended upon legality of tenant's transactions—Hence they could not challenge transactions while maintaining advantages therefrom 52*a*
——Decision for party on strength of certain plea—Same point raised in another suit—Party cannot adopt contrary plea 10*a*
Evidence—Admissibility of documents—Waiving necessity of formal proof, and objection to inadmissible evidence—Difference between—Objection to inadmissible evidence can be taken in appellate Courts 634*a*
——Admissibility—Admission of document—Party must get fair chance to produce evidence—Documents in possession of another Court—Requisition sent for these documents through trial Court—Refusal to take those documents on record by trial

Evidence
Court—Case should be remanded by appellate Court 631
——Admissibility—Documents—Copies of documents filed by party in suit—Opposite party not raising any objection in trial Court as to their relevancy or denying their accuracy—He cannot object in appeal that there was no evidence of formality of comparing copies with originals 600*b*
——Ambiguity, not latent—Judge cannot take help of questions of fact to enable to construe document — No expression in document enabling Judge to construe—Question of fact can be availed of 275*b*
——Admissibility—Witness examined in chief—Circumstances making cross-examination impossible—Deposition can be treated as evidence on record—Weight of such evidence depends on circumstances—Court should see if indications that cross-examination would seriously have shaken testimony exist 34
——Appreciation—Plaintiff admitting defendant's case on one issue after closing of evidence—Hence plaintiff's evidence believed unreliable—Court deciding in defendant's favour on other issues—Court held competent to do so and High Court could not interfere in second appeal with finding 7*c*
——Evidence on commission—Not formally tendered—Evidence cannot be rejected 6*a*

Evidence Act (1 of 1872), *S. 13 (b)*—Suit by zamindar for declaration that certain village is not rent-free nor debutter property—Defendants relying on patta and kabuliyat by their tenant in which village was described as lakheraj debutter—Documents held not admissible against zamindar 543*a*
——*S. 14* — Prosecution under S. 409, Penal Code—Evidence as to history and dealings between accused and owner is relevant 350*g*
*——*Ss. 21 and 145*—Statement made in document—Document relevant under S. 21 and also under S. 145—Provisions of S. 145 need not be complied with 588
——*S. 21*—False report by accused to police of offence—Report not a confession to Magistrate under Criminal P. C., S. 164, as accused reported was not accused under S. 211, I. P. C., but only witness making statement of admission—Hence admissible in evidence under S. 21 358*a*
——*Ss. 32 (2) and 13*—Register and maps regarding land in dispute prepared by

Evidence Act
people dead or whose whereabouts not traceable are admissible 462*a*
——*S. 32 (7)*—Before admitting documents under S. 32 (7), document must be admissible under S. 32 315*a*
——*Ss. 40 to 43*—Decree for confirmation of possession is not conclusive of possession on date of judgment 537*a*
——*Ss. 40 to 43*—Judgment—Admissible only to show date and its legal consequence 537*b*
——*S. 66, Prov. 2*—Document produced from custody of person asserting title—Fact is important in considering question of benami—Judge is not however bound to conclude that title is made out 136*a*
——*S. 66, Prov. 2*—Objection by party that secondary evidence is inadmissible—Original in possession of party objecting but not producing it—S. 66, Prov. 2, applies—Notice to produce original is not necessary 129*a*
——*S. 102*—Meaning of—Party on whom burden lies not discharging it—It must fail 243*a*
——*S. 110*—Original entry under ostensible lawful basis—Forcible dispossession—S. 110 can be called in aid of person dispossessed and possession restored 602*a*
Execution—Attachment and sale of right to receive royalty—Right to money actually due on date of sale is only sold 572*h*
——Prior mortgagee's suit impleading mortgagors and puisne mortgagee—Claim against latter abandoned and suit dismissed against him—Objection by puisne mortgagee that property put up for sale by prior mortgagee was his—Prior mortgagee contending that puisne mortgagee was no party and objection was invalid since not covered by S. 47, Civil P. C.—Puisne mortgagee held party, but S. 47, Civil P. C., did not apply—Puisne mortgagee's encumbrance must however be mentioned in sale proclamation of prior mortgagee 552
——Sale—Application under O. 21, R. 66, Civil P. C., made on same day after valuation fixed—Order of valuation held proper 443*b*
*——Decree binding—Mortgage — Decree against puisne mortgagee personally behind his back, when no prayer for personal decree in plaint—Objection to executability of decree is competent 303*b*
*——Property given by judgment-debtor as security for satisfaction of decree—Subsequent purchase of property by

Execution
another decree-holder in execution of his money decree—Execution of first decree against property is as if it is charge—Purchaser decree-holder being representative of judgment-debtor should be given opportunity of redemption 289*b*
——Certification of payment — Decree-holder's omission to certify payment by judgment-debtor in spite of promise—Judgment-debtor cannot override 90 days' limitation of Art. 174, Lim. Act, for application under O. 21, R. 2, Civil P. C.—Court cannot exercise its inherent jurisdiction 270*b*
——Sale—Execution of certificate sale—Only right, title and interest of judgment-debtor is sold 200*c*
——Transfer of decree—Decree cannot be transferred for execution to Court incompetent to try suit in which decree is passed—It is no case of irregularity but is want of jurisdiction 177
——Sale—Compromise between judgment-debtor, decree-holder and auction-purchaser to confirm sale without auction-purchaser having to pay balance of purchase money—Petition to record compromise should not be refused on ground that 30 days have not expired after sale 164*b*
——Mortgage decree—Original attaching creditor of mortgaged property who was impleaded as party, dying—No steps taken to bring his legal representatives on record—Legal representatives sought to be impleaded as judgment-debtors in execution proceedings—They are entitled to be discharged 110
——Law—Applicability — Court passing decree governed by special law of limitation—Sending decree for execution to Court where that law not applicable—Execution is governed by special law (*Obiter*) 104*a*
——Simultaneous execution by two or more methods is reasonable and feasible—Security sufficient for realising decree—Decree-holder's procedure showing harassment and not desire to realise decree—Court may refuse relief against judgment-debtor's person 28
——Petition dismissed—High Court setting aside dismissal and directing execution to proceed except against some—High Court's order held revived proceeding by vacating dismissal order—Hence fresh execution petition not necessary 26*e*
Execution Sale—Property in possession of receiver—Sale in execution of decree without leave of Court is irregular and not void 572*g*
——Setting aside—Sale set aside after one month on application of one of judgment-debtors—Appeal thereon dismissed but sale confirmed on revision by High Court—Subsequent application by other persons having knowledge of sale to set it aside—Limitation held ran from date of sale and not from date of confirmation by High Court 558*b*
——Property sold in execution—Owner not taking steps under Civil Procedure Code—He cannot after sale plead that, though party, proceedings are not binding on him—Court having jurisdiction over proceedings—No irregularity—Sale cannot be set aside and is binding on owner 442*a*
*——Application under O. 21, R. 89, Civil P. C.—Circumstances showing applicant's readiness to deposit sum—Court can entertain application 119*d*
——Sale of immoveable property—Judgment-debtor having no interest in it at sale—Sale is within executing Court's jurisdiction and not void as between judgment-debtor and decree-holder or purchaser — Decree-holder purchaser not applying under O. 21, R. 91—He cannot revive proceedings on ground that sale did not satisfy decree to extent of sale price **FB 97
——16 annas share yielding Rs. 3,095 income according to cess revaluation—Share of Rs. 1,250 to Rs. 1,300 annual income sold for Rs. 15,000—Price held not inadequate 26*a*
——Substantial injury—No interest of judgment-debtor in property sold, or having doubtful claim therein at date of sale—Price fetched not inadequate—Judgment-debtor held not materially prejudiced 26*b*
——Decree for Rs. 75,000 to one lac—Price fetched by sale of judgment-debtor's property amounting to a little over Rs. 44,000—Decree-holder not proposing further execution for balance—Position of parties not altering materially even if properties had fetched full decretal amount—Case for setting aside sale held not made out 26*c*
——Irregularity—Decree amended—But execution on basis of original decree—Amendment rendering decree incapable of execution against some defendants—No action against them or their heirs in exe-

Execution Sale
cution as directed by High Court—Error held not of substance but of form and proceeding not vitiated thereby 26*d*
——Transferable right of share in deity's service—Sale is valid if purchasers are entitled to perform worship 10*c*
Guardians and Wards Act (8 of 1890), *S. 34 (d)*—Court can record any definite finding as to exact amount due from guardian 447*b*
——*S. 39*—Locus standi of petitioner—Court can act in the matter of removal of guardian on application of any person interested 447*a*
Hindu Law—Alienation—Widow — Alienation in excess of power is not void but voidable 602*c*
——Alienation — Female — Necessity is mixed question of law and fact—Lower Court not having misdirected itself on question of law—There is no justification for disturbance of its finding of fact 426
——Alienation—Legal necessity—Widow succeeding to co-widow's share on her death—Alienating her's and co-widow's interest for performance of husband's sradh—Both widows were under religious obligation to perform sradh—If one did not, other's duty was to do it—Therefore alienation held valid as regards interest of both widows 80*b*
——Alienation — Widow—Document by widow purporting to be dedication—Document found acknowledgment of dedication by husband—Document not executed till 25 years after husband's death—Dedication by husband not established—Document held not binding on reversioners 80*c*
——Alienation — Widow — Reversioner's suit to declare alienation not binding—Defence that alienation was necessary for widow's daughter's marriage—Alienation deed stating that bulk of amount raised was for *K's* marriage—Plaintiff contending that *K* was not widow's daughter—*K* found widow's daughter—Suit dismissed in belief that *K* being widow's daughter alienation was for legal necessity—Held Court assumed as correct recital in deed that money was borrowed for marriage—Court had to decide if money was actually borrowed and for marriage 7*d*
——Dayabhaga — Partition — Partition between brothers—All properties must be deemed to be separate 142*d*
——Debts—Great-grandsons are equally liable with grandsons (*Obiter*) 158*c*

Hindu Law
——Idol—Idol or deity in position of perpetual minor—Still no analogy between next friend of minor and shebait or person bringing suit on behalf of idol 411*a*
——Joint family—Business by member appropriate to his caste is part of joint family property 485*a*
——Joint family — Family business — Managing member contracting debts for such business—Share of minor also is liable—Purchase of goods must be presumed to be necessary for carrying on business 485*b*
——Joint family—Decree against coparcener—Burden of proof—Decree against junior member of family personally—Burden of proof on decree-holder to show that judgment-debtor was sued as managing member of family—Burden not discharged—Decree not binding on family 319
——Maintenance — Claim on contract—Suit is not governed by Art. 128 or Art. 129 but by Art. 115, Lim. Act 158*a*
——Partition — Presumption — Partition suit—Parties in possession of and exercising ownership rights over separate lands for long time—Court may presume partition 68*a*
——Widow—Co-widows may convert joint estate inherited from husband into estate held in severalty—One of them may relinquish her right of survivorship in portion of estate held by other—In such case, in event of death of one widow, estate would go to heirs of deceased widow and not to surviving widow—Alienee from deceased widow is entitled to continue in possession till death of other widow—Succession will not open till surviving widow is dead 200*a*
——Widow—Co-widows — Step-daughter dying issueless—Co-widow is entitled to succeed to her, being sapinda of her father 200*b*
——Widow — Surrender — Widows can accelerate succession only if they surrender their life-estate absolutely — Surrender must be of entire estate and not in favour of particular individual 200*d*
——Widow—Widow carrying on litigation to recover to have revenue sale of husband's property set aside—Suit dismissed on account of technical defect—Decree for costs and mesne profits against widow—Widow is not personally liable—Estate of husband in her possession is liable 200*e*
——Widow—Widow in possession of husband's estate—She has absolute right over

Hindu Law
income of estate—It is optional for her to keep property acquired from saving of income, separate or mix it up with estate 200*f*
*——Widow—Mithila School—Immoveable property obtained in lieu of mortgage debt — Property belongs absolutely to widow—Immoveable property purchased by widow with husband's money is hers absolutely and goes to her stridhan heirs on her death 80*a*
Income-tax — Assessment—Accounting—Method of accounting not normal but used regularly by assessee—If profits can be deducted from such method, application of S. 13, proviso, is not valid 295*b*
——Questions of law—High Court can under S. 66 (2) decide only question of law raised by case stated—Computation of profits under proviso to S. 13 whether can be on accrued interest held not question of law 295*c*
*——Assessment — Income in hands of woman—No presumption that it is benami for husband—Absence of evidence that income is benami—Income cannot be assessed in husband's name 267
Income-tax Act (11 of 1922), *S. 4 (3) (ii)* —Words "religious and charitable purposes" are to be construed according to general principles of construction and not by reference to personal law of assessee 532
——*Ss. 25-A and 26-A*—Scope of inquiry under S. 25-A—Application under S. 26-A—Assessees not suggesting existence of joint family alongside that of partnership—Absence of evidence that family divided—Income-tax Officer held was right in not enquiring under S. 25-A and concluding that partnership was fictitious 476*b*
——*S. 26-A*—Question whether partnership is real or fictitious is one of fact 476*a*
——*S. 66 (2)*—S. 66 (2) is indifferently framed 295*a*
Inherent power—High Court—Stay of suit—Mining lease—Lessee covenanting to develop mine as early as possible—Suit by lessor for breach of covenant—Lessee applying for stay of suit, pending suit by Secretary of State against lessor and lessee claiming declaration that lessor had no title to minerals—High Court's inherent powers invoked for stay of suit—Lessor's suit stayed by High Court pending decision of other suit 408

Inherent Power
——Mortgage suit—Application for final decree beyond time — Similar previous application made in time dismissed for failure to comply with some steps concerning service of notice on judgment-debtors—Though application was beyond time Court held could restore previous application for justice—Court held had better kept previous application pending until requirements complied with—Rejection of previous application held did not amount to dismissal of mortgage suit—Once decree passed, suit cannot be dismissed unless decree reversed on appeal 93*a*
***Injunction**—Breach—Penalty in O. 39, R. 2 (3), Civil P. C., by detention in civil prison applies to injunctions under O. 39, R. 1 also 23*a*
Interest—Suit for recovery of money had and received for plaintiff's use—Interest runs from date of demand 370*c*
——Mortgage—Stipulated interest 24 per cent—Mortgage for depriving legatee of mortgagor of benefit of property—Mortgagee in collusion with mortgagor allowing accumulation of interest — Interest held very high and was reduced to 6 per cent 3*b*
Interpretation of Statutes—Construction which is not unreasonable and which is in conformity with well-known legal principles must be placed 393*c*
——Penal law — Dishonest intention is essential element of offence—No conviction unless guilty mind is proved 350*a*
——Some rules stated 282*b*
——New law—It should be construed, as to interfere as little as possible with vested rights 173*b*
——New law—Subsequent enactment does not affect pending actions, unless it applies to them in express terms 173*c*
Jurisdiction—Area under jurisdiction of one Court subsequently transferred by Government notification to jurisdiction of another Court—Cases pending in former Court in respect of such area are automatically transferred to latter Court—Former Court has no power to pass decrees in cases so transferred 546
——Rent—Assessment of—Courts have no jurisdiction to assess fair rent except in cases governed by statute (*Obiter*) 511*b*
——Small Cause Court—Facts stated in plaint showing action wrongful or illegal, but not necessarily penal—Jurisdiction of Small Cause Court is not barred 428*b*
——Civil Courts—Statute giving right and providing mode of obtaining it—Civil Court

Jurisdiction
cannot maintain a suit to enforce it—Acts authorized by law—No right to compensation provided—No right exists — Right existing independently of statute—Statute affirming it providing particular remedy—Remedy is exclusive—Civil Court's jurisdiction is impliedly barred 87*c*
——Partnership contract by *P* and *D* firms with head offices at Calcutta—*P* firm having branch in Muzaffarpur District—Contract that jute be purchased by *P* at K in Muzaffarpur and sold at Calcutta by *D*—Suit by *P* for dissolution and accounts—Accounts of partnership kept at Calcutta—Purchase at K held not carrying on of business—Hence Muzaffarpur Court held had no jurisdiction 6*b*
Land Acquisition Act (1 of 1894), *S. 11* —Land should be valued upon basis of its present use 542*b*
Land Acquisition (Mines) Act (18 of 1885), *Ss. 5 and 6*—Object explained 513*a*
——*S. 5*—Restriction has effect against whole world 513*b*
——*Ss. 5 and 6*—Effect stated 513*c*
——*Ss. 5 and 6*—Restrictions lawfully imposed—Every person interested becomes entitled to compensation and refusal to pay or assess compensation makes Government liable for direct recovery by suit under Art. 120, Lim. Act 513*e*
——*Ss. 5 and 6*—Licensee legally restricted over part of area—Licensee liable to pay minimum royalties and rate of profit—Licensor's claim cannot be postponed till particular coal required 513*f*
——*Ss. 5 and 6*—Measure of compensation, explained 513*g*
——*Ss. 5 and 6*—Payment to one claimant is no defence against claim by another 513*h*
——*Ss. 5 and 6*—Lump sum compensation on arbitration—Award cannot be examined subsequently 513*i*
——*Ss. 5 and 6*—Coal under-ground acquired compulsorily — Royalty owner — S. 23 (2), Land Acquisition Act, has no application 513*j*
——*S. 6*—Parties can enter into agreement as to amount of compensation 513*m*
Landlord and Tenant—Rent—Enhancibility—Jagirdar under zamindar—Sarsikan paper before Permanent Settlement is evidence 400
——Under-raiyat—Interest of under-raiyat with occupancy rights is not heritable 384*a*

Landlord and Tenant
——Heritability — Equitable estoppel — Application of 384*c*
——Raiyat—Every cultivator is not raiyat —Raiyat is one who cultivates land as raiyat directly under zamindar or tenure-holder—Test is whether person concerned has obtained interest in land 362*a*
——Rent—Non-payment of,explained315*b*
——Partition of landlord's interest — It does not affect or increase rights against tenants 285*b*
——Rent—Decree for—Execution—It is not obligatory on part of landlord to execute rent decree against rent-paying property—He may execute it against other property belonging to judgment-debtor—But Bengal Tenancy Act would not then apply—Case would be governed by ordinary law relating to execution of money decree 258*a*
——Non-transferable holding — Transfer of—Purchaser of non-transferable holding remaining in possession for over 12 years under transfer not authorized by landlord but not denying title of landlord—Purchaser becomes merely occupancy tenant of land and not full owner—Subsequent transfer by him is liable to be set aside at instance of landlord 173*a*
——Partition—Tenants cannot be brought on record or before Court to show their consent to partition between cosharer landlords—Cosharer landlord's rent suit after partition—Question whether rent apportioned—Whether tenant agreed to partition must be seen 96*a*
——Standing trees—Landlord cannot disturb raiyat 38*a*
Lease—Covenant not to alienate demised property without lessor's consent — Property sold in execution of rent decree—Covenant held running with land and binding on assignee from lessee 493*a*
——Covenant in restraint of alienation—Transfer to original lessees — Forfeiture clause held still applied 493*b*
——Lease with covenant in restraint of alienation—Landlord condoning breach on receipt of consideration — Estoppel held did not arise and landlords held refrained from enforcing their right on subsequent occasion 493*d*
——Suit for ejectment—Original tenant not entering appearance nor appealing against decree for ejectment — Landlord held entitled to eject transferees from such tenant 493*f*

Lease
*——Construction—No rule that forfeiture clause should be strictly construed against lessor—Intention of parties should be ascertained from several clauses looked at as a whole 450*a*
*——Forfeiture—Joint lessees—Share of each mentioned—Covenant not to transfer whole or even portion of property—Transfer of portion by one of them—Lessor is entitled to re-enter only on portion of such lessee but not in those of others 450*c*
——Construction—Forfeiture clause must be literally and strictly construed and taken strongly against lessor 372*b*
——Construction—Forfeiture for assignment without assent—Mere agreement to assign does not incur forfeiture 372*c*
——Construction — Covenant against assignment—Agreement to assign does not amount to assignment nor does putting prospective assignee in possession amount to subletting or transfer of interest in leasehold 372*d*
——Construction—Forfeiture—Lease providing forfeiture must be legal 372*f*
——Construction—Covenant not to assign—Equitable assignment is not sufficient 372*h*
——Construction — Lease for mining — Agreement by lessee authorizing third party to extract and remove limestone on behalf of lessee is license and not sub-lease 372*j*
——Forfeiture—Forfeiture and grant of lease to another do not amount to dispossession 372*k*
——Construction—Rent made charge on property—Rent payable to lessors, half to one party and half to another—Suit by one party for his demand joining other party as defendant—Decree for charge on whole property is lawful 306
——Construction—Rights of lessee—Ordinary agricultural tenancy—Lessor retains all rights in mines and quarries—Lessee is however entitled to collect and remove lime-stone found on surface 111
Legal Practitioner—Visiting Police Officer at his house and opening conversation with him about case in official investigation under him is misconduct **SB** 423
——Pleader decree-holder correcting mistakes in record after certain papers had become part of record—No mala fides—Conduct held unprofessional **SB** 418
Legal Practitioners' Act (18 of 1879), *S. 13 (b)*—Illegal exactions by mukhtar—Mukhtar is liable to suspension **SB** 337
Legal Practitioners' Act
——*S. 13 (f)*—Pleader working as insurance agent—Practice held injurious to profession and public—Pleader held guilty of professional misconduct **SB** 1
Libel—Privilege—Petition to Manager of Court of Wards and Deputy Commissioner held gave only at best qualified privilege. 309*a*
——Privilege—Qualified—Person claiming should prove first privilege 309*b*
***Limitation** —Execution — Certificate of payment of decretal amount is not "application" within Art. 182, Limitation Act 386*b*
——Suit to declare mortgage void barred—Sale held under mortgage gives fresh right to sue 323*d*
——Suit for declaration of exclusive title of plaintiff and entry in record of rights to be wrong—Plaintiffs in exclusive possession of property—Suit after six years—Suit held not barred 321(2)
——Application for transferring decree to another Court—Order on such application is step-in-aid of execution 313*a*
*——Subsequent mortgagee from one of three sons taking possession of house under sale in his decree on paying off prior mortgage by father—Claim by heirs of other two sons for possession of 2/3rd share on paying proportionate sum—Art. 148, Limitation Act, held applicable as subsequent mortgagee held "mortgagee" within Art. 148 by subrogation 60*b*
Limitation Act (9 of 1908), *S. 6*—S. 6 does not apply to applications under Sch. 2, Para. 20, Civil P. C. 161*b*
——*S. 12*—"Time requisite for obtaining copy of decree appealed from" means time necessary in any case for obtaining copy of decree—Period under appellant's control is not time requisite—Judgment delivered on 6th December—Decree signed on 13th—Copy obtained on 15th—Period between 6th and 15th held beyond appellant's control and should be excluded: *6 P L J 350=A I R 1921 Pat 175= 62 I C 649, OVERRULED* **FB 45.
——*Ss. 20 and 21 (2)*—Payment by one joint mortgagor saves limitation against all 361
——*Art. 2*—Art. 2 applies only to suits for compensation and damage for tortious acts of public officer purporting to act in pursuance of statutory power. 513*d*
——*Art. 47* — Scope — Title created prior to order under S. 145, Criminal P. C.—Art. 47 is not applicable 629*a*

Limitation Act
——*Art. 48*—Suit for compensation for wrongfully taking coal from one's land—Fact of encroachment and taking away of coal known to plaintiff for more than three years back—Suit is barred—Mistaken belief that property removed was not his will not help to save limitation 179*a*
——*Art. 60*— Customer's money standing to his credit in account of banker is money deposited —Test to see whether money is "deposited"—Specific use of such word is not necessary 539*a*
——*Art. 60*—Absence of notice of dissolution of partnership to outsiders—Demand against one of partners gives cause of action against all 539*b*
——*Art. 110*—Suit to realize money due on settlement by auction of date and palm trees is suit of Small Cause nature—It is governed by Art. 110—It is not suit between landlord and tenant and does not come under Bengal Tenancy Act 403
——*Arts. 116, 65, 97*—Grant of lease under registered document on consideration of certain premium—Subsequent finding as to lessor's incapacity to make such grant—Lease is void and lessee is entitled to refund of money—Suit for refund is governed by Art. 116 462*b*
——*Art. 120*—Suit by Hindu against Hindu female holding estate under bequest for declaration that alienation by her did not bind him falls under Art. 120 323*c*
——*Art. 120*—Sut for declaration of title and that settlement record is erroneous and fraudulent is governed by Art. 120—Mere payment of ad valorem fees makes no difference 129*c*
——*Arts. 125 and 120*—Gift of land by deceased in favour of certain person—Daughter of deceased objecting and contesting its registration in alienee's name—Land registered in alienee's name—Mere failure by her to bring title suit afterwards does not amount to constructive alienation by her for purpose of Art. 125 and suit by reversioner to set aside alienation is governed by Art. 120 535*a*
——*Art. 125*—Art. 125 does not apply if possession is by virtue of grant, transfer inter vivos, or bequest 323*a*
——*Art. 128*—Art. 128 does not apply if claim independent of status of parties 323*b*
——*Art. 131*—Claim for money under recurring right is not governed by Art. 131 158*b*

Limitation Act
——*Art. 144*—Art. 144 only applies where defendant holds adversely to plaintiff without title 147*a*
——*Art. 148*—Tenant mortgaging holding to another—Purchaser's suit against mortgagee for possession on redemption—Mortgagee contending that mortgage was invalid hence suit for possession barred as not within 12 years—Mortgagee's position held that of mortgagee—Hence right to redeem not extinguished till 60 years 63*c*
——*Arts. 149, 109 and 116*— Railway Company granting land owned by it for cultivation under license—Suit by Railway Company and Secretary of State for ejectment of licensee after expiry of license and for rent and mesne profits is governed by Art. 149 and not by Art. 109 or Art. 116 362*d*
——*Arts. 166 and 181*—Execution—Sale void being beyond Court's jurisdiction—Objection to such sale is governed not by Art. 166, but by Art. 181 496*b*
——*Art. 182 (5)*—Art. 182 (5) contemplates judicial order on application by decree-holder 313*b*
——*Art. 183*—Order of Master of High Court for transmission of decree to another Court for execution or notice by him under O. 21, Rr. 16 and 22, Civil P. C., is not revivor 398

Lis Pendens—Applicability—Purchase of another's property during pendency of contribution suit against such person in which simple money decree passed—Such purchase is not affected by doctrine of lis pendens nor is it subject to decree in contribution suit 571*a*

Mahomedan Law—Wakf—Annuity and maintenance— Difference between Maintenance refers to duty to maintain, with corresponding right to be maintained, while annuity does not—Certain sum to be given as stipends to wife and daughters —Held annuity allowance 527*a*
——Wakf—Power to bind trust funds to pay debts incurred—Sajjadanashin stands in same position as Mutawalli—He can borrow money and incur debts for preservation of trust property but only with sanction of Kazi—Carrying out objects of wakf is not a purpose for which he may bind trust property—In matter of limitation on his powers, his position is different from that of Mahant of Hindu math 390*b*

Merger — Co-sharer landlord purchasing holding from occupancy tenant--No merger occurs 63*a*

Minor—Decision based not upon alleged compromise but upon evidence in case—Minor is bound by decree 428*c*

——Admission by father—Minor represented by pleader, not denying it—Minor held bound by admission 428*d*

——Suit for wrongful misappropriation of crops against minors and their father—Decree can be passed against minors 428*e*

——Decree against — Gross negligence amounts to fraud and affects representation of minor — Decree cannot be obtained against minor unless properly represented—If obtained, can be collaterally challenged 231*c*

——Decree against—Suit to set aside on ground of gross negligence of guardian—Art. 120 and not Art. 95, Limitation Act, applies—Time commences when negligence becomes known (*Obiter*) 231*d*

*——Minor proprietor trading under trade name through manager—Hundi in favour of proprietor in trade name becoming payable during minority—Proprietor held entitled to benefit of S. 6, Lim. Act, though manager could sue 194*c*

——Guardian — Order appointing fresh guardian discharges former guardian by implication 153*b*

—Party to contract—Contract when becomes void—Consideration for contract is something done by minor—Other party promissing to do something in favour of minor for what he has already done—Minor can enforce such promise (mortgage in his favour) 153*f*

——Decree—Setting aside—Mortgage suit—Minor mortgagors properly represented—Decree — Minor's suit for declaration that decree not binding on them— Prayer to stay execution sale until disposal of suit—Mortgage-decree not challenged by minors for 6 years — Court staying sale holding security far exceeded decretal amount— Court held ought to have considered facts that mortgagor's liability was established in competent Court in their presence and that they took no steps challenging mortgage for 6 years. 76*a*

Minority—Limitation—Plea not raised in plaint -- Pleadings clear to show that money became due to minors during their minority — Issue of minority not depending on any issue of fact—Plea is not surprise and can be decided by Court 194*d*

Mortgage— Redemption—Piece-meal redemption when allowed—Mortgage created either by statute or by contract inter partes — S. 60, T. P. Act, is applicable to all mortgages 629*b*

——Deed—"Fixed and consolidated jama"—Inclusion of such expression has no legal significance—Expression only meant to avoid religious sin 583*a*

——Usufructuary — Mortgage executed before Transfer of Property Act came into force—Liability of mortgagees to account—Ss. 76 and 77, T. P. Act, are applicable 583*b*

*——Usufructuary--Liability of mortgagee to account—Liability depends upon contract—Mortgagee liable to account appropriating profits—Mortgagor's money retained by mortgagee must be applied towards reduction of capital — Equitable right has precedence over right to refuse piece-meal redemption—Liability of mortgagee to pay certain sums to mortgagor independent of his rights in realizing profits—Non-discharge of such liability will not make mortgagee liable to account at annual rests 583*c*

——All persons interested in mortgage to be parties to suit—They need not be arrayed on same side 439*a*

——Redemption—Tenant mortgaging his holding with possession—Holding purchased by landlord in execution of rent decree due to default by mortgagee in payment of rent—Landlord giving notice to mortgagee to annul encumbrance—Mortgagee suing for preservation of his mortgagee-rights--Rights affirmed by compromise decree though rent sale not set aside—Equity of redemption in the meantime passing to original mortgagee's separated brother—Mortgagee subsequently purchasing holding—Purchaser of equity of redemption suing to redeem—Purchaser held could not redeem 434

——Equity of redemption—Mortgagors bringing suits for redemption—Suits ending in decree fixing amount to be paid by them within stipulated time—Amount not paid within stated time—Their successors subsequently filing suit for redemption—Held that right of redemption was not extinguished nor the suit barred by res judicata 420*a*

——Discharge—Mortgagee taking sale of some of mortgaged properties in discharge of entire mortgage debt—Partial failure of consideration by mortgagee not getting part of property purchased—Mortgage held

Mortgage
completely discharged—Clause in sale deed that mortgage would be kept intact held merely preserved shield to mortgagee against claims of persons setting up subsequent charge 404
——Suit on, against mortgagor and puisne mortgagee—No personal decree can be passed against puisne mortgagee 303*a*
——English mortgage—Provision in mortgage deed for management by mortgagee for ensuring interest—Provision that management should be as agent of mortgagor—Provisions held not inconsistent with English mortgage 211*a*
——Construction—Clause providing repayment on particular date—Clause giving mortgagor options for part-payment and extensions of time—Latter clause held grace allowed to mortgagor, hence not affecting previous clause 211*b*
——English mortgage—Mortgagee not getting possession — Mortgagor can recover possession from third party and recover rent and profits—Power of attorney by him to party for collecting rent and profits is consistent with mortgage 211*c*
——Anomalous mortgage—No delivery of possession by mortgage deed—Mortgagee not entitled to retain possession till mortgage money repaid—Agreement not inconsistent with English mortgage 211*d*
——Whether mortgage is valid or not mortgagee is only a mortgagee unless he sets up adverse title 63*d*
*——Suit on—One of legal representatives of Hindu mortgagee minor—Minor forming joint family with major brothers—Major brothers made parties—Minor is properly represented 3*a*
Motor Vehicles Act (8 of 1914), *S. 11*—Patna Rules, R. 46, Para. 7—"Plying" bus means "to ply for hire and not merely travelling or driving." 321(1)
——*S. 16*—Rules under Act, R. 61—Cleaner is not "attendant" for purposes of R. 61 172*a*
——*S. 16*—Rules under Act, R. 61, requires only one person besides driver for dealing with all matters unconnected with actual driving—It does not entail employment of three men 172*b*
Orissa Tenancy Act (2 of 1913), *S. 67 (3), (8)*—Subdivisional Officer taking proceedings under S. 67—Orders made are by revenue officer—District Magistrate or High Court cannot revise such order under

Orissa Tenancy Act
criminal revisional jurisdiction—Proper remedy is under S. 67 (8) 607
**——*S. 74*—Burden of proof—Chandnadar tenant—Landlord must prove usage or custom in support of ejectment: *1 Cuttack L T 5 and 8, OVERRULED.*
FB 29
——*S. 204 (1) (e) and (4)*—Sales of holding held in execution of rent decree set aside by Sub-Deputy Collector—Appeal lies to Collector and he has jurisdiction to entertain it 621
Parties—Person interested in equity of redemption not party—Omission is not fatal—Court can add parties under O. 1, R. 10, Civil P. C. 153*a*
Partition—Right to—Mere fact that member of the family was not in actual possession does not disentitle him to partition 422
——Zamindari—Bakashat land divided—Lands under tenancy undivided—Each Pattidar collecting separately his share of rent—Proprietary interest held completely partitioned 77
Partnership—Firm—Firm not juristic person—It is not firm that sues or is sued—Partners sue or are sued as individuals in name of firm 194*a*
——Father trading under business name—Sons succeeding to trade—Sons are not partners because partnership is not status but creation of contract 194*b*
Part payment—Alleged payment by judgment-debtor by arrangement with *A*, judgment-debtor's debtor — Relationship of debtor and creditor between *A* and decree-holder—Arrangement embodied in document signed by judgment-debtor—No indication in document that payment made by or on judgment-debtor's behalf—Document held not acknowledgment 386*a*
Pauper—Court cannot go into merits of applicant's case 2
Penal Code (45 of 1860), *Ss. 24 and 405*—"Wrongful gain" and "wrongful loss," meaning, explained 350*c*
*——*Ss. 84 and 302*—Accused alleged to have committed murder by reason of being possessed by evil spirit—S. 84 does not apply—It is not case of unsoundness of mind 245*b*
——*Ss. 107, 120-A and 120-B*—Criminal conspiracy amounting to abetment—Ss. 120-A and 120-B need not be invoked 346*c*
——*S. 147*—Charge under—Charge need not contain words "force or by show of

Penal Code
force"—Word "rioting" in the charge conveys meaning of force 627
——*S. 149*—Construction — Member of assembly whether liable to same offence as principal offender or of minor offence—Such member is to be convicted according to offence he must have known to be likely to be committed by assembly 481*b*
——*Ss. 149, 38 and 110*—Principle of Ss. 38 and 110 applies to S. 149—Liability of individual member under S. 149 depends upon his intention or knowledge 481*c*
——*S. 186*—Constructive obstruction to judicial officer in discharge of judicial functions—S. 186 does not apply 74*a*
——*S. 193*—Accused, Hindus, giving evidence regarding use of mosque during certain interval—Magistrate disbelieving evidence—Only four witnesses, all Mohamedans cited by Magistrate in petition of complaint—Only witness referred to in judgment and relied on was Sub-Inspector—Sub-Inspector stating that certain Hindus made certain statement to him inconsistent with that of accused—Prosecution held should not proceed 162*b*
——*S. 211*—False report by accused to two officers—One not competent to investigate—Offence under S. 211 held partially committed at each place 358*b*
——*Ss. 224 and 225*—Person alleged to be arrested without warrant in exercise of general power of Police Officer under S. 54 (1) thirdly of Criminal P. C.—Proclamation not proved to have been served—Arrest is illegal—Escape and rescue from such custody does not amount to offence under Ss. 224 and 225 249*c*
——*S. 243*—Accused in possession of counterfeit coins—Coins purchased at auction sale openly and no attempt made to pass them as genuine afterwards—No offence under S. 243 held proved 533
——*S. 302*—Absence of motive on part of accused—It does not necessarily mean that witnesses are telling lies or that confession by accused is false 245*a*
——*S. 302*——Sentence—Accused murdering husband with brutality and not making even pretence of grief—No intelligent motive present for committing offence—Accused making full confession stating that she committed offence under influence of evil spirit—Case held to be one in which extreme penalty was not called for 245*c*
——*S. 302*—Sentence—Accused jointly entitled with his brothers to crops—Storing entire produce in his room—Brothers removing their share during accused's absence—Altercation between accused and his brothers—Accused assaulting one with spear—Death resulting—Though provocation not sufficient to take offence out of S. 302, transportation held sufficient 11*e*
——*S. 366*—Accused charged under S. 366—Age of woman 18 or more—Woman appearing to have gone willingly with accused—No evidence that she had been forced to go by deceitful means—Woman herself not examined—Commitment held liable to be set aside 103
*——*S. 378*—Taking away fish from running stream does not constitute theft 152
——*S. 405*—Fraud or deceit is not an ingredient 350*b*
——*S. 409*—Intention wrongfully to deprive owner of use of property for a time and secure use of it for his own benefit for a time is sufficient 350*d*
——*S. 409*—Ingredients—Precise manner the money was spent or appropriated by the accused not necessary to be proved 350*e*
——*S. 409*—Entrusting in capacity of agent necessary—Accused need not be agent when committing breach of trust 350*h*
——*S. 409*—Marginal note must not prevail over description of offence 350*i*
——*S. 409*—Charge can be framed with reference to date of overt act manifesting intention 350*j*
——*S. 411*—House occupied by two brothers living jointly—Finding of property stolen by younger brother—From mere fact that members of criminal tribes used to visit him, it cannot be presumed that his elder brother had knowledge that property was stolen one 534
——*Ss. 426 and 352*—Accused charged and convicted under S. 426 only—Conviction cannot be changed on appeal to one under S. 352 536
——*S. 482*—Sentence—Measure of punishment should be damage caused to complainant 579*b*
Plaint—Simple money suit—Prayer in plaint for making decree charge upon shares of defendants—Such plaint is not one involving claim against immoveable property 571*b*
Pleadings — Amendment involving substantial alteration of cause of action should not be allowed 535*b*
——Plaintiff joining in one suit two independent claims—Court should not try suit

Pleadings
in that form—It should ask plaintiff to elect 142*a*
——Frame of suit defective — Court must give party opportunity of putting pleadings in order 140*c*
——Judgment or order not in conformity with pleadings—Successful party should be asked to amend his pleadings 40
Possession—Suit for — Possession under alienation by widow — Dispossession by trespasser—Person dispossessed is entitled to restoration of possession 602*b*
——Suit for possession subject to redemption—Suit cannot fail merely because substantially it is redemption suit 63*b*
Possessory Suit—Trespassers — No presumption under S. 110 in favour of one dispossessed — Whether latter can be restored to possession (*Quaere*) 602*d*
Practice — Amendment — Amendment which has result of starting a new action should not be allowed 491*c*
——Amendment—Prayer for amendment of plaint made just before judgment of appellate Court — Prayer is made too late to be entertained 185*g*
*———Appeal — Admission of part — No provision in Civil Procedure Code for partly admitting appeal—No admission on limited ground — Appeal once admitted must be heard as whole—Court informed at hearing that appeal would be confined to some grounds only—Court may note fact 7*a*
——Inconsistent pleas — Rule against joinder of inconsistent and alternative title is not absolute — Plaintiff in honest doubt as to nature of relief may make inconsistent or alternative claims 474
——Inherent powers—Application under O. 21, R. 58, Civil P. C.—Court requiring application to be put upon date fixed for execution and also ordering information to be sent to decree-holder—Decree-holder not informed by officers of Court — Order passed under O. 21, R. 58 in the absence of decree-holder—Court has inherent jurisdiction to recall such order 176
——New case—Execution against minor —Minor impeaching proceedings on ground of guardian's fraud and collusion—Plea of guardian's negligence not taken—Allegations not established—Court held could not set up negligence as ground of attack 442*b*
——New plea—Plea not taken either in trial Court or in application for revision—Plea cannot be raised in revision 428*a*

Practice
——New plea—Action for libel—Defendant taking plea of qualified privilege at appellate stage—Plea should not be upheld as plaintiff had no opportunity of proving that such privilege was not properly used 309*c*
——New plea—Jurisdiction—Properties of all three judgment-debtors sold in execution—Price sufficient to satisfy decree—Another decree-holder of two judgment-debtors getting rateable distribution in price—Contention that decree was satisfied as against third debtor as rateable distribution order was not against him — Question held not allowable in second appeal as not raised before—Jurisdiction of rateable distribution order held not challengeable at that stage 62*c*
*——Presumption — Proprietary rights long enjoyed—Presumption of lawful origin —No evidence on question of necessity of grant—No evidence to support that grant is ultra vires—Grant should be presumed for legal necessity: *Rowland, J.* contra 275*d*
——Procedure—Duty of Court—Suit by creditor for his loan—Debtor's objection to claim as fraudulent — C. I. D. Officer appointed to investigate fraud — Dates fixed for hearing adjourned and another date fixed — C. I. D. Officer requesting postponement of case for two months—Postponement granted without any intimation to creditor's pleader—Procedure held not according to law **FB** 472*a*
——Procedure — Intervention by third party in suit is contrary to judicial principle—Communications from third parties being improper, however laudable motive may be, should not form part of record — Action should always be taken upon such communication only on intimation to the party who might be adversely affected and after having such party heard in open Court **FB** 472*b*
——Record—Order sheet of one case filed in another—Only copy of original order sheet filed on record submitted to appellate Court—Copy should be certified as true copy and number given to original should be noted in margin 249*a*
——Relief — Suit for injunction and damages—Question of damages may await decision of title 372*a*
——Relief—Suit by landlord for ejectment — Defendants recorded as raiyats—Plaintiff challenging entry, suing for declaration of his rights to property and for ejecting

Practice
defendants—Decree by Court should be confined to relief asked for—It should not grant declaration that defendants are tenants, in respect of land in dispute 230
——Relief — Plaintiff entitled to relief although on other ground than those set forth in claim—Court should grant relief if defendant is not taken by surprise—Suit for ejectment—Court finding title to be made out by plaintiffs but not by defendants — Defendant found not tenant of plaintiffs—Court while proposing to give decree for possession can go into question of limitation—Defendant cannot be said to be prejudiced, onus of proof not being on him 147*b*
——Relief—Right taken away by statute —Aggrieved party when has remedy open 87*b*
——Remand—Small discrepancy in finding of amount due—No remand 539*c*
——Remand — Statutory and inherent powers of remand should not be exercised to provide merely another opportunity to unsuccessful party 160*a*
——Second appeal — Question whether tenancy permanent or precarious—Question must be decided by Court in second appeal 384*b*
——Service—Slight irregularity in procedure for effecting service does not invalidate entire service—Court should determine whether in spite of irregularity, service has in fact been effected—Court finding that service was effected—Matter of regularity or irregularity of service cannot be re-agitated 593
——Successful party to litigation is entitled to Court's assistance in reaping fruits of victory 76*b*
——Suit—Maintainability of—Allegations of plaintiff must be assumed to be correct. 572*d*
Precedent — Bench decision cannot be overruled unless by properly constituted Bench 54*d*
Presumption—Document — Consideration —Execution not denied—Executant dead —No evidence showing want of consideration — Document produced by person in whose favour it was executed—Consideration may be presumed 57*a*
Principal and Agent — Several persons appointing common agent—One of them cannot revoke under all circumstances 456*b*
Private Defence—Unlawful assembly attacking accused with dangerous weapons—
Private Defence
Accused in defence inflicting fatal injuries on members of that assembly and causing death—Accused entitled to take all necessary measures for private defence—Too accurate a judgment of force to be used is not expected 622
Promissory note—Suit on note written on one of leaves of bahi—If genuineness of note is proved, regular course of business regarding bahi is immaterial 498*a*
——Consideration proved but different from that mentioned in note—Suit is not liable to dismissal on this ground 498*b*
——Suit on—One of two co-promisees cannot bring suit without making other party to it 274
****Provincial Insolvency Act (5 of 1920)**, *Ss. 24 (2) and 25*—Court may after hearing debtor's evidence, if satisfied, refuse further evidence by creditors and grant adjudication—But Court if inclined can hear creditor's evidence **FB** 18
*——*Ss. 28 and 59*—Power of Hindu father to sell joint family property including son's interest therein does not vest in receiver—Receiver is not empowered to sell such property 115
——*Ss. 28, Cl. (7), 37 and 51* — Some of the creditors of insolvent bringing to sale property of insolvent before order of adjudication but during pendency of insolvency proceedings and realizing money from it—They must share proceeds with other creditors — They are liable under S. 28 read with S. 51 to make over proceeds to receiver, although he is subsequently appointed, when he calls upon them to do so—S. 37 does not apply to such case 112
Provincial Small Cause Courts Act(9 of 1887), *S. 16*—Small Cause suit within pecuniary jurisdiction and not excluded by Articles—Court exercising jurisdiction as Small Cause Court and Munsif—Appeal from decree does not lie 406*b*
——*S. 25*—Suit of small cause nature — Appellate Court dismissing appeal but allowing cross-appeal by plaintiff though no appeal nor cross-appeal could lie—Patna High Court when exercising revisional powers under S. 25 will not interfere with lower appellate Court's decision if it is sound on merits 562
——*S. 25* — Suit for damages against Secretary of State in respect of consignment booked with railway—Wilful neglect on part of railway must be proved — Lower Court holding that misconduct on

Provincial Small Cause Courts Act
part of railway not proved by mere fact that damage was caused by rain water coming through flaps of wagon — It commits no error of law—High Court will not interfere 257
——*S. 25*—High Court would ordinarily not call for record in every case in which possible error of law has been made—Lower Court committing all possible mistakes—Whole case a mis-trial—Case is liable to be sent back for re-trial 132
——*S. 25*—Cases cannot be argued like second appeals—High Court cannot interfere wherever question of law is wrongly decided—It will interfere only when substantial injustice is caused 84*a*
——*Arts. 8 and 31*—Recovery of payments under kabuliyat executed by usufructuary mortgagee releasing part of zarpeshgi and stipulating to pay fixed sum as profits on account of raiyati right—Suit does not fall under Art. 8 or Art. 31 406*a*
——*Sch. 2, Arts. 41 and 15*—Suit for recovery of money advanced by *A* to *B* as contribution by *A* for purchase of certain land—Suit held did not come under Art. 41 or Art. 15, Small Cause Courts Act, nor under S. 66, Civil P. C. 429
Railways Act (9 of 1890), *S. 72*—Risk note—Wilful misconduct and misconduct 84*b*
——*S. 72*—Misconduct—Waggons merely sealed not locked—No proof of rule that waggons should be locked—Not locking held of itself no misconduct of railway servants 84*d*
——*S. 72, Risk-note H* — Misconduct — Standing orders requiring wagons with flap doors and windows not to be used in monsoons for damageable goods—Windows of C type wagons required to be securely fastened and care taken that there was no likelihood of rain penetrating—Damageable consignment loaded in C type wagons damaged by rain — Wagons not established water-tight—Breach of rules held amounted to misconduct 70
——*Ss.* 75, 78—Declaration under S. 75 not representing true value of consignment—Declaration forming basis of calculation of per centage payable by way of compensation—Part second of S. 78 applies—Consignor cannot recover more than value of goods according to valuation 393*g*
——*S.* 75 (1) — Expression "shall not exceed the value so declared" implied that claim may be less than value declared—In case of deterioration of package whole

Railways Act
amount declared cannot be recovered as damages 393*b*
——*S.* 75 (1)—Declaration made by consignor under S. 75 (1) as to value of goods—Railway undertaking to carry goods on basis of declaration—Consignor is estopped from alleging that declared value is not true value 393*d*
——*S.* 75 (1)— S. 75 (1) contemplates declaration as to contents and value of each package 393*e*
——*S.* 75 (1) *and* (2)—Suit for compensation for loss of goods while in transit—Plaintiff cannot go behind declaration made under S. 75 (1) and prove real value of whole or portion of consignment—He can recover compensation only for that portion which represents loss sustained 393*a*
——*S.* 75 (2)—S. 75 (2) should be read with Ss. 58 and 78—Declaration under S. 75 is same as 'account' and 'description' referred to in S. 58 393*f*
*——*S.* 108—"Reasonable and sufficient cause"—It is question of fact—No hard and fast rule—Accident taking place in running train through neglect of passenger—Even then he is entitled to pull alarm signal for reasonable and sufficient cause 499
Receiver—Appointment of—Receiver of mortgagor's property appointed by Insolvency Court—Subsequent appointment of a receiver in mortgage suit—Effect of a later appointment would be to deprive creditors in insolvency of usufruct of mortgage property—Appointment of receiver in mortgage suit was set aside 357
Record of Rights—Presumption — Entry in Record of Rights that certain village is rent free debatter property—Presumption of correctness will not be rebutted until landlord proves that land held to be rent free lies within his regularly assessed estate or mahal and that revenue has been assessed on it 543*b*
——Entry in Record of Rights is not proof of rent free grant—It is not document of title—Tenant must prove it 315*c*
——Entry stating fact of possession without person paying rent—But this does not debar landlord from filing suit for rent 287*d*
——Record of Rights even if following another one in matter of boundary lines is entitled to presumption of correctness—Record of Rights of neighbouring district can be adopted in matter of dispute of boundary lines 185*b*

Record of Rights
——Value of—Record of Rights has presumptive evidentiary value 142*c*
——Presumption — Draft entries by Khanapuri and Attestation Officer—Final entries in Record of Rights—Latter carry more weight 57*c*
——Burden of proof—Record of Rights describing party as under-raiyat with occupancy rights—Burden held not on party to prove custom supporting entry's correctness—Other party held ought to prove absence of custom and disprove correctness 57*d*

Registration Act (16 of 1908) *S. 49 (as amended in* 1929) — Unregistered instrument is admissible to prove collateral purpose not required to be effected by registered document 634*b*

Res judicata—Rent suit—Ex parte decree — Relationship of landlord and tenant must be presumed to be determined—Subsequent rent suit between same parties—Question of relationship of landlord and tenant is barred by res judicata 556
——Order in execution proceedings affirmed by High Court—Party to proceedings cannot question that order 305
——Claim in execution of decree that property attached belongs to claimant dismissed for default—Application for restoration also dismissed—Suit for declaration that property attached is not liable to be attached and sold is barred by reason of rule of constructive res judicata or by general policy of law 268
——Appeal—If appeal fails or is not proceeded with, judgment appealed from, becomes final 198*a*
——Question of law—Decision although wrong on point of law may be res judicata—All questions of law cannot however be dealt with, on same footing—Special considerations apply in reference to certain questions of law—In questions of jurisdiction Court and public also have interest—Decision on such question does not operate as res judicata 198*c*
——Application for rule rejected—Court can grant rule on subsequent occasion 119*b*
——Execution—Execution case and miscellaneous cases arising therefrom—Court having jurisdiction over them ordering in one miscellaneous case that entire execution proceeding was null and void—Other miscellaneous case duly disposed of—Court held not prevented from passing final order in latter case by its order in previous case—Execution case held not disposed of by order 93*c*
——Execution — Objection — Mortgage decree—Application for final decree time-barred—Objection not raised when notices served on judgment-debtors nor when execution started — Objection filed six months after sale—Objection held could not be raised 93*d*

Review—Order rejecting plaint for non-compliance with order for payment of Court-fee—Review is permissible 310*a*

Revision—Power of interference is much more limited than in case of second appeal—Concurrent finding of fact based on evidence cannot be interfered with 558*a*
——Remand—Improper order of remand can be interfered with in revision 160*b*
*——Judge assuming jurisdiction and proceeding to decide question of law—High Court cannot interfere though decision wrong—Judge deciding question of law or fact for determining jurisdiction question, before assuming jurisdiction—High Court can revise decision 119*f*
——Competency — Application to Patna High Court presented after expiry of 60 days from date of order—It will not be entertained unless case is of special importance 109*a*
——High Court will not interfere with order permitting plaintiff to continue suit without additional Court-fee 85

Second Appeal—Construction of document of title is question of mixed fact and law 287*a*
——Finding of fact—Arrived at on fair consideration of evidence is binding on High Court 270*a*
——Finding of fact—Omission to consider piece of evidence does not alter character of finding 243*b*
——Finding of fact—Finding marked by errors of law is not binding 185*a*
——Question of law—Lower Court stating law correctly and coming to particular conclusion—It decides point as question of law 136*c*
——Finding of fact—Documents not documents of title—Decision of Court with regard to such documents not question of law—Erroneous decision by Court as to import of such documents is not error of record but is merely decision on question of fact 129*b*
——New facts cannot be investigated: 49*a*

Specific Relief Act (1 of 1877), *S. 42*—Suit for declaration that certain facts existed and therefore sale is void is not barred 572*a*

——*S. 42*—Sub-lessee liable to pay commission and royalty purchasing in son's name but in reality for himself, right to recover same in certificate sale — Suit purely for declaration that sale is void held maintainable 572*b*

——*S. 42*—Person admittedly in possession of mauza claiming land recorded by survey authorities as lying outside mauza —He is not entitled to mere declaration of title without also suing for possession 185*c*

——*S. 57* — Persons having right to manage their shares separately agreeing to have common management—Agreement held in substance to be negative and S. 57 is applicable—Injunction from breaking agreement held could be granted 456*c*

Succession Act (39 of 1925), *S. 95*—"Absolute estate"—No word of limitation is necessary to convey an absolute estate 323*j*

——*S. 373 (4)*—Applications for certificate by wife and daughter—S. 373 (4) has no application 430

Suit—Continuance of—Devolution of interest of plaintiff pending suit—He can still prosecute suit to its conclusion 420*b*

Tort—Trespass—Owner of land trespassed upon not knowing that land was his—Trespasser is not exonerated 179*b*

Trade Mark—Infringement of — Court deciding whether one trade mark is colourable imitation of another must place itself in position of unwary customer—It is sufficient if there is such similarity between the two that unwary or illiterate customer will not be able to distinguish between them 579*a*

Transfer—Appeal—Three suits tried by same Court and decided by one judgment —Two appeals filed before District Judge and one before High Court—Application to transfer all appeals to High Court was rejected 345

Transfer of Property Act (4 of 1882), *Ss. 3 and 130*—Deed of wakf providing certain sums to be given annually as stipends to certain relatives and after them to their aulad—Annuities held actionable claims under S. 3 and could not be transferred by oral hiba 527*c*

——*S. 3*—Palm and date trees are immoveable property 66*a*

Transfer of Property Act

——*Ss. 4 and 107*—S. 107 is to be read as supplemental to Registration Act and lease falling under Para. 2, S. 107, if unregistered, shall not affect any immoveable property comprised in lease 372*e*

——*S. 6 (e)*—Right of maintenance in definite sum of money is not mere right to sue 527*b*

——*S. 53-A* — Completed agreement is necessary pre-requisite of S. 53-A 372*g*

——*S. 53-A*—Section only debars transferor from enforcing any right in respect of property if transferee is in possession 372*i*

——*S. 68*—Usufructuary mortgage—Suit for mortgage money under S. 68—Mortgagee does not lose right to proceed against security 439*b*

——*S. 76 (c)*— Mortgagee in possession paying municipal taxes—Rent agreed to be set off against principal and interest—Mortgagee is entitled to set off municipal taxes in mortgage account 312

——*S. 92*—S. 92 is retrospective 60*a*

——*S. 114*— Covenant in restraint of transfer in lease—Transferee original lessee —S. 114 is confined to forfeiture for non-payment of money and hence not applicable 493*c*

Trusts — Liability of trust property — Debt incurred by trustee—Creditor cannot recover against trust property unless trustee, if he pays debt, can claim indemnity out of trust property—Right of trustee to be indemnified out of trust property differs in different cases 390*a*

***Usufructuary Mortgage**—Stipulation to pay certain sums to mortgagor annually—Money not paid—Suit for redemption by mortgagor—Deductions of money not paid claimed—Debt treated on equitable principle—Limitation not applicable — Simple interest can be granted on such debt: 583*d*

Usurious Loans Act (10 of 1918)—Act is not retrospective 78*b*

Waiver—Sale proclamation — Judgment-debtor not raising objection to decree but taking time for raising money—He cannot turn round and question execution on ground that there was no decree 568*b*

——Litigant can waive any right under any statute unless waiver makes any matter illegal 75

Will—Construction — Court should read will as whole, and importance should not be attached to isolated expressions — Words 'repugnant to clearly expressed intention' have to be discarded 323*e*

Will
——Construction—Bequest in favour of paternal cousin's wife, after her death her daughter and her children successively one after the other—Daughter's son if one, to be treated absolute owner—Will held created absolute estate in daughter and her children 323*f*

——Construction—Will of Hindu—Rule in *2 I. A. 7* at page 14 is not of universal application 323*k*

Words and Phrases—"Aulad" does not necessarily mean children—It means descendants and progeny as well 323*g*

—— "Aulad" includes both sons and daughters and all descendants in male but not in female line 527*d*

——"Silsilewar" means serially 323*i*

——"Waris" or "warisa" in reference to bequest indicate absolute estate 323*h*

***Workmen's Compensation Act (8 of 1923)**, *Ss. 10 and 13, Proviso*—Whether facts found constitute reasonable delay is question of law 307*a*

——*S. 10*—Accident to workman—Leave granted—Long correspondence and workman finally informed that he could not be re-employed as being unfit—Claim for compensation 2 years after such final order held barred by time 307*b*

S. N. DAR, B. A. LL. B.,
Vakil High Court,
SRINAGAR (Kashmir)

CASES OVERRULED & REVERSED
IN
A. I. R. 1936 PATNA.

Bageswari Charan Singh v. Bindeshwari Charan Singh, (1932) 12 Pat 147= 13 P L T 509=A I R 1932 Pat 337= 142 I C 495	Reversed in A I R 1936 P C 46.
Dukha Lal Chaudhuri v. Mt. Manabati, (1935) A I R 1935 Pat 194=156 I C 407	" A I R 1936 Pat 341 (S B).
Jyotindranath Sarkar v. Lodna Colliery Co., Ltd., (1921) 6 Pat L J 350=2 Pat L T 361=A I R 1921 Pat 175= 62 I C 649 (F B)	Overruled in A I R 1936 Pat 45 (F B).
Kedar Nath Mullick v. Bikal Prusti, 1 Cuttack L T 5	" A I R 1936 Pat 29 (F B).
Krishna Charan Mahanty v. Punai, 1 Cuttack L T 8	" A I R 1936 Pat 29 (F B).
Lalita Prasad v. Sarnam Singh, (1933) 14 P L T 27=A I R 1933 Pat 165= 149 I C 491	Reversed in A I R 1936 P C 304.

COMPARATIVE TABLES

A. I. R. 1936 Patna = Other Journals.

AIR	Other Journals			AIR	Other Journals			AIR	Other Journals			AIR	Other Journals		
1	16	P L T	781	40	1936	P W N	320	84	160	I C	1086	122	1936	Cr C	159
SB	1936	Cr C	10	41	159	I C	342	85	17	P L T	9		37	Cr L J	413
	160	I C	23	44	17	P L T	37		161	I C	22		1936	P W N	120
	37	Cr L J	230		1936	Cr C	69		15	Pat	340	123	159	I C	828
	15	Pat	175		160	I C	795		1936	P W N	9		17	P L T	73
2	160	I C	351		37	Cr L J	327	87	16	P L T	877		15	Pat	82
3	16	P L T	689		1936	P W N	104		160	I C	915	125	17	P L T	36
	160	I C	681	45	16	P L T	849		15	Pat	246		160	I C	27
6	160	I C	353	FB	160	I C	447	93	16	P L T	744		1936	P W N	23
7	16	P L T	803		15	Pat	284		159	I C	248	126	160	I C	119
	160	I C	984		1936	P W N	4		15	Pat	51		1936	P W N	14
	15	Pat	96	46	1936	Cr C	70	96	160	I C	1079	128	159	I C	260
10	160	I C	355		160	I C	675		17	P L T	360		17	P L T	261
	17	P L T	77		37	Cr L J	320		1936	P W N	52		1936	P W N	307
11	16	P L T	730		1936	P W N	286	97	16	P L T	908	129	161	I C	465
	1936	Cr C	6	49	16	P L T	813	FB	160	I C	1049	132	159	I C	1075
	160	I C	181		160	I C	976		15	Pat	308	133	161	I C	514
	36	Cr L J	235		15	Pat	219		1936	P W N	36	135	161	I C	474
15	16	P L T	823	52	159	I C	490	101	1936	Cr C	122		1936	P W N	151
FB	160	I C	156	54	160	I C	1103		160	I C	1076	136	161	I C	331
	15	Pat	238	56	16	P L T	807		37	Cr L J	374		17	P L T	366
18	16	P L T	833		1936	Cr C	82		17	P L T	148		1936	P W N	140
FB	160	I C	153		160	I C	797		1936	P W N	12	140	161	I C	516
	15	Pat	177		37	Cr L J	324	102	160	I C	186	142	161	I C	695
	1936	P W N	146		1936	P W N	235		17	P L T	88	145	160	I C	343
20	16	P L T	748	57	159	I C	460	103	160	I C	161		37	Cr L J	289
	1936	Cr C	46	59	1936	Cr C	83		1936	Cr C	141		17	P L T	258
	160	I C	177		17	P L T	22	104	17	P L T	57		1936	Cr C	231
	37	Cr L J	240		160	I C	945		160	I C	1096		1936	P W N	45
	15	Pat	138		37	Cr L J	378		15	Pat	356	147	161	I C	585
23	17	P L T	61		1936	P W N	42	106	160	I C	150		1936	P W N	129
	160	I C	347	60	160	I C	933		17	P L T	173	150	160	I C	345
	15	Pat	320	62	159	I C	494		1936	P W N	214		17	P L T	12
26	160	I C	678	63	160	I C	1066	107	160	I C	149		1936	P W N	44
28	160	I C	685	65	159	I C	500	108	160	I C	12	151	16	P L T	811
29	16	P L T	864		17	P L T	241		1936	Cr C	142		161	I C	472
FB	160	I C	437	66	160	I C	1054		37	Cr L J	219	152	17	P L T	189
	15	Pat	187		17	P L T	170	109	160	I C	152		161	I C	477
33	159	I C	179	68	159	I C	453		1936	Cr C	144		1936	Cr C	236
34	160	I C	445	70	16	P L T	837		37	Cr L J	234		37	Cr L J	452
	17	P L T	101		159	I C	580		1936	P W N	22		1936	P W N	153
36	16	P L T	793	74	16	P L T	808	110	159	I C	1073	153	161	I C	579
	159	I C	246		159	I C	503	111	160	I C	114		1936	P W N	321
	1936	Cr C	66		37	Cr L J	104	112	160	I C	146	158	16	P L T	789
	37	Cr L J	63		1936	Cr C	103		17	P L T	313		161	I C	478
37	16	P L T	872	75	159	I C	717		1936	P W N	83		1936	P W N	329
	1936	Cr C	67		17	P L T	108	114	17	P L T	118	160	16	P L T	795
	160	I C	450	76	1936	P W N	149		161	I C	18		161	I C	699
	37	Cr L J	319		160	I C	923		15	Pat	382	161	14	Pat	855
	1936	P W N	283	77	17	P L T	104		1936	P W N	127		17	P L T	20
38	16	P L T	891		160	I C	921	115	17	P L T	39		161	I C	691
	1936	Cr C	68		1936	P W N	23		161	I C	167	162	159	I C	817
	160	I C	443	78	160	I C	1073		15	Pat	363		37	Cr L J	193
	37	Cr L J	309	80	160	I C	1083		1936	P W N	92		1936	Cr C	254
39	159	I C	350		17	P L T	372	119	161	I C	26				
40	160	I C	927		1936	P W N	31	122	17	P L T	66	164	16	P L T	709
	17	P L T	275	84	16	P L T	887		161	I C	20		161	I C	714

AIR	Other Journals			AIR	Other Journals			AIR	Other Journals			AIR	Other Journals		
167	159	I C	821	249	37	Cr L J	318	317	1936	P W N	336	384	1936	P W N	333
	17	P L T	414		1936	Cr C	273	319	162	I C	870	386	163	I C	915
170	16	P L T	913	250	17	P L T	253	321 (1)	17	P L T	378	390	15	Pat	88
	1936	Cr C	244		162	I C	486		163	I C	399		17	P L T	393
	161	I C	705		1936	P W N	209		37	Cr L J	850		163	I C	869
	1936	P W N	420	253	162	I C	482		1936	Cr C	497	393	17	P L T	268
	37	Cr L J	468		1936	P W N	219	321 (2)	163	I C	408		15	Pat	394
171	17	P L T	115	256	163	I C	397	322	17	P L T	420		1936	P W N	182
	161	I C	706		17	P L T	810		163	I C	131		163	I C	685
	15	Pat	386		1936	P W N	195	323	15	Pat	151	398	15	Pat	102
	1936	P W N	172	257	162	I C	793		17	P L T	131		17	P L T	317
172	17	P L T	162		1936	P W N	198		163	I C	940		163	I C	411
	161	I C	703	258	162	I C	879		1936	P W N	497	400	163	I C	971
	1936	Cr C	256		1936	P W N	461	337	17	P L T	263	401	163	I C	675
	37	Cr L J	469	260	16	P L T	915	SB	1936	Cr C	567		15	Pat	456
	1936	P W N	147		15	Pat	272		1936	P W N	360		1936	P W N	653
173	16	P L T	782		162	I C	1004	339	161	I C	690	402	15	Pat	626
	160	I C	606	265	162	I C	981		17	P L T	152		1936	P W N	385
175	1936	Cr C	253		1936	P W N	463		15	Pat	353		17	P L T	363
	17	P L T	327	266	17	P L T	129		1936	P W N	206		166	I C	488
	161	I C	932		162	I C	592	340	163	I C	984	403	17	P L T	363
	37	Cr L J	502		1936	P W N	171	341	17	P L T	339		15	Pat	626
	1936	P W N	86	267	160	I C	611	SB	163	I C	1003		1936	P W N	385
176	161	I C	933	268	159	I C	960		15	Pat	594		166	I C	484
	1936	P W N	118	270	17	P L T	195		1936	P W N	373	404	15	Pat	120
177	17	P L T	160		162	I C	849	345	163	I C	962		17	P L T	389
	1936	P W N	116		15	Pat	422	346	15	Pat	26		163	I C	391
	161	I C	700		1936	P W N	267		17	P L T	234		1936	P W N	433
179	161	I C	855	274	163	I C	405		1936	Cr C	539	406	1936	P W N	169
185	161	I C	709		37	Cr L J	848		37	Cr L J	893		161	I C	102
	17	P L T	405		17	P L T	879		1936	P W N	489	408	163	I C	895
190	16	P L T	889		1936	P W N	239		164	I C	86	409	163	I C	514
	160	I C	608	275	162	I C	797	350	15	Pat	108		1936	Cr C	641
191	161	I C	862		17	P L T	488		17	P L T	302		1936	P W N	358
	1936	P W N	155	282	15	Pat	36		1936	Cr C	543	410	15	Pat	418
194	16	P L T	649		17	P L T	123		164	I C	74		163	I C	518
	158	I C	25		1936	Cr C	398		37	Cr L J	877		1936	Cr C	642
198	14	Pat	633		162	I C	550		1936	P W N	450		17	P L T	543
	159	I C	173		37	Cr L J	634	356	161	I C	694		1936	P W N	515
	16	P L T	819		1936	P W N	215	357	163	I C	811	411	163	I C	538
200	155	I C	213	285	162	I C	875		17	P L T	671	413	17	P L T	412
	14	Pat	518	287	162	I C	838		1936	P W N	306		1936	Cr C	660
	16	P L T	713		1936	P W N	458	358	1936	Cr C	558		163	I C	965
211	14	Pat	560	289	162	I C	830		17	P L T	472		37	Cr L J	875
	158	I C	738		17	P L T	434		163	I C	805		1936	P W N	383
	16	P L T	757		15	Pat	545		37	Cr L J	862	414	163	I C	522
	1936	P W N	400		1936	P W N	473		1936	P W N	276		1936	P W N	314
225	14	Pat	292	295	162	I C	995	360	17	P L T	399	416	165	I C	578
	17	P L T	403	300	17	P L T	164		1936	Cr C	560		1936	P W N	532
	162	I C	32		162	I C	787		163	I C	402	417	17	P L T	380
226	17	P L T	109	303	162	I C	867		37	Cr L J	846	SB	162	I C	177
	162	I C	210		1936	P W N	281		1936	P W N	332		15	Pat	589
	15	Pat	404	305	162	I C	987	361	163	I C	808		1936	P W N	339
	1936	P W N	109		1936	P W N	284	362	17	P L T	206	418	17	P L T	266
230	162	I C	183	306	163	I C	175		163	I C	525	SB	162	I C	13
	1936	P W N	320	307	17	P L T	33		1936	P W N	298		37	Cr L J	560
231	16	P L T	484		162	I C	817	370	161	I C	171		1936	Cr C	652
	14	Pat	824		1936	P W N	293		15	Pat	433		1936	P W N	265
	162	I C	235		1936	Cr C	430		17	P L T	663	420	163	I C	908
243	162	I C	21	309	162	I C	809		1936	P W N	480		17	P L T	564
245	1936	Cr C	285		17	P L T	816	372	17	P L T	217		15	Pat	607
	162	I C	25	310	162	I C	992		163	I C	501		1936	P W N	447
	37	Cr L J	543		17	P L T	766		15	Pat	460	422	161	I C	943
	1936	P W N	189		1936	P W N	240		1936	P W N	252	423	17	P L T	348
248	16	P L T	847	312	163	I C	55	382	17	P L T	276	SB	162	I C	216
	1936	Cr C	288		1936	P W N	278		1936	Cr C	581		1936	Cr C	643
	162	I C	22	313	162	I C	984		163	I C	451		37	Cr L J	625
	37	Cr L J	513		1936	P W N	665		37	Cr L J	838		1936	P W N	327
	1936	P W N	438	315	162	I C	999		1936	P W N	223		161	I C	939
249	17	P L T	81	317	17	P L T	97	384	17	P L T	202	425	37	Cr L J	559
	160	I C	604		162	I C	820		163	I C	415				

AIR	Other Journals
425	1936 Cr C 645
	1936 P W N 524
426	161 I C 941
428	161 I C 937
429	162 I C 553
	17 P L T 591
	1936 P W N 526
430	163 I C 861
433	17 P L T 187
	164 I C 93
	1936 P W N 296
434	17 P L T 531
	164 I C 213
437	162 I C 557
	1936 P W N 359
438	17 P L T 444
	1936 Cr C 699
	164 I C 184
	37 Cr L J 906
439	162 I C 15
	1936 P W N 343
442	164 I C 178
	17 P L T 832
	1936 P W N 165
443	161 I C 936
	1936 P W N 264
444	162 I C 178
446	164 I C 98
	1936 P W N 436
447	164 I C 282
	17 P L T 756
	1936 P W N 805
450	17 P L T 554
	164 I C 358
	15 Pat 680
	1936 P W N 552
456	164 I C 220
	17 P L T 865
	1936 P W N 568
462	164 I C 277
465	164 I C 287
	17 P L T 760
	15 Pat 659
	1936 P W N 656
468	162 I C 218
472	17 P L T 329
FB	162 I C 568
	15 Pat 561
	1936 P W N 367
474	15 Pat 448
	164 I C 804
	1936 P W N 624
476	164 I C 799
480	17 P L T 385
	162 I C 805
	15 Pat 614
	1936 P W N 388
481	17 P L T 350
	162 I C 563
	37 Cr L J 630
	1936 Cr C 798
	1936 P W N 362
485	164 I C 876
486	1936 Cr C 810
	164 I C 1079
	37 Cr L J 1061
490	164 I C 854
491	164 I C 1085
491	1936 P W N 233
493	17 P L T 502
	164 I C 811
	15 Pat 673
	1936 P W N 534
496	163 I C 34
	1936 P W N 527
498	165 I C 809
499	17 P L T 569
	1936 Cr C 821
	165 I C 815
	1936 P W N 679
	38 Cr L J 77
501	17 P L T 609
	1936 Cr C 823
	165 I C 844
	1936 P W N 646
	38 Cr L J 22
503	163 I C 29
	37 Cr L J 785
	1936 Cr C 825
	17 P L T 723
505	163 I C 142
	17 P L T 607
506	17 P L T 743
	165 I C 857
	1936 P W N 565
508	17 P L T 467
	163 I C 24
	1936 P W N 493
511	163 I C 136
	17 P L T 715
	1936 P W N 487
512	17 P L T 573
	1936 Cr C 820
	15 Pat 696
	1936 P W N 908
	165 I C 803
	38 Cr L J 100
513	17 P L T 279
	15 Pat 510
	164 I C 860
	1936 P W N 59
527	165 I C 298
	1936 P W N 395
531	1936 Cr C 897
	165 I C 564
	38 Cr L J 72
532	165 I C 32
	1936 P W N 844
533	17 P L T 648
	1936 Cr C 898
	165 I C 603
	37 Cr L J 1154
	1936 P W N 606
534	1936 Cr C 900
	165 I C 230
	37 Cr L J 1123
	1937 P W N 39
535	165 I C 21
	1936 P W N 779
536	17 P L T 572
	1936 Cr C 898
	165 I C 600
	37 Cr L J 1156
537	15 Pat 336
	17 P L T 526
	165 I C 289
537	1936 Cr C 915
	37 Cr L J 1126
	165 I C 593
	15 Pat 709
	1936 P W N 649
	18 P L T 79
542	165 I C 585
	18 P L T 125
543	15 Pat 260
	17 P L T 507
	165 I C 589
546	165 I C 26
	1936 P W N 844
	15 Pat 704
548	15 Pat 326
	17 P L T 584
	165 I C 612
552	165 I C 317
	1936 P W N 581
553	163 I C 139
	17 P L T 602
	15 Pat 637
	1936 P W N 587
556	17 P L T 633
	165 I C 623
	1936 P W N 621
558	...
561	15 Pat 414
	17 P L T 650
	1936 P W N 710
	165 I C 574
562	163 I C 133
563	165 I C 378
	15 Pat 644
	1936 P W N 885
	18 P L T 46
568	15 Pat 345
	17 P L T 540
	165 I C 561
570	165 I C 581
	18 P L T 123
571	165 I C 567
572	165 I C 749
577	1936 Cr C 948
	165 I C 542
	37 Cr L J 1159
579	17 P L T 667
	1936 Cr C 950
	165 I C 745
	38 Cr L J 35
581	1936 P W N 667
	1936 Cr C 952
	165 I C 761
583	17 P L T 684
	1936 P W N 628
	166 I C 545
588	17 P L T 621
	1936 P W N 635
	165 I C 805
590	17 P L T 673
	1936 P W N 607
	15 Pat 698
	165 I C 812
591	1936 P W N 694
	15 Pat 738
	165 I C 927
	18 P L T 39
593	165 I C 850
593	1936 P W N 931
595	15 Pat 295
	17 P L T 575
	1936 P W N 598
	166 I C 317
600	17 P L T 709
	166 I C 262
602	166 I C 305
	1937 P W N 10
	18 P L T 63
604	165 I C 936
606	17 P L T 549
	1936 P W N 583
	165 I C 854
607	15 Pat 350
	17 P L T 500
	1936 P W N 717
	1936 Cr C 1073
	165 I C 925
	38 Cr L J 26
608	1936 Cr C 1074
	1936 P W N 914
	165 I C 952
	38 Cr L J 90
611	15 Pat 229
	17 P L T 956
	166 I C 86
615	15 Pat 439
	1936 P W N 669
	165 I C 959
	18 P L T 36
616	163 I C 38
	1936 P W N 594
619	15 Pat 390
	1936 P W N 671
	165 I C 940
	18 P L T 110
621	15 Pat 375
	17 P L T 902
	165 I C 929
622	1936 Cr C 1060
	18 P L T 21
	1937 P W N 5
	166 I C 129
626	17 P L T 794
	1936 Cr C 1064
	1936 P W N 773
	165 I C 931
	38 Cr L J 2
627	1936 P W N 626
	1936 Cr C 1065
	165 I C 945
	38 Cr L J 87
629	15 Pat 481
	1936 P W N 673
	17 P L T 726
	166 I C 29
631	166 I C 216
634	1937 P W N 2
	166 I C 209
636	1936 Cr C 1067
	17 P L T 953
	166 I C 206
637	166 I C 198
639	17 P L T 791
	1936 Cr C 1070
	1936 P W N 926
	165 I C 942
	38 Cr L J 29

Other Journals = All India Reporter.

I. L. R. 15 Patna = All India Reporter

ILR	AIR			ILR	AIR			ILR	AIR			ILR	AIR			ILR	AIR		
1	1935	P	383	177	1936	P	18	353	1936	P	339	481	1936	P	629	659	1936	P	465
8	"	"	508	187	"	"	29	356	"	"	104	488	1937	"	202	667	1937	"	108
26	1936	"	346	203	"	PC	46	363	"	"	115	510	1936	"	513	673	1936	"	493
36	"	"	282	210	"	"	63	372	1937	"	13	545	"	"	289	680	"	"	450
44	1935	"	435	219	"	P	49	375	1936	"	621	561	"	"	472	696	"	"	512
46	"	"	504	229	"	"	611	379	1937	"	11	567	"	PC	189	698	"	"	590
51	1936	"	93	238	"	"	15	382	1936	"	114	579	1937	P	183	704	"	"	546
58	1935	"	490	246	"	"	87	386	"	"	171	584	"	"	189	709	"	"	539
64	"	"	488	260	"	"	543	390	"	"	619	589	1936	"	417	716	1937	"	9
69	"	"	515	268	"	PC	49	394	"	"	393	594	"	"	341	721	"	"	169
82	1936	"	123	272	"	P	260	404	"	"	226	607	"	"	420	738	1936	"	591
88	"	"	390	284	"	"	45	414	"	"	561	614	"	"	480	742	1937	"	156
96	"	"	7	295	"	"	595	418	"	"	410	619	1937	"	180	753	"	"	44
102	"	"	398	308	"	"	97	422	"	"	270				402	762	"	"	151
108	"	"	350	320	"	"	23	433	"	"	370	626	1936	"	&	772	"	"	178
120	"	"	404	326	"	"	548	439	"	"	615				403	779	"	"	22
127	"	PC	24	336	"	"	537	443	1937	"	200	630	1937	"	196	786	"	"	36
138	"	P	20	340	"	"	85	448	1936	"	474	637	1936	"	553	792	"	"	1
151	"	"	323	345	"	"	568	456	"	"	401	644	"	"	563	798	"	"	58
175	"	"	1	350	"	"	607	460	"	"	372	655	1937	"	144	810	"	"	16

17 Patna Law Times = All India Reporter

PLT	AIR			PLT	AIR			PLT	AIR			PLT	AIR			PLT	AIR		
1	1936	PC	24	162	1936	P	172	380	1936	P	417	593	1936	PC	253	791	1936	P	639
5	1935	"	180	164	"	"	300	385	"	"	480	594	"	"	253	793	1937	"	85
9	1936	P	85	170	"	"	66	389	"	"	404	602	"	P	553	794	1936	"	626
12	"	"	150	173	"	"	106	393	"	"	390	607	"	"	505	801	"	PC	318
16	1937	"	105	175	"	PC	89	399	"	"	360	609	"	"	501	806	1937	P	4
20	1936	"	161	177	"	"	83	403	"	"	225	613	"	PC	238	810	1936	"	256
22	"	"	59	187	"	P	433	405	"	"	185	621	"	P	588	812	1937	"	63
25	"	PC	49	189	"	"	152	412	"	"	413	627	1937	"	131	815	"	"	136
28	"	"	46	191	1935	"	504	414	"	"	167	633	1936	"	556	816	1936	"	309
33	"	P	307	195	1936	"	270	420	"	"	922	636	"	PC	304	819	1937	"	96
36	"	"	125	202	"	"	384	429	"	PC	176	644	1937	P	9	824	"	"	165
37	"	"	44	206	"	"	362	434	"	P	289	648	1936	"	533	832	1936	"	442
39	"	"	115	217	"	"	372	444	"	"	438	650	"	"	561	835	1937	"	214
45	"	PC	20	234	"	"	346	445	1937	"	202	653	"	PC	230	842	"	"	54
57	"	P	104	241	"	"	65	461	1936	PC	189	663	"	P	370	845	"	"	144
61	"	"	23	243	"	PC	246	467	"	P	508	667	"	"	579	847	"	"	50
66	"	"	122	253	"	P	250	472	"	"	358	671	"	"	357	852	"	"	104
67	1935	"	503	258	"	"	145	475	1935	"	177	673	"	"	590	855	"	"	92
69	1936	PC	44	261	"	"	128	477	1936	PC	198	677	1937	"	141	857	"	"	134
73	"	P	123	263	"	"	337	480	"	"	183	684	1936	"	583	861	"	"	122
77	"	"	10	266	"	"	418	488	"	P	275	692	1937	"	211	865	1936	"	456
81	"	"	249	268	"	"	393	500	"	"	607	697	"	"	169	876	1937	"	163
83	1935	"	488	275	"	"	40	502	"	"	493	709	1936	"	600	879	1936	"	274
88	1936	"	102	276	"	"	382	507	"	"	543	712	1937	"	20	881	"	PC	264
89	"	PC	63	279	"	"	513	513	"	PC	171	713	"	"	16	888	"	"	283
93	1935	"	185	302	"	"	350	526	"	P	537	715	1936	"	511	892	1937	P	196
97	1936	P	317	313	"	"	112	529	1935	"	154	717	"	PC	277	896	"	"	146
101	"	"	34	317	"	"	398	531	1936	"	434	723	"	P	503	899	"	"	108
104	"	"	77	321	"	PC	103	536	1935	"	492	726	"	"	629	902	1936	"	621
108	"	"	75	327	"	P	175	540	1936	"	568	731	1937	"	22	905	"	PC	332
109	"	"	226	329	"	"	472	543	"	"	410	736	"	"	58	910	"	"	281
115	"	"	171	339	"	"	341	546	1937	"	13	743	1936	"	506	914	"	"	309
118	"	"	114	348	"	"	423	549	1936	"	606	747	1937	"	127	919	1937	P	100
123	"	"	282	350	"	"	481	554	"	"	450	754	"	"	112	926	"	"	149
129	"	"	266	360	"	"	96	564	"	"	420	756	1936	"	447	932	"	"	160
131	"	"	323					569	"	"	499	760	"	"	465	937	1936	PC	301
148	"	"	101	363	"	"	402 & 403	572	"	"	536	766	"	"	310	940	1937	P	113
150	1935	"	481					573	"	"	512	769	1937	"	73	948	"	"	137
152	1936	"	339	366	"	"	136	575	"	"	595	774	"	"	78	951	"	"	138
155	1937	"	200	372	"	"	80	584	"	"	548	780	"	"	40	953	1936	"	636
160	1936	"	177	378	"	"	321	591	"	"	429	785	"	"	76	956	"	"	611
																963	1937	"	36

PWN	AIR		PWN	AIR		PWN	AIR		PWN	AIR		PWN	AIR		PWN	AIR	
1	1935	PC 57	196	1935	P 481	362	1936	P 481	587	1936	P 553	768	1937	P 151			
4	1936	P 45	198	1936	" 257	367	"	" 472	590	"	PC 201	773	1936	" 626			
9	"	" 85	200	"	PC 70	373	"	" 341	594	"	P 616	775	1937	" 73			
12	"	" 101	206	"	P 339	383	"	" 413	598	"	" 595	779	1936	" 535			
14	"	" 126	209	"	" 250			402	606	"	" 533	782	1937	" 160			
17	"	PC 46	214	"	" 106	385	"	" &	607	"	" 590	785	"	" 50			
22	"	P 109	215	"	" 282			403	610	1937	" 56	789	"	" 195			
23*a*	"	" 77	219	"	" 253	388	"	" 480	614	1936	PC 253	791	"	" 189			
23*b*	"	" 125	223	"	" 382	390	"	PC 131	615	"	" 253	794	1936	PC 283			
31	"	" 80	225	"	PC 83	395	"	P 527	621	"	P 556	796	1937	P 78			
36	"	" 97	233	"	P 491	400	"	" 211	624	"	" 474	800	"	" 40			
42	"	" 59	235	"	" 56	417	"	PC 176	626	"	" 627	805	1936	" 447			
44	"	" 150	236	1937	" 200	420	"	P 170	628	"	" 583	809	1937	" 183			
45	"	" 145	239	1936	" 274	421	1937	" 202	635	"	" 588	812	"	" 76			
48	"	PC 49	240	"	" 310	433	1936	" 404	638	"	PC 230	817	"	" 165			
52	"	P 96	242	"	PC 89	436	"	" 446	646	"	P 501	822	"	" 122			
55	"	PC 24	244	"	" 246	438	"	" 248	649	"	" 539	825	"	" 104			
59	"	P 513	252	"	P 372	439	"	PC 141	653	"	" 401	827	"	" 146			
83	"	" 112	264	"	" 443	447	"	P 420	656	"	" 465	829	1936	PC 289			
86	"	" 175	265	"	" 418	450	"	" 350	660	"	PC 242	844*a*	"	P 532			
88	"	PC 44	267	"	" 270	458	"	" 287	665	"	P 313	844*b*	"	" 546			
92	"	P 115	272	"	PC 91	461	"	" 258	667	"	" 581	847	1937	" 63			
98	1937	" 191	276	"	P 358	463	"	" 265	669	"	" 615	849	1936	PC 318			
104	1936	" 44	278	"	" 312	464	"	PC 183	671	"	" 619	855	1937	P 139			
109	"	" 226	281	"	" 303	470	"	" 198	673	"	" 629	856	"	" 155			
116	"	" 177	283	"	" 37	473	"	P 289	677	1937	" 112	858	"	" 214			
118	"	" 176	284	"	" 305	480	"	" 370	679	1936	" 499	865	"	" 219			
120	"	" 122	286	"	" 46	483	"	PC 189	681	"	PC 304	867	"	" 149			
122	"	PC 63	288	"	PC 103	487	"	P 511	689	1937	P 141	871	"	" 220			
127	"	P 114	293	"	P 307	489	"	" 346	694	1936	" 591	873	1936	PC 281			
129	"	" 147	296	"	" 433	493	"	" 508	696	1937	" 17	875	"	" 309			
134	"	PC 60	298	"	" 362	497	"	" 323	702	1936	PC 207	880	1937	P 144			
140	"	P 136	306	"	" 357	513	"	PC 199	708	1937	P 49	986	"	" 108			
146	"	PC 18	307	"	" 128	515	"	P 410	710	1936	" 561	885	1936	" 563			
147	"	P 172	309	"	PC 20	518	"	PC 171	713	1937	" 11	891	"	PC 332			
149	"	" 76	314	"	P 414	524	"	P 425	714	"	" 16	895	"	" 301			
151	"	" 135	320	"	" 40	526	"	" 429	716	"	" 20	901	1937	P 147			
153	"	" 152	321	"	" 153	527	"	" 496	717	1936	" 607	904	"	" 196			
155	"	" 191	327	"	" 423	530	1937	" 86	719	1937	" 58	908	1936	" 512			
159	"	PC 15	329	"	" 158	532	1936	" 416	727	1936	PC 264	909	1937	" 44			
165	"	P 442	332	"	" 360	534	"	" 493	733	1937	P 1	914	1936	" 608			
168	1937	" 39	333	"	" 384	538	"	PC 179	736	"	" 62	918	1937	" 9			
169	1936	" 406	336	"	" 317	552	"	P 450	738	"	" 169	921	"	" 100			
171	"	" 266	339	"	" 417	561	1937	" 131	747	"	" 31	926	1936	" 639			
172	"	" 171	343	"	" 439	565	1936	" 506	751	"	" 36	928	1937	" 137			
175	1935	PC 199	346	"	PC 93	568	"	" 456	756	"	" 22	930	"	" 138			
182	1936	P 393	358	"	P 409	577	1937	" 211	760	1936	PC 277	931	1936	" 593			
189	"	" 245	359	"	" 437	581	1936	" 552	765	1937	P 4	934	1937	" 156			
195	"	" 256	360	"	" 337	583	"	" 606									

THE JAMMU & KASHMIR UNIVERSITY
LIBRARY.

DATE LOANED

Class No. [redacted] Book No. [redacted]

Vol. _____ Copy _____

Accession No. [redacted]

THE
ALL INDIA REPORTER
1936
PATNA HIGH COURT

A. I. R. 1936 Patna 1

(Special Bench)

COURTNEY-TERRELL, C. J., DHAVLE AND AGARWALA, JJ.

In the matter of *S, a Pleader, Raghunathpur.*

Civil Ref. No. 1 of 1935, Decided on 4th October 1935, from order of Dist. Judge, Manbhum, D/- 16th June 1935.

Legal Practitioners Act (1879), S. 13-F—Pleader working as insurance agent—Practice held injurious to profession and public—Pleader held guilty of professional misconduct.

A pleader had been trying to run two businesses at the same time, the business of the pleader and the business of an insurance agent nominally through his brother :

Held : that such a practice was in the highest degree injurious to the interest of the profession and the interest of the public and hence the pleader was guilty of professional misconduct.

[P 2 C 1]

K. P. Jayaswal, S. C. Mazumdar and *G. C. Das*—against Reference.

Order.—This is a proceeding under S. 13 (f), Legal Practitioners Act, against one *S*, a pleader, who has been practising at Raghunathpur in the district of Manbhum. A suit was brought by the heirs of an assured person on a policy of insurance against the Insurance Company. The defence of the Insurance Company was that there had been fraud in the obtaining of the policy of insurance, and in the course of the suit the pleader amongst other persons was called as a witness in support of the plaintiff. It became clear from his evidence that the nominal agent of the company for negotiating the policy was the brother of the pleader, one B. De, who lives with the pleader at Raghunathpur. The evidence of the pleader made it further clear that it had been the practice for the pleader to render assistance to his brother in negotiating policies ; but the evidence went very much further than the disclosure of the mere rendering of assistance in the particular case. It may well be that a pleader of experience may properly give advice from time to time to a younger brother who is engaged in business, and had the matter rested there, there would have been little to complain of ; but the evidence of the pleader in this suit clearly shows that the insurance agency, though nominally that of the brother, was really that of the pleader. The brother is an ignorant young man with little education and little knowledge of English and it is improbable that he would ever have been appointed an agent but for the existence of the pleader brother against whom this complaint is made. In the particular case under investigation the suit was concerned with the insurance of a person named Surajmal and it is clear that the pleader played a most active part and his evidence indicates that no less active part must have been played by him in many cases that have passed through his brother's hands. Now persons who wish to take up a profession must take their choice. If they wish to be insurance agents there is nothing to prevent them from carrying on that useful occupation ; but if they enter the profession of the law as pleaders, then they must make up their mind to conduct the business of the pleader and nothing else. There is the most distinct rule of the Court by which a person who, after having been admitted as a pleader or mukhtear, accepts any appointment or enters into any other trade or business, must give notice to the High Court and the High Court has the

power thereupon to suspend him from practice or pass any other suitable order. Here the pleader has clearly been trying to run two businesses at the same time, the business of pleader and the business of an insurance agent, and such a practice is in the highest degree injurious to the interest of the profession and to the interest of the public. We are satisfied that the pleader has been guilty of professional misconduct and we suspend him from practice for a period of six months from this date.

S.R. *Order accordingly.*

A. I. R. 1936 Patna 2

Wort, J.

Balbahadur Missir—Petitioner.

v.

Narbada Prasad and *others*—Opposite Parties.

Civil Revn. No. 289 of 1935, Decided on 18th October 1935, from order of Sub-J., 2nd Court, Arrah, D/- 4th April 1935.

Pauper—Court cannot go into merits of applicant's case.

There is nothing in the provisions of the Civil P. C. which would entitle a Court to go into the merits of the case of the applicant for permission to be allowed to sue as a pauper: 1925 *Pat* 30 and 20 *All* 299, *not Foll.* [P 3 C 1]

Mahabir Prasad and *Tarkeshwar Nath*—for Petitioner.

B. P. Sinha—for Opposite Parties.

Order.—At first I was of the opinion that this question was not subject to the revisional jurisdiction of this Court. The rule which has been granted was against the order of the Subordinate Judge dismissing the applicant's case to be allowed to sue in forma pauperis. There is no doubt as to his poverty, but the learned Judge comes to the conclusion that there was no cause of action. If that conclusion had been come to regularly, that is to say, in a regular manner, this Court would be in grave difficulties in interfering with the order. But the procedure adopted by the learned Judge in the Court below is wholly irregular in my judgment and therefore the matter comes quite clearly within S. 115, Civil P. C. Mr. Sinha who appears on behalf of the respondents relies upon the decision in 20 All 299 (1) decided by Burkitt, J., and Sir John Edge. But at the date of the decision the Code of 1882 was in force and since that date the words have been materially altered. In the old Code the question which had to be determined was the poverty of the alleged pauper, and Cl. (c), S. 407, provides that a Court shall reject the application if it appears 'that his allegations do not show a right to sue in such Court'. Allegations showing a right to sue might be construed in two ways: it might be construed in the sense of the words used in O. 33, R. 5 (d) or it might be construed in the way that the learned Judges to whom I have referred construed it. But it is in any event no authority for the proposition that the Code means when it says that the allegations do not show a cause of action, that the Judge is entitled to go into the merits of the case. The scheme of Orders 5, 6 and 7 is clear.

The first thing a Court is to be satisfied with is whether the allegations show a cause of action. I am speaking of course with regard to the point under discussion. Now the allegations may be contained in a plaint or, as will be seen from a later rule, may be plaint plus his statement in evidence. But whether those allegations show a cause of action is merely a matter of whether on the face of them, if they are believed, they show a cause of action. The merits are not to be discussed, and the learned Judges have got no jurisdiction to come to any conclusion as to whether the allegations in the plaint or statement by the proposed plaintiff himself is true or not. R. 6 provides for a hearing in the presence of both the applicant and the proposed defendant and Cl. 7 provides for the procedure to take place at that hearing. R. 7 at first provides that the Court may examine witnesses produced by either party and may examine the applicant or his agent, and shall make a memorandum of the substance of their evidence. But it is to be noted that the evidence which the applicant has to give is evidence in proof not of his cause of action but in proof of his pauperism: that is provided by R. 6, O. 33. Then comes sub-Cl. (2) of R. 7 which provides for argument offered by the proposed defendant that the statements on the face of them disclose no cause of action or the evidence as to pauperism is not to be believed.

1. Kamrakh Nath v. Sunder Nath, (1898) 20 All 299=1898 A W N 36.

But it is perfectly obvious that although the question of his pauperism is a question of fact, there is nothing in the rules to which I have referred which would in any way entitle the Judge to go into the merits of the plaintiff's case. If authority is needed for that statement it is to be found in the decision of this Court in 3 Pat 275 (2) where Jwala Prasad and Adami, JJ., came to the conclusion that under the rules the Judge could not examine the witnesses for deciding the question of limitation. It is to be noted that that decision does not go so far as to state that where on the plaintiff's own showing his action is barred by limitation, the Judge would not be entitled to reject the application. That is entirely a different matter and it has nothing to do with this Court in this particular case in any event. But the authority to which I have referred (and there are abundant authorities in this respect), shows in my judgment the obvious and the only meaning which can be placed by any lawyer upon the expressions disclosed in Cl. (d), R. 5, O. 33, Civil P. C. "Where his allegations do not show a cause of action." The learned Judge going into the merits of the applicant's claim has acted with material irregularity and his order must be set aside. It is quite clear on the face of his allegations that he has got a cause of action. Whether he could prove those allegations or not was an entirely different matter and was no concern of the Judge. The rule is therefore made absolute with costs, hearing fee two gold mohurs.

S.R. *Rule made absolute.*

2. Mahomed Nasrullah v. Mahomed Shukurullah, 1925 Pat 30=83 I C 871=3 Pat 275=6 P L T 209.

* A. I. R. 1936 Patna 3

MOHAMMAD NOOR AND SAUNDERS, JJ.

Ram Ajodhya Tewari—Defendant—Appellant.

v.

Firangi Tewari and *others*—Plaintiffs and Pro-forma defendants—Respondents.

Appeal No. 173 of 1931, Decided on 12th August 1935, from appellate decree of Addl. Sub-Judge, Chapra, D/- 31st October 1930.

***(a) Mortgage—Suit on—One of legal representatives of Hindu mortgagee minor—Minor forming joint family with major brothers—Major brothers made parties—Minor is properly represented.**

Where one of the legal representatives of a Hindu mortgagee is a minor and is living jointly with his major brothers, in a mortgage suit if the major brothers are made parties to the suit and the minor is not, the minor is nevertheless properly represented because one of the major brothers must be the karta of the joint family and having been made a party can represent the minor : 33 *All* 272 and 1922 *Pat* 450, *Rel on* ; 1916 *Pat* 310 and 1933 *Cal* 621, *Disting.* [P 5 C 1, 2]

(b) Interest—Mortgage—Stipulated interest 24 per cent—Mortgage for depriving legatee of mortgagor of benefit of property—Mortgagee in collusion with mortgagor allowing accumulation of interest—Interest held very high and was reduced to 6 per cent.

In a mortgage deed the rate of the interest stipulated was 24 per cent. The mortgagor had deliberately created the mortgage in order to deprive the legatee under his will of the benefit of the property. The mortgagee who was in collusion with the mortgagor allowed the interest on the mortgage to accumulate obviously with the intention of absorbing the entire property:

Held : that the interest was very high and was reduced to 6 per cent. [P 5 C 2]

S. M. Mullick and *Anand Prasad*—for Appellant.

A. B. Mukherji and *J. M. Ghosh*—for Respondents.

Mohammad Noor, J.—This second appeal is by defendant 2 of a suit to enforce a simple mortgage by defendant 1 for a sum of Rs. 500. The mortgage was dated 10th September 1915, the due date being 30th Aghan 1324 Ps (corresponding to 15th December 1916). It was in favour of six persons : (1) Rameshwar Tewari; (2) Sheogobind Tewari; (3) Daroga Tewari; (4) Firangi Tewari; (5) Ravan Tewari and (6) Supan Tewari. There is no specification about the extent of the interest of each mortgagee in the deed, but it was stated in the plaint that Rameshar and Sheogobind had one-third, Daroga and Firangi another one-third and Ravan and Supan the remaining one-third. The original plaintiffs were Daroga and Firangi alone. Ravan and Supan and the representatives of Ramesher and Sheogobind who had died were made party defendants, Bidya and Kirtan, defendants 7 and 8, as representatives of Ramesher and Ramlakhan, defendant 9, that of Sheogobind. Later on, Bidya and Kirtan applied that they along with their minor brother Chandrika be made plaintiffs. Similarly, Ramlakhan applied that he along with

his minor nephew Nathuni Tewari be made plaintiff; but as the application of Bidya, Kirtan and Ramlakhan was not for adding any party but only for transferring of names from the category of defendants to that of plaintiffs, Chandrika and Nathuni were not added as plaintiffs, and only the names of Bidya, Kirtan and Ramlakhan were transferred to the category of plaintiffs. Ravan Tewari and Supan Tewari also applied to be made plaintiffs and their names also were transferred from the category of defendants to that of plaintiffs. I have stated these facts in detail as they are necessary for the determination of the appeal.

Defendant 1, the mortgagor, did not contest the suit, though he appeared and took time to file a written statement which he never did. The suit was contested by defendant 2 who had taken a gift of the mortgaged properties from defendant 1. He alleged that the mortgage deed was farzi, invalid, null and void and inoperative and without consideration, and also pleaded that the suit was bad for defect of parties. The trial Court held that the deed was genuine, real and for consideration. About the defect of parties it held that the absence of Nathuni was not fatal as he was effectively represented by his uncle Ramlakhan whom it found to be the karta of the family, but it held that the absence of Chandrika was fatal and dismissed the suit. On appeal by the plaintiffs, the learned Subordinate Judge has decreed the suit. He doubted the reality of the mortgage, but held that on the evidence on record he was bound to uphold it. He also held that neither the absence of Nathuni nor of Chandrika affected the suit. Defendant 2, as I have said, has preferred this second appeal, and the only question before us is whether the suit can succeed in the absence of two minors Nathuni and Chandrika, who admittedly have an interest in the mortgage, Nathuni being the grandson of the original mortgagor, Sheogobind and Chandrika that of Ramesher. Ramlakhan, the uncle of Nathuni and son of Sheogobind, is as I have said, on the record and so are Kirtan and Bidya, the two elder brothers of Chandrika, all the three being the grandsons of the original mortgagor Ramesher. The learned Munsif seems to have erred in thinking that Nathuni is the nephew of Sheogobind. In fact he is, as I have said, the grandson of Sheogobind and nephew of Ramlakhan. Similarly, the learned Subordinate Judge has erred in thinking that Bidya, Kirtan and Chandrika are the sons of Ramesher. They are sons of Bishun and, as I have said, the grandsons of Ramesher.

Now the question is whether Nathuni was effectively represented by Ramlakhan, and Chandrika by his two elder brothers Bidya and Kirtan. The appellants have relied upon the case reported in 1 Pat L J 468 (1). In this case no less than ten members of the descendants of the four mortgagees were omitted from the suit. Roe and Jwala Prasad, JJ., held the omission to be fatal and the mortgage suit was dismissed. This case was however distinguished in the two later cases: 6 Pat L J 640 (2) and 2 P L T 572 (3) to both of which Jwala Prasad, J., was a party. In the former case there was a finding that the sons of the plaintiffs were joint with them, and holding that the plaintiffs' claim was on behalf of the family the Court held that the omission of the sons did not affect the suit. Reliance has also been placed upon a decision of the Calcutta High Court in 1933 Cal 621 (4) where it was held that a mortgage is indivisible and a suit must be instituted at the instance of all the mortgagees and if it is brought at the instance of one of the several mortgagees, all the remaining must be impleaded in the category of defendants and if the necessary parties were not impleaded before the suit became barred by limitation the whole suit must fail. The respondents have relied upon the Privy Council decision in 33 All 272 (5) where their Lordships of the Judicial Committee held that a suit by the managing member of a joint family to enforce a contract in favour of the family was maintainable and the addition of the other members of the family as parties was unnecessary.

1. Girwar Narain Mahton v. Mt. Makbunessa, 1916 Pat 310=36 I C 542=1 Pat L J 468.
2. Jag Sah v. Ram Chandra Prasad, 1921 Pat 377=63 I C 564=6 Pat L J 640.
3. Abdul Rahman v. Shib Lal Sahu, 1922 Pat 252=63 I C 570=2 P L T 572=6 Pat L J 650.
4. Govind Chandra Ghose v. Jamaluddin Mondal, 1933 Cal 621=146 I C 259=60 Cal 777=37 C W N 478.
5. Kishan Prasad v. Har Narain Singh, (1911) 33 All 272=9 I C 739=38 I A 45 (P C).

Reference has also been made to a decision of this Court in 1 Pat 504 (6) where the absence of a minor from the category of the defendants was not considered fatal to the suit. I do not propose to discuss these cases in detail. The law on the subject is laid down in O. 34, R. 1, Civil P. C., and it cannot be disputed that all the mortgagees must be party to a suit to enforce the mortgage. In my opinion, there is no conflict of decisions in this respect. The only question which arose in those cases was whether or not all the mortgagees were effectively represented in the suit. Those cases were decided on the facts of their own, where it was held that the defendants, though not on record, were sufficiently represented and the suit was held to be good.

If it was found that they were not represented, the suit failed. In the present case both the Courts below have held that Nathuni was properly represented by his uncle Ramlakhan. There is a finding of fact by the trial Court that Ramlakhan is the karta of the joint family of which he and Nathuni are members. This fact was deposed to by Firangi Tewari (P. W. 1) and was not challenged by the defendants in his cross-examination. This finding has been upheld by the learned Subordinate Judge and it is conclusive. In the case of Chandrika the trial Court held, as I have said, that his two elder brothers did not represent him. This view was not accepted by the learned Subordinate Judge in appeal. There is always a presumption in favour of jointness of a Hindu family. There is no suggestion that the family consists of any other member than Bidya, Kirtan and Chandrika. Chandrika is minor and, in my opinion, his two elder brothers, who are joint with him, effectively represent him also. The Karta of the family must be either of the two elder brothers. It should be borne in mind that these persons are not mortgagees. The mortgagees were Sheogobind and Ramesher. The question is whether the estate of Sheogobind and Ramesher was represented by the persons on record. The learned Subordinate Judge has held that it was so represented and there is no legal defect in this finding. In my opinion, therefore, the appeal on this point fails.

There is, however, one matter which requires consideration and that is the question of interest. The interest stipulated in the mortgage deed is 24 per cent. per annum. This rate is certainly very high. The circumstance under which the mortgage was executed requires that relief should be given in respect of the interest. Defendant 1 is without any issue or a wife. There was some struggle between the plaintiffs on the one side and Ram Ajodhya (defendant 2) on the other as to who should take his property on his death. Girvardhari appears to have been changing sides. Defendant 2 obtained a will in his favour. Thereafter Girvardhari went to the side of the plaintiffs. It was then that the mortgage in question seems to have been executed. The learned Subordinate Judge has reluctantly found that consideration did pass. Be that as it may, it is obvious that the object of this mortgage was to keep a lever against the claim of defendant 2, to the property of Girvardhari, and it is for this reason that the plaintiffs allowed the interest on the mortgage to accumulate so that the entire property of Girvardhari might be absorbed. The suit was not instituted till the mortgage deed was about to become barred by limitation. This was pointed out to Mr. A. B. Mookerji, the learned advocate for the mortgagees, and he very fairly consented to such reduction of interest as we consider just.

Under the peculiar circumstances of the case I think the plaintiffs should be allowed interest at six per cent per annum. I would, therefore, allow this appeal in part and direct that the plaintiffs should get the usual mortgage decree for the principal sum of Rs. 500 together with interest at the rate of six per cent per annum. A fresh mortgage decree for sale will be prepared in this Court. Six months' time from to-day will be allowed for payment of the decretal amount. The plaintiffs will get the costs of the two Courts below on the sum which may be found due to them on the date of institution of the suit. The costs of this Court will be allowed to him on the sum found due up to the date the appeal to this Court

.Hari Prasad Singh v. Sourendra Mohan Sinha, 1922 Pat 450=66 I C 945=1 Pat 506= 3 P L T 709.

was preferred. The defendants shall bear their own costs throughout.

Saunders, J.—I agree.

S.R. *Appeal partly allowed.*

A. I. R. 1936 Patna 6

MACPHERSON AND MOHAMMAD NOOR, JJ.

Raghunath Rai Rambilas, Firm—Plantiffs—Appellants.

v.

Surajmal Nagarmal, Firm—Defendants—Respondents.

Appeal No. 1216 of 1931, Decided on 25th October 1935, from appellate decree of Dist. Judge, Muzaffarpur, D/- 23rd June 1931.

(a) Evidence—Evidence on commission—Not formally tendered—Evidence cannot be rejected.

Where evidence has been taken on commission the fact that it has not been formally tendered cannot be a ground for rejecting it from being taken in evidence; 36 *Cal* 566 and 30 *Cal* 999, *Disting.* [P 6 C 2]

(b) Jurisdiction—Partnership contract by *P* and *D* firms with head offices at Calcutta—*P* firm having branch in Muzaffarpur district—Contract that jute be purchased by *P* at *K* in Muzaffarpur and sold at Calcutta by *D*—Suit by *P* for dissolution and accounts—Accounts of partnership kept at Calcutta—Purchase at *K* held not carrying on of business—Hence Muzaffarpur Court held had no jurisdiction.

A contract of partnership was entered into by *P* firm with *D* firm both of whom had their head offices at Calcutta. The *P* firm had a branch in the district of Muzaffarpur; the contract was that jute was to be purchased by the *P* firm at *K* in the Muzaffarpur district; and was to be sent to Calcutta to the *D* firm for sale. A suit for dissolution of partnership and rendition of accounts was instituted in the Muzaffarpur Court by the *P* firm; accounts of partnership, i.e., the accounts of sale and of profit and loss of the business were kept at Calcutta:

Held : that the purchase of jute for the purposes of business could not necessarily be the carrying on of the business of the partnership. Hence there was no place of business of the partnership in Muzaffarpur, but it was at Calcutta where the accounts were maintained. Therefore Muzaffarpur Court had no jurisdiction to try the suit : 1926 *Mad* 427, *Disting.* [P 7 C 1]

L. N. Singh and *Ishvarinandan Prasad*—for Appellants.

K. P. Jayaswal and *N. C. Ray*—for Respondents.

Mohammad Noor, J.—This appeal is directed against a decree of the District Judge of Muzaffarpur dismissing the plaintiff-appellant's suit for dissolution of partnership and rendition of accounts which was decreed by the trial Court.

The main question which was in controversy before the learned District Judge was whether the Muzaffarpur Court had jurisdiction to try the suit. It is an admitted fact that the plaintiffs have a firm at Sitamarhi in Muzaffarpur district which is a branch of a firm of the same name stationed at Calcutta. The defendants are also a firm having its head office at Calcutta. It is also admitted that the two firms entered into a partnership business for purchase and sale of jute. It was arranged that the capital was to be supplied by the defendants and that jute was to be purchased by the plaintiffs at Karnal in the district of Muzaffarpur and despatched to Calcutta where it was to be sold by the defendants; the profit or loss was to be shared by both the parties, the defendants being further entitled to charge interest on the capital advanced by them. The plaintiff instituted the present suit for dissolution of the partnership and for taking accounts of the jute business. The defence with which we are concerned in this second appeal was that the partnership was entered into at Calcutta and therefore the Muzaffarpur Court had no jurisdiction to try the suit. The learned Subordinate Judge decided the question of jurisdiction in favour of the plaintiffs and passed a preliminary decree for accounts. On appeal the learned District Judge has reversed that decree. He disbelieved the plaintiff's evidence that the agreement for partnership was entered into at Sitamarhi and having found that the main business of partnership had been carried on at Calcutta held that the Muzaffarpur Court had no jurisdiction to try the suit.

The learned Advocate for the appellants has raised two points : first, that the evidence taken on commission on behalf of the defendants ought not to have been taken in evidence, as it was not formally tendered. He relied upon a decision of the Calcutta High Court in 30 Cal 999 (1). That decision was based upon a practice of the Original Side of the Calcutta High Court as was pointed out in the case of 36 Cal 566 (2). There does not seem to be any merit in this

1. Kusum Kumari Roy v. Satya Ranjan Das, (1903) 30 Cal 999=7 C W N 784.
2. Dhani Ram v. Murli Lal Mahto, (1909) 36 Cal 566=1 I C 366.

contention. The second point taken was that as jute was to be purchased in Karnal in the district of Muzaffarpur it must be taken as another place of partnership business and therefore the suit was maintainable at Muzaffarpur. He relied upon a decision of the Madras High Court in 1926 Mad 427 (3). It was laid down in this case that where a partnership business is carried on at two places, the cause of action arises in both the places and the Courts have jurisdiction to entertain the suit for dissolution of the partnership in either of these places. This decision was however based upon facts of its own. There was a definite finding of fact that the business in question was carried on at Bellary also and not only at Coimbatore as alleged by the defendant. It was found that the account of the partnership business was kept at Bellary. In this case it is practically admitted that the account of the partnership, namely the account of sale and of profit and loss of the jute business, was kept at Calcutta. The only account which might have been possibly maintained in the district of Muzaffarpur was about the purchase of jute ; but the purchase of jute for the purposes of business cannot necessarily be the carrying on of the business of the partnership. The learned District Judge has clearly found as a matter of fact that it was at Calcutta that the accounts were kept and that there was no place of business of the partnership in Muzaffarpur. I see no merit in this appeal and dismiss it with costs.

Macpherson, J.—I agree.

S.R. *Appeal dismissed.*

3. G. Thimmappa v. Balakrishna Mudaliar, 1926 Mad 427=92 I C 915=50 M L J 298.

* A. I. R. 1936 Patna 7

FAZL ALI AND LUBY, JJ.

Rekha Thakur—Plaintiff—Appellant.

v.

Ramnandan Rai and *another* — Defendants—Respondents.

Appeal No. 1192 of 1932, Decided on 24th September 1935, from decision of Addl. Sub-Judge, Saran, D/- 27th May 1932.

*** (a) Practice—Appeal—Admission of part—No provision in Civil Procedure Code for partly admitting appeal—No admission on limited ground—Appeal once admitted must be heard as whole—Court informed at hearing that appeal would be confined to some grounds only—Court may note fact.**

There is no provision in the Code of Civil Procedure enabling the Court of appeal to pass an order partly admitting and partly dismissing the appeal and in the present state of the law it must be held that an appeal cannot be admitted on a limited ground as a whole. If at the time when the appeal is heard under O. 41, R. 11 the appellate Court is informed that the appeal will be confined to certain specified grounds only and that the other grounds are abandoned or if it is conceded on behalf of the appellant that the grounds other than those specified are not fit to be urged in appeal, there is nothing to prevent the Court before which the appeal is placed under O. 41, R. 11 from making a note of this fact : 15 *C W N* 921 and 1916 *Cal* 741, *Rel on.* [P 8 C 2, P 9 C 1]

(b) Civil P. C. (1908), S. 100—Question of fact.

Where the question sought to be re-opened in a second appeal is a question of fact, the decision of the lower appellate Court thereon is definite and the question cannot be re-opened. [P 9 C 1]

(c) Evidence—Appreciation—Plaintiff admitting defendant's case on one issue after closing of evidence — Hence plaintiff's evidence believed unreliable — Court deciding in defendant's favour on other issues—Court held competent to do so and High Court could not interfere in second appeal with finding.

After the closing of the evidence in a suit, the plaintiff abandoned his main case on an issue and admitted the case put forward by the defendant. The evidence adduced by the plaintiff was therefore believed by the Court to be tainted and unreliable and on that ground the Court decided other issues also in favour of the defendant :

Held : that the Court was perfectly competent to do so and the High Court could not interfere in second appeal with the decision of the Court. [P 9 C 2]

(d) Hindu Law—Alienation—Widow—Reversioner's suit to declare alienation not binding—Defence that alienation was necessary for widow's daughter's marriage—Alienation deed stating that bulk of amount raised was for *K*'s marriage—Plaintiff contending that *K* was not widow's daughter—*K* found widow's daughter—Suit dismissed in belief that *K* being widow's daughter alienation was for legal necessity — Held, Court assumed as correct recital in deed that money was borrowed for marriage—Court had to decide if money was actually borrowed and for marriage.

A widow in possession of her husband's property made an alienation of a portion thereof. The next reversioner therefore brought a suit for declaration that the alienation was not binding on him. The defence put forward was that the alienation was necessary for defraying the expenses of marriage of *K*, the daughter of the widow. The deed of alienation recited that the bulk of amount raised under the deed had been borrowed for the marriage of *K*. The plaintiff

however contended that *K* was not the widow's daughter. The Court found that *K* was the daughter of the widow and dismissed the suit as he thought that once it was found that *K* was the daughter of the widow the alienation must be upheld as supported by legal necessity:

Held : that the fallacy committed by the Court was that he assumed without giving any reasons that the recital in the deed that the money had been actually borrowed for the marriage of *K* was correct or sufficient for the purpose of deciding the case. As a matter of fact what the Court had to decide was firstly, whether the money was actually borrowed and secondly, whether it was in fact borrowed for the purpose of marrying *K* and meeting other necessary expenses and it was incumbent upon the Court to record definite findings on these questions. [P 9 C 2]

Hareshwar Prasad Sinha—for Appellant.

S. N. Rai—for Respondents.

Fazl Ali, J.—This appeal arises out of a suit instituted by the plaintiff for a declaration that a certain zarpeshgi deed executed by defendant 1, Rajpalo Kuer, in favour of defendant 2, Ramnandan Rai, was not binding on him. Rajpalo Kuer was the widow of one Kari Thakur and it is not disputed now that Kari Thakur and the plaintiff were descended from a common ancestor. The case of the plaintiff as put forward in his plaint was that Kari Thakur, the husband of Rajpalo Kuer, had predeceased his father Ramruch and upon the death of Ramruch all his properties were inherited by the plaintiff's father and the plaintiff. But Rajpalo was allowed to remain in possession of those properties in lieu of maintenance. It was also asserted alternatively that even if it be held that Rajpalo had a title to the estate of Ramruch, the zarpeshgi deed was not binding upon the plaintiff who was the person presumptively entitled to the estate after the death of Rajpalo. At a later stage, the case that Kari Thakur had predeceased Ramruch and that the plaintiff and his father were the real owners of the disputed property at the time the zarpeshgi deed was executed was abandoned and the plaintiff confined himself only to the alternative case. His case as to the zarpeshgi deed was that it had been obtained by fraud and deceit by defendant 2 who was related to Rajpalo and that no consideration had actually passed.

In the deed itself there was a recital that the sum of money for which the deed was executed had been borrowed by Rajpalo to marry her daughter, Kismato, and to meet certain other necessary expenses. The plaintiff however contended that Kismato Kuer was not the daughter of Rajpalo and that there was no legal necessity to justify the execution of the zarpeshgi deed. The trial Court came to the conclusion that Kismato was not the daughter of Rajpalo and that there was no legal necessity to justify the execution of the zarpeshgi deed and upon this footing passed a decree in favour of the plaintiff. Upon an appeal by the defendant however the decision of the Munsif was reversed and the plaintiff's suit was dismissed. The learned Subordinate Judge who heard the appeal accepted the defendant's case that Kismato was the daughter of Rajpalo and briefly disposed of the question of legal necessity by pointing out that once it was established that Kismato was the daughter of Rajpalo, it followed that the document was justified by legal necessity. The plaintiff thereupon preferred this second appeal which being placed before a Judge of this Court for hearing under O. 41, R. 11 the following order was recorded :

This appeal is dismissed on the question whether Kismato was the daughter of Kari and Rajpalo. It will be heard on the question whether the zarpeshgi deed executed by Rajpalo is binding on the plaintiff.

One question which is now raised on behalf of the appellant is whether it is competent to a Court of appeal under O. 41, R. 12, Civil P. C., to restrict an appeal to a specific ground and whether, when the appeal is admitted, the whole appeal or only the selected ground upon which it is admitted is open to discussion. It appears that this was precisely the question raised in 15 C W N 921 (1) and it was held by a Division Bench of the Calcutta High Court that it was not competent to a Court of appeal to admit an appeal only on some specified grounds and that once the appeal is admitted the whole appeal is open to discussion. This view was reiterated by the same High Court in 43 Cal 178 (2) and no contrary view seems to have been expressed by any other High Court. As is pointed out in these cases, there is no provision

1. Lakhi Narain v. Sri Ram Chandra, (1911) 15 C W N 921=11 I C 212.
2. Janaki Nath v. Prabhasini Dass, 1916 Cal 741=30 I C 898=43 Cal 178=22 C L J 99=19 C W N 1077.

in the Code of Civil Procedure enabling the Court of appeal to pass an order partly admitting and partly dismissing the appeal and I think that in the present state of the law, it must be held that an appeal cannot be admitted on a limited ground only, but that once it is admitted it has to be heard as a whole. At the same time it appears to me that, if at the time when the appeal is heard under O. 41, R. 11 the appellate Court is informed that the appeal will be confined to certain specified grounds only and that the other grounds are abandoned or if it is conceded on behalf of the appellant that the grounds other than those specified are not fit to be urged in appeal, there is nothing to prevent the Court before which the appeal is placed under O. 41, R. 11 from making a note of this fact. However that may be, in the present case although the learned Advocate for the appellant has tried to re-open the question as to whether Kismato is the daughter of Kari and Rajpalo, yet on hearing him fully on the subject, I have no hesitation in holding that the learned Judge of this Court was right in expressing the opinion that so far as that question is concerned the decision of the lower appellate Court is final and the matter cannot be re-opened in second appeal. The question now sought to be re-opened is a question of fact and the decision of the lower appellate Court on that question is definite. The lower appellate Court in dealing with the question frankly conceded that the oral statements made by the witnesses taken by themselves would not be sufficient for deciding the case, because

> the oral evidence adduced by one side cannot be said to be so superior to that adduced by the other side that it can be accepted as true without hesitation.

The learned Subordinate Judge has also made it clear in his judgment that such documentary evidence as had been adduced in the case was also not of much assistance in deciding the case. The fact however which greatly weighed with the learned Subordinate Judge was that the plaintiff had abandoned his main case and that he had made an admission that Rajpalo was in possession of Kari's property not in lieu of maintenance but in her own right as his widow. According to the learned Subordinate Judge this was the decisive factor in the case because it showed that the evidence adduced on behalf of the plaintiff was tainted and unreliable. Upon this reasoning the learned Subordinate Judge gave his decision in favour of the defendant and in my opinion he was perfectly competent to do so and this Court cannot in second appeal interfere with the finding that Kismato is the daughter of Rajpalo and Kari. Now it is obvious that this finding is not sufficient to dispose of the litigation and it was incumbent on the lower appellate Court to record a clear finding on the second question, namely whether the zarpeshgi deed was justified by legal necessity or not. On this question all that the learned Subordinate Judge says in his judgment is as follows:

> I find thus the first point raised in the appeal in favour of the appellants and necessarily the second point also is decided against the respondents.

It appears that it being recited in the zarpeshgi deed that the bulk of the amount raised under the deed had been borrowed to meet the marriage expenses of Kismato, the learned Subordinate Judge thought that once it was established that Kismato is the daughter of Rajpalo the deed must be upheld. The fallacy committed by the learned Subordinate Judge was that he assumed without giving any reasons that the recital in the deed that the money had been actually borrowed for the marriage of Kismato was correct or sufficient for the purpose of deciding the case. As a matter of fact what the learned Subordinate Judge had to decide was, firstly, whether the money was actually borrowed and, secondly, whether it was in fact borrowed for the purpose of marrying Kismato and meeting other necessary expenses. It was incumbent upon the learned Subordinate Judge to record definite findings on these questions, because the trial Court had come to the conclusion that out of the consideration stated in the deed only Rs. 25 had been received by Rajpalo. In these circumstances it seems to me that the question of legal necessity has not been properly investigated by the learned Subordinate Judge and this case should be remitted to him for recording a clear and proper finding on that question. It may also be mentioned that in course of the argument it was brought

to our notice that Mt. Kismato Kuer had stated in her deposition that she had a son. Now, if it is a fact that Kismato has a son, then it seems to be clear that the present plaintiff has no locus standi to bring the suit. The question therefore whether Kismato has a son or not also requires investigation, and in remitting this case to the learned Subordinate Judge we direct him to submit his finding on this question also. The findings of the Subordinate Judge should be submitted to this Court as soon as possible when this appeal will be finally disposed of. If the parties choose to adduce additional evidence on the question whether Kismato has a son or not, they should be permitted to do so.

Luby, J.—I agree.

S.R. *Case remitted.*

A. I. R. 1936 Patna 10

COURTNEY-TERRELL, C. J. AND DHAVLE, J.

Ramsaran Pandey—Appellant.

v.

Iswar Pandey and *another*—Respondents.

Letters Patent Appeal No. 8 of 1935, Decided on 2nd October 1935, from decision of Wort, J., D/- 11th January 1935, reported in 1935 Pat 131.

(a) Estoppel — Decision for party on strength of certain plea—Same point raised in another suit— Party cannot adopt contrary plea.

Where a party adopts a certain plea in a suit and obtains a decision on a point in his favour on the strength of that plea, he cannot in another suit in which the same point is raised be heard to adopt a plea inconsistent and contrary to the one relied on in the former suit.

[P 10 C 2]

(b) Civil P. C., (1908), S. 60— Proviso (f) —Right of personal service.

The rights of personal service within the meaning of proviso (f) to S. 60, Civil P. C., cannot be either heritable or partible or transferable.

[P 10 C 2 P 11 C 1]

(c) Execution Sale—Transferable right of share in deity's service—Sale is valid if purchasers are entitled to perform worship.

Where right to receive a share in the service of a deity is transferable, an alienation of it by the procedure of a Court sale can be brought about provided the class of persons to whom the sale is to be made is a class who would be entitled to perform the services: 1933 *Cal* 757, *Ref.*

[P 11 C 1]

Rajkishore Prasad—for Appellant.

K. Sahai—for Respondents.

Dhavle, J.—This is an appeal under the Letters Patent from a decision of a learned Judge of this Court, and the only question raised is whether the property in dispute, being palas or shares in the worship of the deity Shitla enjoyed in turns, is saleable. The learned advocate for the appellant has contended that these palas or rights of worship are mere rights of personal service within proviso (f) to S. 60, Civil P. C., and that they are accordingly not liable to attachment from which it will, of course, follow that they are not saleable in execution. He has referred to a series of cases beginning with 10 Bom 395 (1) in which vrittis and some-what similar rights of worship and officiation have been held to be not liable to attachment under the provision of law on which the learned Advocate has laid stress. That, however is only the general rule. So far as the rights we are particularly concerned with go—rights of worship of the deity Shitla in the temple at Meghra—there is a previous decision of this Court in 6 Pat 245 (2), and it is important to notice that in the litigation that ended in that decision the appellant before us was the plaintiff. The question on that occasion was whether these palas were partible, and Adami, J., who delivered the judgment of the Court, Macpherson, J., concurring, observed that it was clear that there had been many cases of transferability, and that though there was no distinct finding that all the elements necessary for the proof of custom existed in the case before him, the lower Courts were not wrong, considering that the then defendant 1 himself claimed under a transfer, in coming to a finding that on the instances given by the parties there was sufficient basis for a finding that the rights of palas in the case of the Shitla Asthan could be transferred and could be partitioned.

As I have already said, this was a decision at the instance of the present appellant who was the plaintiff in the former litigation. He cannot therefore now be heard to say that the palas are not partible or are not transferable, nor has he attempted to make out that they are not heritable. Had these palas been mere rights of personal service within the meaning of proviso (f) to S. 60, Civil P. C., it is obvious that they could

1. Ganesh v. Sahanker, (1886) 10 Bom 395.
2. Jagdeo Singh v. Ram Saran Pande, 1927 Pat 7=97 I C 332=6 Pat 245.

not have been either heritable or partible or transferable. The particular argument on which the learned Advocate has laid so much stress is, therefore clearly inapplicable. The learned Advocate has no quarrel with the observation contained in the judgment under appeal that if there was a custom established to transfer, it is impossible to hold that the alienation thus warranted cannot be brought about by the procedure of a Court sale so long as the condition mentioned in 60 Cal 1351 (3) is imposed; that is to say, the class of persons to whom the sale is to be made is a class of persons who would be entitled to perform the services.

There is also no dispute that the auction purchaser does belong to the class of persons so entitled. I would accordingly dismiss this appeal with costs and affirm the judgment of the lower Court.

Courtney-Terrell, C. J.—I agree.

S.R. *Appeal dismissed.*

3. Haridas Haldar v. Charu Chandra Sirkar, 1933 Cal 757=147 I C 924=60 Cal 1351=37 C W N 978.

** A. I. R. 1936 Patna 11

VARMA AND ROWLAND, JJ.

Emperor

v.

Lalji Rai—Accused.

Criminal Ref. No. 34 and Appeal No. 192 of 1935, Decided on 6th September 1935, from order of Addl. Sess. Judge, Muzaffarpur, D/- 31st July 1935.

**** (a) Criminal Trial—First information report lodged at two places—One earlier than other—Later report is not statement during investigation but independent first information report and is hence admissible.**

Where a report about the commission of an offence is given to the police at two different places by two different persons, and one is earlier in point of time than the other, the later report is not a statement made to a police officer in the course of investigation but is an independent first information report and therefore can be used in evidence by the prosecution. [P 12 C 2]

(b) Criminal P. C., (1898), Ss. 164 and 512—Statements recorded under — Recording Magistrate need not be examined for corroboration.

Where the statements of witnesses have been recorded under Ss. 164 and 512, Criminal P. C., a presumption of genuineness attaches to the statements and the Magistrate recording the statements need not be examined in order to corroborate them. [P 13 C 2]

*** (c) Criminal Trial — Retracted statements—Statements before committing Magistrate—Witness examined in Sessions—Previous statement becomes substantive evidence under S. 288, Criminal P. C.—Statement modified or resiled in Sessions—Conviction on previous statement is unsafe unless circumstances indicate truth of statement.**

On the question whether a conviction could be based upon the statements of witnesses who have resiled from their previous statements before the committing Magistrate, one has to look into the statements made by the witnesses from time to time under S. 288, Criminal P. C. A statement made by a witness before a committing Magistrate becomes a substantive piece of evidence if he is examined in the Court of Session; and if the former statement has been modified or resiled from in the Court of Session, as a rule of prudence, it would not be safe to base a conviction on the statement made before the committing Magistrate, unless there are circumstances present to indicate that the statement before the committing Magistrate is true and that before the Court of Session is due to circumstances on account of which the witness is not prepared to tell the truth : 1934 *Cal* 124; 1925 *Pat* 51; 1929 *Pat* 343 and 1923 *Mad* 20, *Rel on.* [P 14 C 1]

(d) Criminal Trial— Retracted Statement—Reliability—Test—Mere repetition is not—Circumstances showing truthfulness—Statement should be accepted as true.

Mere repetition of a statement does not by itself prove its reliability, but when from all the circumstances of the case, of which a previous similar statement is also one of the circumstances, it seems that the statement bears the stamp of truthfulness, there is no hesitation in accepting that statement as true. [P 14 C 2]

(e) Penal Code, (1860) S. 302—Sentence—Accused jointly entitled with his brothers to crops—Storing entire produce in his room — Brothers removing their share during accused's absence— Altercation between accused and his brothers— Accused assaulting one with spear— Death resulting— Though provocation not sufficient to take offence out of S. 302, transportation held sufficient.

The accused was entitled jointly with his brothers to a portion of "Haldi" produced in their fields. But he stored the entire produce of "Haldi" in his room without the concurrence of his brothers. While the accused was away from the house the brothers removed from the room of the accused their share of the produce. Thereupon, on his return home, there ensued an altercation between the accused and his brothers and the accused struck a blow with a spear to one of his brothers as a consequence of which the brother died immediately:

Held : that although the provocation was not such as to take the offence out of the provisions of S. 302, Penal Code, in the circumstances of the case a sentence of transportation for life would meet the ends of justice.

[P 12 C 1; P 15 C 1]

*** (f) Criminal Trial — Practice — Map index—Admissibility—Indices should be exhibited with map.**

There are certain kinds of indices which are regarded as inadmissible, but if the index is of a legitimate nature there is no reason why it should not be exhibited along with the map : 1924 *Cal* 1029; 1925 *Cal* 909; 1925 *Cal* 959 and 1926 *Cal* 550, *Rel on.* [P 15 C 1]

Asst. Govt. Advocate—for Reference.

Sarju Prasad—against Reference.

Varma, J.—This is a reference under S. 374, Criminal P. C., by the Additional Sessions Judge of Muzaffarpur, in the matter of one Lalji Rai who has been convicted under S. 302, I. P. C, and sentenced to death. Lalji has appealed against his conviction and sentence and the appeal has also been heard along with this reference.

Lalji Rai is a resident of the village Rai Kararia which is at a distance of nine miles from the Gobindganj police-station. The deceased who is said to have been killed by the appellant was one Gopal Rai, a brother of the appellant. The appellant has one more brother named Ajodhya Rai who has been examined as prosecution witness 9 in this trial. It appears that these three brothers were living in a house occupying separate sets of rooms with a common courtyard, but they carried on their cultivation jointly even after separation. Last year, in the month of Baisakh, they had grown turmeric which they kept in a ditch ; the quantity of the turmeric was measured as fifteen basketfuls. On 14th May 1934, Lalji removed all the turmeric into his room, but later on 21st May 1934 when the appellant Lalji had gone out in a barat party, the other two brothers took away from Lalji's room 10 basketfuls of the turmeric. The appellant returned home on the evening of 23rd May and, it is said, that there was a quarrel amongst the three brothers over the turmeric, whereupon, at the instigation of one Jugeswar Pathak, the appellant inflicted a bhala blow on Gopal who died immediately. Ajodhya Rai intervened and tried to snatch away the bhala from the appellant, but only the iron portion of the bhala was separated from the handle, and Ajodhya Rai himself received injuries. Ajodhya Rai and one Daroga Rai then removed Gopal's body to the south-facing room of the house. Thereafter Ajodhya started weeping and there came Raghubir Rai a cousin of the brothers. Having heard about the occurrence and seen the dead body of Gopal Rai, Raghubir Rai proceeded to the thana where he lodged an information before the Assistant Sub-Inspector Lachhmi Narain Pandey at 10-30 a. m. on 24th May 1934. After Raghubir Rai had left for the thana a chaukidar, Dost Mohammad (P. W. 1) reached the house of Gopal and stayed there to guard the dead body and overhearing some conversation, amongst the villagers who had assembled, of an attempt to dispose of the dead body he sent for two other chaukidars, Mahadeo (P. W. 2) and Jangi (P. W. 3), and leaving them in charge of the dead body, Dost Mohammad himself proceeded towards the thana to inform the police about the talk of causing the disappearance of the dead body. When he was a few miles away from the village he heard that Assistant Sub-Inspector Chatura Prasad was in the neighbourhood. He therefore went to Chatura Prasad and gave him the information which was reduced to writing at 1 a. m. on 24th May 1934. The learned Sessions Judge has treated this information lodged by Dost Mohammad, chaukidar, as the first information report in the case and has excluded the information laid by Raghubir Rai, on the ground that the latter information was given later in point of time. He has no doubt relied on the decisions which lay down that an information given after the investigation has commenced is a statement made to a police officer under S. 161, Criminal P. C., and therefore is not to be used in evidence by the prosecution. I do not think that Raghubir's information need have been excluded on this ground as it was not a statement made to a police officer in the course of investigation but was an independent first information report. The Assistant Sub-Inspector Chatura Prasad then reached the place of occurrence at 2-30 a. m., and taking charge of the dead body started investigation. He examined a number of witnesses and while going over the place of occurrence recovered the iron portion of the bhala (Ex. 4) stained with blood and covered with sand. The iron portion of the bhala was identified by Ajodhya Rai as appertaining to the spear used by Lalji Rai in killing Gopal Rai. The accused Lalji Rai disappeared. At about 5 a. m., the Assistant Sub-Inspector Lachhmi Narain Pandey came to the place of occurrence to whom Chatura Prasad made over charge of the case.

After holding an inquest Lachhmi Narain Pandey sent the dead body to Motihari for post mortem examination.

He took charge of the iron portion of the bhala from Chatura Prasad, and continued investigation till 25th May 1934 when Sub-Inspector N. K. Tewari took charge of the investigation. The Sub-Inspector continued the investigation and recovered five basketfuls of turmeric (Ex. 1) and got a map prepared of the place of occurrence by one Jagdamb Sahay (P. W. 11), and thereafter he made over charge of the case to Sub-Inspector Dhanesh Prasad Varma on 27th May 1934. This Sub-Inspector of Police finding that the eye-witnesses were related to the accused and were interested in him got their statements recorded under S. 164, Criminal P. C., by a Deputy Magistrate, Mr. Qamrul Huda, on 29th May 1934. These witnesses were Gauri Shankar (P. W. 7), son of the deceased, Ajodhya Rai (P. W. 9), brother of the deceased, and Daroga Rai (P. W. 10), a cousin of the deceased. Mt. Darpan (P. W. 8), wife of the deceased, although she came out of her house soon after the occurrence, does not appear to have been an eye-witness of the assault. The accused remained untraced and, therefore, the Sub-Inspector submitted a final report and evidence was recorded under S. 512, Criminal P. C., by another Magistrate, Mr. N. K. Banerji, on 10th August 1934.

In the opinion of the Assistant Surgeon, who held the post mortem examination, Gopal Rai's death was due to shock and haemorrhage caused by the punctured wound on the chest which could be caused by a sharp weapon like the bhala ; and the Chemical Examiner to whom the bhala was sent reported that the stains on it were of human blood. After a lapse of time the accused was arrested in the Nepal territory and produced on 9th April 1935, and ultimately committed to the Court of Session. At the trial all the eye-witnesses resiled from their previous statements and the learned Sessions Judge based the conviction of the accused upon the statements made by the witnesses before the Committing Magistrate, corroborated by their statements recorded under Ss. 512 and 164, Criminal P. C. The accused in his examination under S. 342, Criminal P. C., pleaded not guilty to the charge. He admitted that he was separate in mess from his brothers but denied having pierced Gopal Rai with a bhala saying that he was not at home but had gone with a marriage party and from there had gone direct to Nepal where he was arrested by the police. He examined no witnesses in defence.

Mr. Sarju Prasad, appearing on behalf of the appellant before us, urges that the statements of the witnesses before the Sessions Judge do not bring the guilt home to the accused, and the statements under Ss. 164 and 512, Criminal Procedure Code, were inadmissible in evidence inasmuch as the Magistrate who recorded those statements were not examined and therefore the statements were not duly proved. The learned Advocate further argues that it was not safe to base a conviction upon statements made before the committing Magistrate unless they were corroborated, and that the depositions recorded under S. 512 of the Code could not be ultilized as the witnesses were examined in the Sessions Court. So far as the want of proof of the statements recorded under Ss. 164 and 512, Criminal Procedure Code is concerned, the argument of the learned Advocate is without force, because provision has been made for such a contingency under S. 80, Evidence Act. The section provides as follows :

> Whenever any document is produced before any Court, purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding or before any officer authorised by law to take such evidence, or to be a statement or confession by any prisoner or accused person, taken in acccrdance with law, and purporting to be signed by any Judge or Magistrate, or by any such officer as aforesaid, the Court shall presume that the document is genuine : that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it are true, and that such evidence, statement or confession was duly taken.

The statements were recorded during an investigation in which oath could be administered to the witnesses by an officer authorised by law for the purpose and bear the presumption of being genuine. The only question that remains is, whether the identity of the persons who deposed under S. 164 has been established to be the same as of those examined before the Sessions Judge. (After discussing evidence on the point, the judgment proceeded). In this state of the evidence there can be no doubt that the identity of the witnesses who

were examined under Ss. 164 and 512 is fully established. If any further materials were wanted, there is the order-sheet of the Subdivisional Officer, dated 29th May 1934, to show that Mr. Qamrul Huda examined Ajodhya, Gaurishankar and Daroga who were sent up by the Sub-Inspector for their evidence being recorded under S. 164. On the question whether a conviction could be based upon the statements of the witnesses who have resiled from their previous statements before the committing Magistrate, one has to look into the statements made by the witnesses from time to time. (After discussing evidence, the judgment proceeded). The position therefore is that although before the committing Magistrate almost all these eye-witnesses alleged that Lalji Rai gave a bhala blow to Gopal as a result of which Gopal died, they have resiled from their statements while deposing in the Court of Session. But under S. 288, Criminal Procedure Code, it is clear that a statement made by a witness before a committing Magistrate becomes a substantive piece of evidence if he is examined in the Court of Session ; and if the former statement has been modified or resiled from in the Court of Session, as a rule of prudence it would not be safe to base a conviction on the statement made before the committing Magistrate, unless there are circumstances present to indicate that the statement before the committing Magistrate is true and that before the Court of Session is due to circumstances on account of which the witness is not prepared to tell the truth.

The learned Additional Sessions Judge has relied upon the case reported in 60 Cal 1339 (1). In our own High Court in 3 Pat 781 (2), while considering a number of decisions on the point, Bucknill, J., observed as follows :

I think therefore that the principle is quite clearly settled by this line of cases that unless there is clearly present, besides the evidence given before the Magistrate, evidence which will show that the evidence given before the Magistrate should be preferred to and substituted for that given before the Sessions Judge, the evidence given before the Magistrate cannot be effectively utilized in support of a conviction.

This view was acted upon in 8 Pat 625 (3), in which it was held that the previous statement of a witness recorded under S. 164, Criminal P. C. 1898, may be treated as corroboration under S. 157, Evidence Act, 1872, of the witness' deposition admitted in evidence under S. 288, Criminal P. C. In this case reliance was placed on 1923 Mad 20 (4), where the wife of the accused while deposing in the Court of Session resiled from her statement before the committing Court which was corroborated by her statement recorded under S. 164, Criminal P. C. ; and their Lordships of the Madras High Court accepted the statement made before the committing Magistrate in preference to the statement before the Court of Session and based a conviction of the accused thereon.

In this case I have given the evidence of the eye-witnesses in extenso from which it is clear that the statements of Gauri Shankar and Ajodhya before the committing Magistrate prove the prosecution case and those statements are corroborated by the statements of the witnesses recorded under Ss. 164 and 512, Criminal P. C. So far as Daroga's statement is concerned I am not inclined to attach the same weight to it as to those of Gaurishankar and Ajodhya, inasmuch as in his statement under S. 164 Daroga did not pretend to be an eye-witness of the actual assault. I want to make myself clear on this point, that mere repetition of a statement does not by itself prove its reliability, but when we find from all the circumstances of the case, of which a previous similar statement is also one of the circumstances, that the statement bears the stamp of truthfulness, there is no hesitation in accepting that statement as true. Apart from these, there are other circumstances which corroborate the prosecution story. (The judgment then proceeded after discussing the corroborating evidence). In this state of the evidence I have no hesitation in acting upon the statements of Gaurishankar and Ajodhya and I find it as proved that it was Lalji, the appellant, who fatally assaulted

1. Manar Ali v. Emperor, 1934 Cal 124=1934 Cr C 169=147 I C 1203=35 Cr L J 567=60 Cal 1339.
2. Emperor v. Jehal Teli, 1925 Pat 51=84 I C 334=26 Cr L J 270=3 Pat 781.
3. Mathura Tewari v. Emperor, 1929 Pat 343=1929 Cr C 155=120 I C 37=30 Cr L J 1136=8 Pat 625.
4. Vellaiah Kone v. Emperor, 1923 Mad 20=72 I C 529=24 Cr L J 417=43 M L J 222=45 Mad 766.

Gopal Rai. The attitude taken up by these witnesses in the Court of Session was clearly with a view to protect the appellant who is one of their own blood. When the shock of Gopal's death was fresh in the minds of the witnesses they did not hesitate to come out with the true story, but as time passed their natural affection for their living brother or relative got the better of their feelings for the dead one.

The case comes clearly within the mischief of S. 302, I. P. C., and the accused has rightly been convicted of that offence. On the question of sentence however it appears that he had some provocation at the time inasmuch as two of his brothers stood against him and the evidence discloses an altercation between the two parties before an assault. Although the provocation was not such as to take the offence out of the provisions of S. 302, I think that in the circumstances of this case a sentence of transportation for life will meet the ends of justice. I therefore uphold the conviction of the accused but commute the sentence passed on him to one of transportation for life. The reference is discharged and the appeal is allowed to the extent indicated above. I cannot part with this case without remarking that no index has been supplied to us of the different spots shown in the map (Ex. 8) with the result that the map itself was of no assistance to us and we had to refer again and again to the evidence of the plan-drawer (P. W. 11) to understand the map, and still in respect of Point 6 on the map (prominently shown at the bottom of the map as "out of scale") we could not make out what it stood for. There are certain kinds of indices which are regarded as inadmissible, but if the index is of a legitimate nature there is no reason why it should not be exhibited along with the map. In this connection the observations of the learned Judges in 52 Cal 172 (5) may be usefully referred to. In that case the Sub-Inspector on going to the locality found certain things and their Lordships were of opinion that these matters could be legitimately marked on the map, but unfortunately the Sub-Inspector did not do so ; on the other hand, he did mark on the map things which he had not seen for himself, e. g. the place where the first blow was struck, where the second blow was struck and where the third blow was struck. He was not present when the blows were struck, and their Lordships remarked that he should not have shown them on the map. In giving these details, Sanderson, C. J., laid down as follows :

> I am of opinion that the person who makes the map ought not to put upon it anything more than what he sees himself. Particulars derived from witnesses examined on the spot should not be noted on the body of the map, but on a separate sheet of paper annexed to the map as an index thereto, the spots being marked as A, B, C, D etc.

Similar views have been expressed in 29 C W N.842 (6), 85 I C 723 (7) and 30 C W N 142 (8). I hope that in preparing a map in the future proper care would be exercised in selecting the matter which is to be mentioned in the index of the map.

Rowland, J.—I agree.

Sentence reduced and Reference discharged.

S.R.

5. Abinash Chandra Bose v. Emperor, 1924 Cal 1029=84 I C 654=26 Cr L J 350=52 Cal 172 =2 C W N 995.
6. Emperor v. Mofizel Peada, 1925 Cal 909=89 I C 242=26 Cr L J 1298=29 C W N 842.
7. Kalia v. Emperor, 1925 Cal 959=85 I C 723= 26 Cr L J 579.
8. Bhagirathi Chowdhury v. Emperor, 1926 Cal 550=92 I C 174=27 Cr L J 222=30 C W N 142.

---

* A. I. R. 1936 Patna 15

(Full Bench)

COURTNEY-TERRELL, C. J., DHAVLE AND AGARWALA, JJ.

C. Gallimore—Petitioner.

v.

Alice Gallimore and *another* — Respondent—Co-Respondent.

Matrimonial Ref. No. 6 of 1932, Decided on 17th October 1935, from order of Dist. Judge, Muzaffarpur, D/- 19th November 1932.

*** Divorce Act (4 of 1869), S. 17—Jurisdiction of High Court to confirm decree arises immediately on reference by District Court—Petitioner's appearance is not essential — Guilty party applying for confirmation—High Court's jurisdiction is not destroyed.**

The jurisdiction of the High Court to confirm the decree in a divorce suit arises immediately upon a reference by the District Court, and to complete the jurisdiction it is not necessary that there should be any personal appearance of the petitioner before the High Court. Even if the guilty party applies for confirmation of the decree, the jurisdiction of the High Court, which arises in any case, is not destroyed: 34 *Mad*

839 and 1916 *Mad* 296, *Foll*; 10 *All* 559; 31 *All* 511 and 1934 *All* 624, *Dissent.* [P 17 C 2]

K. K. Banerjee—for Respondent.

Courtney-Terrell, C. J.—This case comes before the Court under S. 17, Divorce Act. Charles Gallimore, the petitioner husband, petitioned for a dissolution of marriage from his wife Alice Gallimore before the District Judge and cited a certain person as co-respondent. The Judge heard the case upon the evidence and came to the conclusion—and we see no reason to differ from him—that the respondent had been guilty of adultery with the co-respondent. He pronounced a decree for dissolution, announcing that the decree would be subject to confirmation by the High Court. The papers were sent by the District Judge to the High Court in the ordinary course of affairs. The petitioner Charles Gallimore however has taken no steps to move the Court to confirm the decree which was granted to him. The decree was dated 2nd of November 1932, and we are now in the year 1935. The substantial point with which we have to deal, having satisfied ourselves that the procedure taken by the District Judge was a correct procedure and that his findings are not vitiated by any lack of the proper precautions to be taken in such circumstances, is as to whether in the absence of specific application by the petitioner we are entitled to confirm the decree. The jurisdiction of the Courts in divorce is a creation of the Indian Divorce Act which succeeded certain prior enactments. S. 7 of the Act states:

> Subject to the provisions contained in this Act, the High Courts and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which, in the opinion of the said Courts, are, as nearly as may be, conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief.

Then follows a proviso with which we are not concerned. Two courses of procedure are open alternatively to a petitioner: he may either come to the High Court direct under S. 16 of the Act, and in that case the Court will in the first instance pronounce a decree nisi—that term having been derived from the English practice—which is not to be made absolute until after the expiration of such time, not less than six months from the pronouncing thereof, as the High Court by general or special order from time to time directs. The concluding paragraph of the section is as follows:

> Whenever a decree nisi has been made, and the petitioner fails, within a reasonable time, to move to have such decree made absolute, the High Court may dismiss the suit.

The alternative procedure is provided by S. 17, according to which the petitioner may proceed before the District Judge. There the words "decree nisi" are not used at all. The section opens with the words:

> Every decree for a dissolution of marriage made by a District Judge shall be subject to confirmation by the High Court.

Then the cases for confirmation are to be heard by not less than three Judges in the case of a High Court constituted as this High Court in fact is. The High Court has the power, if it is necessary, to direct further inquiry and further taking of evidence, and when the result of such inquiry and additional evidence are certified to the High Court, "the High Court shall thereupon make an order confirming the decree for dissolution of marriage," or such other order as to the Court seems fit. Then there is a proviso that no decree shall be confirmed under this section until after the expiration of not less than six months from the pronouncing thereof. Certain doubts have apparently arisen as to whether in the event of such a reference by the District Judge himself of his order for confirmation, or in the case of an application by the respondent—but in either case without the application of the petitioner himself—the Court has power to confirm the decree. It cannot be denied that S. 17 makes no such reservation in favour of the rights of the petitioner and there is nothing in the section itself which would suggest that the active motion of the petitioner is necessary before the Court can exercise its jurisdiction to confirm the decree. The whole idea that the active motion of the petitioner is necessary seems to have sprung from the English practice and from that part of S. 7 which directs the Court to apply the principles and rules of the English Divorce Court; but such a conclusion cannot be arrived at without ignoring the opening words of that section: "Subject to the provisions contained in this Act". The procedure instituted by S. 17 of the Act is a new procedure which has no parallel in the

English law and is specific in itself and contains no saving clause of any kind applying any principles existing in any other country. The matter has been the subject of divergent opinions. On the one hand, there is a series of decisions of the High Court of Allahabad; on the other hand, there is a corresponding series of decisions in the opposite direction by the High Court of Madras, and in my opinion the view of the High Court of Madras is distinctly to be preferred, and that Court has decided that no application by the petitioner is necessary for the exercise of the jurisdiction of confirmation. It is not necessary to go through all the Allahabad decisions. I will refer however to two only. The earlier case is a Full Bench decision of that High Court: 31 All 511 (1). In that case the petitioner did not appear and the learned Judges seem to have feared that it was possible that the differences between the petitioner and the respondent might have been composed.

They refer to an earlier case of 10 All 559 (2), which they followed and decided that it was necessary to have a motion before the Court before the jurisdiction could be exercised. Later on, the petition for confirmation was in fact made by the husband and the Court confirmed the decree. But the case was not argued at any length, nor does anyone appear to have pointed out to the learned Judges, first of all, the nature of S. 7 of the Act applying the principles of the English law only to those cases in respect of which specific provision was not made by the Act, and, secondly, the attention of the learned Judges does not seem to have been drawn to the difference between Ss. 16 and 17 of the Act. There was a subsequent case before the Full Bench of the High Court, which is 1934 All 624 (3), which came before Young, Thom and Bennet, JJ. Once again the nature of S. 7 and the difference between Ss. 16 and 17 do not seem to have been presented to the Court nor indeed was the decision of the High Court of Madras, to which I shall refer in a moment, brought to the attention of the Judges. They appear to have taken the matter as beyond dispute and as being settled by a matter of practice, and simply stated that it was contrary to principle that a marriage should be dissolved on the motion of the guilty party. They do not seem to have considered the question as to whether or not, even if there should have been no motion before the Court, the Court itself had no jurisdiction to deal with the decree made by the District Judge when reported by the District Judge to them. With these decisions of the Allahabad High Court, I respectfully disagree, and I turn now to the decision of the Full Bench of the Madras High Court consisting of Sir John Wallis, C. J., and Ayling and Sadasiva Aiyar, JJ. In that case, 29 I C 178 (4), the Chief Justice and Ayling, J., held that the jurisdiction of the High Court to confirm the decree in a divorce case arises immediately upon a reference by the District Court, and to complete the jurisdiction it is not necessary that there should be any personal appearance of the petitioner before the High Court. Sadasiva Aiyar, J., appears to have differed from that point of view and seems to have treated the decree of the District Court as a "decree nisi", requiring a subsequent decree absolute. There is no report of the argument which took place, but the dissentient learned Judge's attention does not seem to have been called to the fact that the term 'decree nisi' is not used in S. 17, whereas it is used in the case of S. 16. Further, differing from the other learned Judges, he seems to have the idea that some principle which is binding upon the Indian Courts imports the idea borrowed from England that the guilty party cannot himself petition. A petition is not necessary at all for the exercise of the jurisdiction; and if the law be as Sir John Wallis says, and I venture to agree, that the jurisdiction arises immediately upon a reference, then the mere fact that the guilty party may also have applied for confirmation of the decree does not destroy the jurisdiction which arises in any case.

This decision follows an earlier Full Bench case of 34 Mad 339 (5). In the

1. Forshaw v. Forshaw, (1909) 31 All 511=3 I C 969 (F B).
2. Culley v. Culley, (1888) 10 All 559=1888 A W N 249.
3. Pushong v. Pushong, 1934 All 624=150 I C 543=1934 A L J 1226 (F B).
4. Guda William v. Guda Karunamma, 1916 Mad 296=29 I C 178=29 M L J 269 (F B).
5. William Dare v. Mrs. Belle, (1911) 34 Mad 339=8 I C 684 (F B).

earlier case the reasoning of the Allahabad High Court was expressly dissented from and the difference between Ss. 16 and 17 of the Act was discussed. It was pointed out that under S. 17 it was inaccurate to speak of the decree of the District Judge as a decree nisi. In the case before us there is no ground, having regard to the length of time which has taken place since the decree and the fact that a citation by advertisement in the newspapers was directed upon the petitioner, to believe that any reconciliation between the parties either has taken place or is likely to take place, and there is no ground for refusing the confirmation of the decree. The fact that the guilty wife has put in a petition for confirmation of the decree is, in my opinion, immaterial to the question of the exercise of our jurisdiction which, as Sir John Wallis says, arose immediately upon the reference by the District Judge. I would therefore confirm the decree.

Dhavle, J.—I agree.

Agarwala, J.—I agree.

S.R. *Decree confirmed.*

****A. I. R. 1936 Patna 18**

(Full Bench)

COURTNEY-TERRELL, C. J., DHAVLE AND AGARWALA, JJ.

Mohammad Alam—Appellant.

v.

Babulal Marwari and *others* — Respondents.

Appeal No. 249 of 1933, Decided on 11th November 1935, from original order of Dist. Judge, Monghyr, D/- 11th August 1933.

****Provincial Insolvency Act(1920),—Ss. 24 (2) and 25—Court may after hearing debtor's evidence, if satisfied, refuse further evidence by creditors and grant adjudication — But Court if inclined can hear creditor's evidence.**

In an insolvency proceeding at the stage of adjudication, the Court must listen to such evidence as the debtor may adduce and the debtor may be cross-examined and if the Court is satisfied after hearing the evidence he may refuse to hear any further evidence and grant adjudication. But if the Court be inclined to hear any evidence presented by the creditor, he is entitled to hear it and may hear as much evidence as he may think fit before deciding on the question of adjudication: 1933 *Pat* 43, *Expl*; 1928 *Pat* 477 and 1927 *Pat* 188 *Doubted*.

[P 19 C 2, P 20 C 1]

H. R. Kazimi—for Appellant.

Harihar Pd. Sinha — for Respondents.

Courtney-Terrell, C. J.—This is an appeal from an order of the District Judge of Monghyr, refusing the petition of the appellant for an adjudication in insolvency. The District Judge heard the appellant from whom it was elicited in cross-examination by the creditors that he had assigned the greater part of his property to his wife in satisfaction of an alleged dower debt. The Judge allowed the creditors to offer evidence and upon this evidence he came to the conclusion that the transfer of property was a mere farzi transaction, that the appellant was in fact still in possession of and controlling the property, and the Judge was not satisfied that the appellant was unable to pay his debts. He therefore rejected the petition. It has been contended on behalf of the appellant that the Judge at that stage of the inquiry was not entitled to take evidence on behalf of the creditors and even if so entitled should not have found that the transfer to the wife was farzi, and further that even if so entitled the finding of fact was unjustified. As to the last point, I am entirely in agreement with the learned Judge. It is unnecessary to go into the facts beyond stating that on the evidence at that stage before the Court the transfer was of a farzi nature and the property really remained with the appellant. The substantial dispute has been upon the proper construction to be put upon the proviso to Sub-S. (4) of S. 24, Provincial Insolvency Act:

> Provided that, where the debtor is the petitioner, he shall, for the purpose of proving his inability to pay his debts, be required to furnish only such proof as to satisfy the Court that there are prima facie grounds for believing the same and the Court, if and when so satisfied, shall not be bound to hear any further evidence thereon.

It is contended that the Judge must form his opinion upon the evidence supplied by the debtor petitioner and must confine himself to that evidence only. It is conceded that the petitioner may be subjected to cross-examination but it is contended that at that stage of the proceedings the Judge should not have admitted any evidence offered by the creditors. Now there have been some decisions of this Court which would seem to imply that the appellant's argument is well founded. The principal of these is the case of 7 Pat 771 (1) decided

1. Narayan Mistri v. Ram Das, 1928 Pat 477= 111 I C 647=7 Pat 771=9 P L T 444.

by Kulwant Shay and Macpherson, JJ. Kulwant Sahay. J., after reading the proviso, went on to read Sub-S. (2):

> The Court shall also examine the debtor, if he is present, as to his conduct, dealings and property in the presence of such creditors as appear at the hearing, and the creditors shall have the right to question the debtor thereon;

and Sub-S. (2) of S. 25:

> In case of a petition presented by a debtor, the Court shall dismiss the petition if it is not satisfied of his right to present the petition.

In that case also the Court had examined a certain transfer made by the debtor with a view to finding out whether it was benami or not. Sahay, J., was of opinion that there was no provision in S. 24 to enable the creditors to produce evidence in support of their allegation that the transfer was benami, but that their activities were limited to cross-examination. On the facts he found on the evidence as it stood that it was not possible to hold that the transfer was in fact *benami*. Macpherson, J., agreed to the order setting aside the order of the District Judge, but he clearly indicated that he did not agree with the reasoning of Sahay, J. He further expressed the view that the decision in 8 P L T 184 (2) upon which Sahay, J., had founded his judgment was not rightly decided. In 8 P L T 184 (2) decided by Adami and Scroope, JJ., the learned District Judge had allowed evidence to be given on both sides to show whether a transaction as to a part of the property of the debtor was benami or not. The Judge finding that it was benami held that the debtors had sufficient funds to pay their debts and dismissed their application. Adami, J., in giving judgment used this expression:

> At the stage of the application for adjudication no very careful inquiry is necessary with regard to the inability to pay debts. If the Court is satisfied that a prima facie case is established by the debtor, the Court will adjudicate him to be an insolvent; and indeed the consideration of the further question as to whether there has been a concealment of property and as to title to property is deferred till the stage when the discharge is applied for.

Now to the extent that the District Judge's inquiry, in so far as it went into the question of title and in so far as it decided that question, was certainly erroneous. The only question before the Court was as to whether the debtor was able to pay his debts, and in my opinion the decision of the learned Judges that the District Judges should not have gone into the question at all was wrong. I agree with the opinion of Macpherson, J. In the earlier case, 1924 Pat 166 (3), the Court dealing with the words "unless he is unable to pay his debts" pointed out that they were for the first time introduced into the present S. 10, sub-S. (1), by the Act of 1920. "A debtor shall not be entitled to present an insolvency petition unless he is unable to pay his debts", and that the Court should not pronounce adjudication until satisfied upon this point. This case however did not deal with the question of whether the creditor was entitled to adduce evidence. More recently in 12 Pat 107 (4) I said:

> There has been a tendency for Courts administering the Insolvency Act to believe that the hearing of a petition is a more or less formal matter and that if the petition is, as it were, merely verified by the evidence of the debtor the Court is bound to accede to the petition. That is not the case. It is the duty of the Court to be satisfied prima facie, and after following the necessary procedure and making the necessary investigation, to come to a conclusion that the statements by the debtor are true. After all the procedure of insolvency is for the protection of creditors quite as much as for the protection of debtors. It is unfortunately more often used by debtors than by creditors with the consequence that the interest of the creditor has a tendency to be forgotten.

The case was remanded to be re-heard and I said:

> The matter should be re-heard and the applicant who will be in a position to adduce such evidence as he may be advised for the purpose of inducing the Judicial Commissioner, acting on the principles I have stated, to make the order in his favour. The creditors will be equally entitled to call such evidence as they think fit to throw discredit upon the statements in the petition.

This case was followed in 12 Pat 866 (5). In using the expression "the creditors will be equally entitled to call such evidence, etc." I think I went too far. The meaning of the proviso is merely that the Court is enabled to deal summarily with the opposition by the creditor, that is to say the Court must listen to such evidence as the debtor may care to adduce and the debtor may be cross-examined, and if the Judge is satisfied

2. Bhagirathi Chaudhry v. Mt. Jamuni, 1927 Pat 188=101 I C 445=8 P L T 184.

3. Gobind Prasad Gir v. Kishun Lal Dhokri, 1924 Pat 166=69 I C 622.

4. Ganesh Lal Sarawgi v. Sanahi Ram, 1933 Pat 43=141 I C 223=12 Pat 107=13 P L T 714.

5. Jagarnath Sahu v. Beni Prasad, 1934 Pat 97 =147 I C 842=12 Pat 866=15 P L T 271.

after such hearing he may refuse to hear any further evidence and may grant the adjudication, but this is very far from saying that the Judge, if he shall be inclined to hear any evidence presented by the creditor, is not entitled to hear such evidence. He may, if he likes, hear the evidence and may hear as much evidence as he may think fit in the circumstances which will vary of course according to the difficulty of the case. In the case before us, the Judge exercised the discretion given to him, and after hearing the evidence tendered by the debtor and such evidence of the creditor as he chose to admit he found that he was not satisfied that the debtor was unable to pay his debts. The order therefore was correct and the appeal must be dismissed with costs to the contesting respondents.

Dhavle, J.—I agree.

Agarwala, J.—I agree.

S.R. *Appeal dismissed.*

---

* A. I. R. 1936 Patna 20

VARMA AND ROWLAND, JJ.

Ajablal Rai and *others*—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 405 of 1935, Decided on 2nd October 1935, from order of Sess. Judge, Monghyr, D/- 9th July 1935.

*** Criminal Trial—Joint trial — Person escaping from lawful custody with rescuers' help—Intention of all is to secure release—Various acts bringing about escape form part of same transaction within S. 239 (d), Criminal P. C.—Hence joint trial of all is legal.**

Where a person escapes from lawful custody because of the help of his rescuers who enabled his escape, the intention of all is to secure the release of the person in lawful custody. Therefore the various acts which bring about the escape from lawful custody form part of the same transaction as contemplated by S. 239 (d), Criminal P. C., and therefore a joint trial of all the persons with regard to the offence committed is legal: *Case law discussed.* [P 23 C 2]

S. N. Sahay and *C. P. Sinha*— for Petitioners.

Asst. Govt. Advocate—for the Crown.

Varma, J.—This petition has come before us on a reference by Macpherson, J., as he considered that a decision by a Division Bench was necessary on the question of law arising in the case. Of the seven petitioners, petitioner 1, Ajablal Rai has been convicted under S.224, Penal Code, on a charge of escaping from lawful custody. Petitioners 2 to 7 were convicted under S. 225, Penal Code, on a charge of having rescued petitioner Ajablal Rai from lawful custody as well as under S. 147 of rioting with the common object of rescuing him from lawful custody. All the petitioners were sentenced to six months' rigorous imprisonment under Ss. 224 and 225, but no separate sentence was passed under S. 147. The question that comes before us for decision is whether the joint trial of the petitioners, viz., of Ajablal Rai under S. 224 and the other petitioners under Ss. 225 and 147 is legal.

The case for the prosecution was that Ajablal Rai, a proclaimed offender was arrested by dafadar Ajablal Dusadh on 19th January 1935. He was arrested outside the shop of one Madho Sahu at mauza Parmanandpur and soon after the arrest, the other six petitioners slapped and assaulted the dafadar and his party, which consisted of chaukidars including Baudhu chaukidar, Bhikho chaukidar and Basant Chaukidar, and thereby effected his escape from lawful custody. The escape was effected after the petitioner Ajablal Rai had been taken a few laggas off by the dafadar and chaukidars in spite of his resistance to proceed to the thana. The charge framed against petitioner Ajablal Rai was as follows:

That you, on or about 19th January 1935 at Sensarpur, P. S. Khagaria, escaped from the custody of Ajablal Dafadar in which you were lawfully detained for the offence of murder under S. 302, I. P. C., and thereby committed an offence punishable under S. 224, Penal Code.

The charges against the other petitioners were as follows:

First.—That you, on or about 19th January 1935 at Sansarpur, P. S. Khagaria, were members of an unlawful assembly, and did, in prosecution of the common object of which, viz., to forcibly rescue prisoner Ajablal Rai from the lawful custody of the chaukidars and dafadar commit rioting, an offence punishable under S. 147, Penal Code, and *Secondly*—That you, on or about the same day of January 1935 at the same place intentionally offered resistance to the lawful apprehension of Ajablal Rai for the offence of murder under S. 302, I. P. C., and rescued the said Ajablal Rai from the custody of Ajablal Dafadar and thereby committed an offence punishable under S. 225, Penal Code.

At this stage I think it proper to refer to Ss. 224 and 225, Penal Code. S. 224 runs as follows:

Whoever intentionally offers any resistance or illegal obstruction to the lawful apprehension of himself for any offence with which he is charged

or of which he has been convicted, or escapes or attempts to escape from any custody in which he is lawfully detained for any such offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Looking at the various acts which constitute an offence under S. 224, it appears that the question of rescue does not arise in the case of

resistance for illegal obstruction to the lawful apprehension of himself for any offence with which he is charged or of which he has been convicted, or attempts to escape from any custody in which he is lawfully detained for any such offence,

because if he succeeds in resisting he is not arrested; if he successfully offers illegal obstruction he has not yet come into lawful custody; if he attempts to escape from any custody in which he is lawfully detained the custody is still there. It is only in the case of his escaping from lawful custody that the question of rescue would arise. I now take up S. 225 which runs as follows :

Whoever intentionally offers any resistance or illegal obstruction to the lawful apprehension of any other person for an offence, or rescues or attempts to rescue, any other person from any custody in which that person is lawfully detained for an offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both, etc.

Looking at the elements of S. 225 it is clear that if the resistance has been offered successfully no question of any lawful custody arises. The same remark applies to illegal obstruction to lawful apprehension. In an attempt to rescue, the offence under S. 225 may be committed but the party in custody may continue in custody. It is only in the case of rescue, if successful, that the person in custody is released from custody. There may be several variations in the offences committed under Ss. 224 and 225 and the question whether the particular series of acts form part of the same transaction will depend on the facts and the circumstances in which the offences were committed. For instance, if a police officer wants to arrest *A* on the strength of a warrant, and *A* and his friends *B*, *C* and *D* obstruct the police officer in arresting *A*, there is no doubt that the acts of all the four were in the course of the same transaction, although by the application of S. 38, I. P. C., *A* will be guilty under S. 224 and *B*, *C* and *D* under S. 225. Now the question that arises in this case is whether the rescue of a man in custody and the escape of the man from lawful custody form part of the same transaction to enable a joint trial of the offenders. The expression "same transaction" has not been defined in the Criminal Procedure Code and it is perhaps not desirable to attempt to frame any precise definition and not safe to lay down any single test of what "one transaction" means. The illustration to Ss. 235 and 239 of the Code in the form in which those sections stood before the amendments of 1923 declare the intention of the legislature to include such cases as are described : but the illustrations were clearly not meant to be exhaustive. Illus. (b), S. 239 of the Code of 1898 runs thus:

A and *B* are accused of a robbery in the course of which *A* commits a murder with which *B* has nothing to do. *A* and *B* may be tried together on a charge charging both of them with the robbery, and *A* alone with the murder.

Proximity in time and place was an element present in all the illustrations to S. 239 as it then stood. S. 235 of the Code was examined in 15 Bom 491 (1) where it was pointed out that proximity of time and place was not essential. The illustrations, as was then pointed out by Birdwood, J., cover cases where (1) the different offences form part of a continuous series of acts, as well as cases where (2) several distinct offences are committed at the same time, and cases where (3) though an interval of time has elapsed the same specific criminal intent is common to all the alleged acts. These observations were applied in 30 Bom 49 (2) to a case where the acts charged were separated by distinct intervals of time. It was held that

a series of acts separated by intervals of time are not excluded, provided that those jointly tried have been directed throughout by one and the same objective.

In that case, there was found to have been continuity of purpose from start to finish and it was said that this rather than proximity of time was the real test. In some later decisions, the observations made in that case have been read as implying that identity of purpose was the sole test and that in the absence of complete identity of purpose among the parties to an

1. Queen-Empress v. Fakirappa, (1891) 15 Bom 491.
2. Emperor v. Datto Hanmant, (1906) 30 Bom 49=7 Bom L R 633=2 Cr L J 578.

incident it will not be deemed to be one transaction. The Judges in 30 Bom 49 (2) did not, I think, intend to lay down such a general proposition, which would have been difficult to reconcile with illus. (b) to S. 239 as it then stood.

It seems to me that any of the matters set forth in 15 Bom 491 (1) may in the circumstances of a particular case—the events under consideration—form one transaction; and all these matters are properly to be considered in deciding whether it is so or not. It is after all a question of fact in each particular case: 31 C W N 337 (3). The case reported in 5 Pat L J 11 (4) is an instance in which the different offences were held to be not parts of the same transaction. A man committed an offence under S. 354 against a woman; the woman's husband wanted to assault the man, whereupon his servants assaulted the husband; in that case it was held that it is not so much the proximity of time as the community of purpose which makes a certain set of act parts of the same transaction. The facts themselves will show that the facts of that case are quite different from this case. The former offence was begun and ended before the latter offence and independently of it. In 1930 Pat 159 (5) one of four persons who was committing theft was arrested by the owners of the field who, after they had walked a short distance, were assaulted by a mob of 20 persons and the arrested man was rescued. It was held that the trial of the persons who were committing theft with those people who committed riot with the object of securing the release of the arrested thief was bad. Here again the former offence was done before the latter offence began, and there was no evidence that the rescuers and the thief were acting in collusion, or that the two sets of facts were otherwise so connected as to make them parts of the same transaction.

In Cr. Revn. No. 223 of 1933 (6) a man was arrested for stealing a handful of radishes from the field of the complainant. He effected his escape by assaulting the complainant and two other persons rescued him from the custody of the complainant by assaulting the complainant. All these three were tried together. On appeal the learned Sessions Judge set aside the convictions under Ss. 224 and 225 but maintained the conviction under S. 323. In revision it was held, relying on the case reported in 5 Pat L J 11 (4), that the various acts were not parts of the same transaction and therefore the joint trial was illegal. The learned Assistant Government Advocate has referred to various cases in which persons charged under S. 224 were tried jointly with persons charged under S. 225, but the point of misjoinder was never raised in those cases. In 43 Cal 1161 (7) one of the petitioners was arrested for an offence under the Opium Act but he escaped with the aid of the others. He was convicted under S. 224, I. P. C., and the others were convicted under S. 225 of the same Code in the same trial. The point of misjoinder was not raised in that case.

In 13 P L T 135 (8), Kartik Chandra Maity was convicted under Ss. 224, 342 and 147, I. P. C., and the others were convicted under Ss. 224, 225 and 353 and also under Ss. 147 and 342, I. P. C. In that case many other points were raised but the question of misjoinder was never raised. In 1933 Lah 159 (9) 25 men were sent up under Ss. 225, 233 and 392/149 and one man Kundan under Ss. 224 and 392, I. P. C. Two of them were acquitted by the Magistrate. The remaining 24 were convicted, Kundan under Ss. 224 and 392, I. P. C., and the 23 others were convicted under Ss. 225 and 333/149. All of them were acquitted in appeal. On appeal by the Crown against the acquittals Kundan was convicted under S. 224, and of the other group 13 were convicted under Ss. 225 and 332. No point about misjoinder of charges or trial was raised. The learned

3. Tamezkhan v. Rajjabali Mir, 1927 Cal 330=100 I C 827=28 Cr L J 347=45 C L J 591=31 C W N 337.
4. Tepanidhi Gobinda Chandra v. Emperor, 1920 Pat 230=54 I C 769=21 Cr L J 161=5 Pat L J 11=1 P L T 180.
5. Raghu Dusadh v. Emperor, 1930 Pat 159=1930 Cr C 202=127 I C 571=32 Cr L J 9.
6. Sitaram Jha v. Emperor, Cr. Revn. No. 223 of 1933.
7. Mohammad Kazi v. Emperor, 1917 Cal 426=35 I C 811=17 Cr L J 379=43 Cal 1161=20 C W N 1294.
8. Kartik Chandra Maity v. Emperor, 1932 Pat 171=1932 Cr C 347=138 I C 844=33 Cr L J 706=13 P L T 135.
9. Kalu v. Emperor, 1933 Lah 159=1933 Cr C 304=144 I C 67=34 Cr L J 679.

Assistant Government Advocate referred to these cases in view of the remarks of their Lordships of the Judicial Committee of the Privy Council in 46 All 95 (10). In that case their Lordships of the Judicial Committee observed that:

When a long series of cases extending over a long period of time when parties were represented by eminent counsel are decided in a way where if a plea which was evident had been taken and upheld, the decision would have been the other way, there arises an irresistible conclusion that the plea was not taken because it was felt to be bad.

He has given us certain instances in which Courts have held that although the different persons were guilty of different offences still if the offences are complementary to one another, they could be tried jointly and for this he has referred to the case reported in 1923 All 88 (11) in which a keeper of a gambling house and a person who had gone to gamble in that house were tried together and their trial was held to be legal. In 53 I C 496 (12), which is a single Bench decision of this High Court, Das, J., held that a gambler could be tried jointly with the keeper of the gambling house, because their acts came within the interpretation of the term "same transaction." Reference was made in this case to the interpretation put upon the term by Garth, C. J., in 6 Cal 171 (13) where the learned Chief Justices said:

A transaction, in the ordinary sense of the word, is some business or dealing which is carried on or transacted between two or more persons.

The decisions reported in 50 All 412 (14) and 3 Lah 359 (15) lay down the same principle. In the case reported in 7 Bom L R 637 (16) a person giving a bribe and a person accepting the bribe were tried together and when the point of misjoinder was raised their Lordships held referring to Ss. 161 and 162:

Looking at these two sections it appears to us that "the same transaction" is involved in the giving to accused 2 herein and the taking and accepting by accused 1 herein. The latter is the principal and the fromer is the agent. The one obtains and the other receives. This transaction of course may have various branches and various details. Therefore it appears to us that there is nothing in the sections which have been referred to, which renders the joint trial of these persons in any way prohibited by any of the provisions of the Criminal Procedure Code.

It is not necessary to multiply instances. In this case as the charge stands it is clear that whereas the man charged under S. 224 escaped from lawful custody the rescuers helped him to escape from lawful custody. The intention of all was to secure the release of the man in lawful custody. Therefore I am of opinion that the various acts which brought about the escape from lawful custody formed part of the same transaction as contemplated by S. 239 (d), Criminal P. C., and therefore the joint trial of the petitioners was legal. I would therefore reject the petition. The sentence is not severe. The convictions and sentences will therefore stand.

Rowland, J.— I agree.

S.R. *Petition rejected.*

10. Brij Narain v. Mangal Prasad, 1924 P C 50=77 I C 689=51 I A 129=46 All 95 (P C).
11. Ganeshi Lal v. Emperor, 1923 All 88=71 I C 507=24 Cr L J 155=20 A L J 967.
12. Nathu Thakur v. Emperor, 1919 Pat 139=53 I C 496=20 Cr L J 768.
13. Gujja Lal v. Fatteh Lal, (1881) 6 Cal 171=6 C L R 439.
14. Emperor v. Darab, 1928 All 20=105 I C 825=50 All 412=28 Cr L J 1001.
15. Khilinda Ram v. Emperor, 1922 Lah 458=68 I C 845=23 Cr L J 621=3 Lah 359.
16. *In re* Shriniwas Krishna Shriralkar, (1905) 7 Bom L R 637=2 Cr L J 582.

* A. I. R. 1936 Patna 23

MACPHERSON AND MOHAMMAD NOOR, JJ.

Jang Bahadur Singh — Defendant—Petitioner.

v.

Chhabila Koiri—Plaintiff — Opposite Party.

Civil Revn. No. 129 of 1935, Decided on 11th November 1935, from order of Addl. Dist. Judge, Arrah, D/- 8th December 1934.

*** (a) Injunction — Breach — Penalty in O. 39, R. 2 (3), Civil P. C.. by detention in civil prison applies to injunctions under O. 39, R. 1 also.**

The penalty prescribed in O. 39, R. 2 (3), Civil P. C., by way of detention in civil prison of the person committing a breach of an injunction applies to cases of injunctions issued under O. 39, R. 1 also though there is no specific provision to that effect in that rule : *Case law discussed.* [P 25 C 1, 2]

(b) Civil P. C. (1908), O. 39, R. 2—Desirability of modifying R. 2 (3).

Drafting of O. 39, R. 2 is not lucid and it is desirable to replace R. 2 (3) by a new rule with such modifications as may be required. [P 25 C 2]

Tarkeshwar Nath——for Petitioner.

Hareshwar Prasad Sinha—for Opposite Party.

Macpherson, J.—The petitioner was one of the defendants to mortage Suit No. 135 of 1932, which was based upon

a simple mortgage bond executed by petitioner and his father and the suit was for realisation of Rs. 1,699-2-0 by the sale of the mortgaged and other properties. The plaintiff applied for an injunction under O. 39, Rr. 1 and 2 against waste of the security through the petitioner and his son cutting trees from the orchard representing the mortgaged property. The Munsif granted ad interim injunction restraining the petitioner and two other defendants from cutting the trees and removing the timber of trees already cut. Eventually on 3rd January 1934, plaintiff represented to the Court that the petitioner and his father were cutting the trees of the orchard in spite of the injunction and asked that they be detained in the civil prison. The Munsif committed the petitioner and his father to the civil prison for four months or till they express their regret to the Court and compensate plaintiff for the loss incurred by him.

The learned Munsif does not specify the provision under which his order was passed; but the District Judge on appeal which was dismissed, mentions O. 39, R. 2, Cl. (3), Civil P. C. I issued the rule to show cause why the order of the Munsif should not be set aside on the basis of Dalal, J.'s decision in 1930 All 387 (1) where he observed :

Through some inadvertence no penalty appears to be provided in O. 39 for the breach of an injunction. It seems likely that the provisions of R. 2 (3), O. 39 were intended to be applied to a breach of an injunction under R. 1 also, but as Cl. 3 is included under R. 2 it would follow that the provisions of that clause will not apply to R. 1.

The learned Judge suggested an amendment of the rules prescribed. This is substantially the view of the law which is pressed at the hearing by Mr. Mahabir Prasad ; but I have not been referred to any other decision in support. On the other hand, Mr. Hareshwar Prasad Sinha relies upon the decisions of the Madras High Court in 44 I C 56 (2) and 1926 Mad 574 (3). The former is the decision of a single Judge who was unable to accept the contention that the provision in O. 39, R. 2 (3) only applies to suits of the nature contemplated by R. 2 (1). (It is clear that in the present circumstances the injunction was issued under R. 1). The learned Judge observes :

Section 94, Cl (c) of the Code is general and empowers the Court to grant a temporary injunction and, in case of disobedience, to commit the person guilty thereof to the civil prison and order that his property be attached and sold. O. 39 must be read with S. 94. I would be sorry to hold that a person who wilfully disobeys an injunction of Court could escape with impunity, unless there is anything in the Code which compels me to do so.

The difficulty however would seem to be that S. 94 (c) is dependent upon the words " if so prescribed " which means " if so prescribed by rules under the Act. " R. 1 certainly empowers the Court to grant a temporary injunction; but the power to commit to the civil prison in case of disobedience is not accorded in that rule and unless it can be implied in O. 39, R. 2 (3) it is not prescribed at all. O. 39, R. 2 (1) deals with cases of a special class and under the ordinary rules of drafting all the sub-rules of R. 2 would ordinarily be understood to refer to sub-R (1) unless otherwise stated. The second case, 1926 Mad 574 (3), which was decided by a Division Bench, may be summarised as follows;

The drafting of R. 2 (3) of O. 39 is somewhat inartistic, but there is no doubt that it applies to disobedience generally of an injunction granted by the Court. It applies not only to disobedience of an order issued under Cls. (1) and (2) of that rule but has a more general application: it applies alike to disobedience of all the injunctions issued under S. 94.

The learned Judges also refer to 42 All 98 (4), at p. 108, where the following appears:

It has been suggested that in any case no procedure is provided for punishing any breach of the condition so imposed. This argument turns in part on the interpretation to be put on O. 39, R. 2, Cl. (3), Civil P. C. The drafting of the rule is a little clumsy, because it has followed mechanically the arrangement of sections in the Code of Civil Procedure of 1882; but we are satisfied that the words "in case of disobedience" are wide enough to cover breaches of injunctions issued under O. 39, R. (1), for which breaches no penalty is elsewhere provided. In any case this Court has unquestionably the power to punish contempt of its own orders.

The last sentence shows that this Allahabad decision is not a direct authority since in the present case the injunction was not issued by the High

1. Balbhaddar v. Balla, 1930 All 387=127 I C 577.
2. Krishnapur Mutt v. Vicar of Suratkal Church, 1918 Mad 340=44 I C 56.
3. S. Adaikkala Thevan v. Imperial Bank, Madura, Branch 1926 Mad 574=95 I C 196=50 M L J 401.
4. Ramprasad Singh v Benares Bank Ltd., 1919 All 20=58 I C 600=42 All 98=17 A L J 1127.

Court. The question is whether it is a case of omission accidental or otherwise, so that in fact the Court is not empowered by rules prescribed in case of disobedience of a temporary injunction granted under O. 39, R. 1, to commit the person guilty thereof to the civil prison, or whether O. 39, R. 2 (3) directly or by necessary implication does prescribe such power of commitment. I may say that Mr. Hareshwar Prasad Sinha has referred to the decision of their Lordships of the Judicial Committee in 20 C W N 457 (5). But it does not appear to be very much in point. In my opinion this is a case which should be decided by a Division Bench and I accordingly refer it so that a decision may be available to the Courts of the province, and that if necessary an amendment in the rules prescribed may be made.

Order of Division Bench

Macpherson, J.—The facts and also the points at issue are set out in the observation made by me in referring the case to a Division Bench and need not be repeated as they will form a part of this judgment. At the hearing two recent decisions have been referrred to, the first being that of Dhavle, J., in 16 P L T 309 (6), and the other that of Baker, J., in 1931 Bom 509 (7). In the former the learned Judge after dissenting from 1930 All 387 (1) and making reference to 42 All 98 (4) and 1926 Mad 574 (3), held that O. 39, R. 2 (3) applies to disobedience generally of an injunction granted by the Court and that the words "in case of disobedience" of that clause are wide enough to cover breaches of injunctions issued under O. 39, R. 1, for which breaches no penalty is elsewhere provided. In the latter it was held that an undertaking by a defendant to the Court was equivalent to an injunction to which O. 39, R. 2 is applicable. Another point which may be mentioned is that though the decision in 42 All 98 (4) related to contempt of the orders of the High Court which the High Court had unquestionably the power to punish, the High Court possesses now under the provisions of the Contempt of Courts Act, 1926, the same power in respect of contempt of the orders of subordinate Courts. Apart from the consideration that the Legislature was unlikely to omit provision for a penalty for a breach of an injunction under O. 39, R. 1, the intention of the Legislature to make R. 2 (3) govern both R. 1 and the earlier part of R. 2 may be inferred from a comparison of Rr. 1 and 2 with the provisions of Ss. 492 and 493, Civil P. C., 1882, which they very largely reproduce. R. 1 is substantially S. 492, and R. 2 is substantially S. 493 with its paragraphs 4 numbered. R. 2 (3) which reads:

> In case of disobedience, or of breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding six months, unless in the meantime the Court directs his release,

is thus based upon para. 3 of S. 493 which runs:

> In case of disobedience, an injunction granted under this section or S. 492 may be enforced by the imprisonment of the defendant for a term not exceeding six months, or the attachment of his property, or both.

The words "or of breach of any such terms" has reference to para. 2 of S. 493 and R. 2 (2). It seems clear that the words

> "in case of disobedience the Court granting an injunction may order" were intended to reproduce "in case of disobedience an injunction granted under this section or S. 492 may be enforced. . . ."

dropping the reference to the sections and to cover all temporary iujunctions as before whether granted under R. 1 or R. 2 (1); and though, as has been frequently observed, the drafting is not lucid, it sufficiently implies that intention. At the same time it would appear desirable to redraft R. 2 perhaps by replacing R. 2 (3), with such modifications as may be required, by a new R. 2-A. Mr. Mahabir Prasad asks us to accept an apology from his client and direct his release from bail, but the materials before us for a decision are inadequate and such an order, if made ought to come from the Court of the Munsif which has to see that, in the words of the order, the petitioner also compensates the plaintiff for the loss incurred by him. The ap

5. Eastern Trust Co. v. McKenzie Mann & Co. Ltd., 1915 P C 106=35 I C 378=20 C W N 457 (P C).
6. Muhammad Naziruddin v. Raja Ram, 1935 Pat 274=155 I C 619=16 P L T 309.
7. Chaturbhujdas Parmanand Das v. Natvarlal Tribhovandas, 1931 Bom 509=134 I C 1165=33 Bom L R 1109.

plication is without merit and I would discharge the rule with costs.

Mohammad Noor, J.—I agree.

S.R. *Rule discharged.*

A. I. R. 1936 Patna 26

FAZL ALI AND LUBY, JJ.

Ram Prasad Singh—Appellant.

v.

Beni Madho Singh and *another*—Respondents.

Appeal No. 4 of 1933, Decided on 17th September 1935, from original order of Sub-J., Gaya, D/- 2nd August 1932.

(a) Execution Sale—16 annas share yielding Rs. 3,095 income according to cess revaluation—Share of Rs. 1,250 to Rs. 1,300 annual income sold for Rs. 15,000—Price held not inadequate.

According to the cess-revaluation the annual income of a sixteen annas share of the property sold at an execution sale was Rs. 3,095. The share of the property which was sold yielded an annual income of Rs. 1,250 to 1,300 and the price fetched by the share was Rs. 15,000:

Held: that having in the view the fact that the properties sold at a Court sale do not as a rule fetch the same price as they might fetch at a sale arranged by private contract, the property was not sold at a grossly inadequate value. [P 27 C 1]

(b) Execution sale—Substantial injury—No interest of judment-debtor in property sold, or having doubtful claim therein at date of sale—Price fetched not inadequate—Judgment-debtor held not materially prejudiced.

When the judgment-debtors had no interest left in the properties sold in execution of decree at the date of the sale or at the utmost they had only a doubtful claim in respect of those properties it could not be said that they were materially prejudiced by the sale of these properties, especially when the price fetched, was though low, not grossly inadequate. [P 27 C 2]

(c) Execution Sale—Decree for Rs. 75,000 to one lac—Price fetched by sale of judgment-debtor's property amounting to a little over Rs. 44,000—Decree-holder not proposing further execution for balance—Position of parties not altering materially even if properties had fetched full decretal amount—Case for setting aside sale held not made out.

The total decretal amount for which the execution was taken out was between Rs. 75,000 and Rs. 1,00,000. The price fetched by the sales of the properties belonging to the judgment-debtor was a little over Rs. 44,000. The decree-holder however did not propose to levy any further execution in respect of the amount of the decree which remained unsatisfied, and so even if the properties had been sold for the full decretal amount it would not have materially altered the position of the parties:

Held: that the judgment-debtor had no case for setting aside the sale. [P 27 C 2]

(d) Execution Sale — Irregularity—Decree amended—But execution on basis of original decree—Amendment rendering decree incapable of execution against some defendants—No action against them or their heirs in execution as directed by High Court—Error held not of substance but of form and proceeding not vitiated thereby.

An amendment was made in a decree as it originally stood and the effect of the amendment was that the decree was not capable of being executed against some of the defendants or their heirs. The decree-holder took out execution on the bais of the original decree as it stood before the amendment but were not proceeding against the said defendants or their heirs in accordance with the directions of the High Court:

Held: that if any error was committed by the decree-holders, it was not one of substance but of form and the legality of the execution proceedings should not be allowed to be affected by it. [P 28 C 1]

(e) Execution—Petition dismissed—High Court setting aside dismissal and directing execution to proceed except against some—High Court's order held revived proceeding by vacating dismissal order—Hence fresh execution petition not necessary.

An execution petition was dismissed by the Court, but on appeal the High Court set aside the order of dismissal and directed that the execution should proceed except against some of the judgment-debtors or their heirs. The execution proceedings were then continued in accordance with the order of the High Court:

Held: that the effect of the order of the High Court was to revive the execution proceedings by vacating the order of dismissal and hence a fresh execution petition was not necessary. [P 28 C 1, 2]

Sarjoo Prasad and *Ram Nandan Prasad*—for Appellant.

S. M. Mullick and *S. N. Ray*—for Respondents.

Fazl Ali, J.—This is an appeal by one of the judgment-debtors from a decision of the Subordinate Judge of Gaya dismissing his application under O. 21, R. 90. It appears that a preliminary mortgage decree was passed in favour of the decree-holders in 1920 and it was made final some time in 1925. This decree was executed by the decree-holders and certain properties belonging to the judgment-debtors were sold in four lots. Before the sale took place a notice under O. 21, R. 66, had been issued, but as the judgment-debtors did not appear the valuation suggested by the decree-holders was accepted and the sale proclamations were issued on the basis of such valuation. The learned Advocate for the appellant has now succeeded in showing that these valuations were inadequate; and this is also clear from the fact that the price fetched at the sale was much higher than the price noted in the sale proclamations. It may also

S. N. DAR, ... Advocate, High Court, SRINAGAR (KASHMIR)

be conceded in favour of the appellant that a gross understatement of the value in the sale proclamation would ordinarily amount to a material irregularity in publishing or conducting the sale. The question to be decided is whether the judgment-debtors sustained substantial injury as a direct consequence of this irregularity.

Now dealing with the various properties individually, it appears that two of them, Pinjor and Harbanspur Mairwa, were valued in the sale proclamation at Rs. 1,000 and Rs. 500 respectively, but they were sold for Rs. 15,000 and Rs. 7,500 respectively. According to the appellant however their proper respective values should have been Rs. 35,000 and Rs. 20,000. Now, so far as Pinjor is concerned, the appellant has not printed any document to enable us to check the accuracy of his valuation, but one of his witnesses, Lalbahadur Singh, has stated that the value of 8 annas share of this village which was sold was Rs. 34,000 to Rs. 35,000. It appears, however, from the judgment of the learned Subordinate Judge that before him the appellant relied upon the cess re-valuation according to which the annual income of sixteen annas is Rs. 3,095. According to certain calculations which were made in this Court by the learned Advocates appearing for the parties and in which allowance was made for collection charges and the annual cess and revenue payable in respect of this property, it was found that the annual income of the share sold would amount to about Rs. 1250 to Rs. 1,300. That being so, and having in view the fact that the properties sold at a Court sale do not as a rule fetch the same price as they might fetch at a sale arranged by private contract, I am inclined to think that the conclusion of the learned Subordinate Judge, that the property was not sold at a grossly inadequate value, is correct. As I have already stated the price fetched by this property at the sale was Rs. 15,000.

As to Harbanspur Mairwa the annual income of this property is, according to the cess valuation, Rs. 1,655 and the Government revenue and cesses are Rs. 572 and about Rs. 100 respectively. After deducting these amounts and the usual collection charges the income of 10 annas 5 pies which was the subject of the sale—would roughly be Rs. 500, and considering that the price fetched at the sale was Rs. 7,500, that is to say about 15 times the net annual income, it cannot be held in the case of this property also that the sale resulted in a substantial injury to the appellant. As to the other two properties they stand on a somewhat different footing, because it appears from certain admissions made by the appellant's own witnesses in the Court below that the equity of redemption, or whatever interest the judgment-debtors had in these properties, had already been sold previous to the date of the sale with which we are concerned. According to Lalbahadur Singh. the fourth witness for the appellant, Saidpur mahal had been sold in execution of a decree obtained by one Jagmohan and purchased by the decree-holder or his wife two or three years before the sale and again according to another witness, examined on behalf of the appellant, Kharrah Rahimabad had been sold in execution of a decree for cess. Considering that the judgment-debtors had no interest left in these properties at the date of the sale, or at the utmost they had a doubtful claim only in respect of these properties, it cannot be said that the appellant was materially prejudiced by the sale of these properties, especially when the price fetched was, as held by the learned Subordinate Judge, though low, not grossly inadequate in the case of these properties also.

Another point which requires consideration in deciding this case is that the total decretal amount for which execution was taken out was according to both the parties between Rs. 75,000 and Rs. 1,00,000 and the price fetched by the sale of these properties was a little over Rs. 44,000. The decree-holders do not propose to levy any further execution in respect of the amount of the decree which remains unsatisfied and so we cannot overlook the fact that even if the properties had been sold for the full decretal amount, it would not have materially altered the position of the parties. In these circumstances I am of opinion that the appellant has failed to make out a case for setting aside the sale and the decision of the learned Subordinate Judge must therefore be upheld. Apart from the contention that

the sale was liable to be set aside by reason of material irregularities resulting in loss to the appellant, it was contended by the learned Advocate for the appellant, the execution proceedings are vitiated by the fact that the decree holder instead of taking out execution in respect of the decree as it stood after certain amendment had been made therein took out execution on the basis of the original decree as it stood before the amendment. It appears that the decree had to be amended because an objection was taken by the judgment-debtors on the ground that the suit had abated as against some of the judgment-debtors as they had died previous to the passing of the final decree and as no steps had been taken for substituting their heirs within the time prescribed by law. The effect of the amendment was that the decree could not be executed against defendants 5, 6 and 13 or their heirs and it appears that in the present execution petition the decree-holders are not proceeding against these defendants or their heirs. The learned Subordinate Judge, in holding that the execution proceedings were not affected by the slight irregularity complained of, has relied upon the decision of this Court in Misc. Appeal No. 68 of 1929.

It appears that the learned Subordinate Judge had previously dismissed two applications for the execution of the final decree in the mortgage suit which has given rise to these proceedings, but his order was set aside on appeal and this Court directed the execution to proceed except against the persons substituted in place of the original defendants 5, 6 and 13 who were expunged from the record. The decree-holders accordingly proceeded with the execution and they proceeded according to the directions of the High Court. In my opinion if any error was committed by the decree-holders it was not one of substance but of form and I do not think that that should be allowed to affect the legality of the present execution proceedings. Lastly, it was contended that the effect of the order of this Court was not to revive the execution proceedings and that a fresh execution petition ought to have been filed by the decree-holders after the order of the High Court. With this view however I am not inclined to agree, because this Court expressly set aside the order of the Subordinate Court dismissing the application for execution and directed the execution to proceed. The effect of the order was clearly to revive the execution proceedings by vacating the order of dismissal which had been passed by the Subordinate Judge. In these circumstances I would dismiss the appeal with costs.

Luby, J.—I agree.

S.R. *Appeal dismissed.*

A. I. R. 1936 Patna 28

MACPHERSON AND MOHAMMAD NOOR, JJ.

Aditya Prasad and *others*—Decree-holders—Appellants.

v.

Ishwar Singh and *others*—Judgment-debtors—Respondents.

Appeal No. 246 of 1934, Decided on 22nd October 1935, from original order of Sub-Judge, Gaya, D/- 27th August 1934.

Execution — Simultaneous execution by two or more methods is reasonable and feasible—Security sufficient for realising decree — Decree-holder's procedure showing harassment and not desire to realise decree—Court may refuse relief against judgment-debtor's person.

No doubt, cases may conceivably occur in which simultaneous execution by two or more methods might be reasonable and feasible; but where there is already sufficient security for the realisation of the decretal amount and the procedure of the decree-holder savours rather of harassment than a genuine desire to realise the decretal amount, the Court may in its discretion refuse the relief against the person of the judgment-debtor. [P 29 C 1]

Rajkishore Prasad—for Appellants.

N. K. Prasad II—for Respondents.

Macpherson, J.—This is an appeal against the order of the Subordinate Judge of Gaya, dated 27th August 1934, in which he refuses to issue a warrant of arrest in execution of the appellants' decree for money. A decree was passed on 29th March 1934. Application for execution was made on 9th May. On the opening day, after the vacation which was the 2nd July 1934, the non-executants of the thika lease appealed to the High Court in Appeal No. 85 of 1934. In their application for execution the appellants had asked for execution against immoveable properties specified, and moveable properties, whereof the details would be submitted later, and by issuing warrant of arrest against the judgment-

debtors. On the 11th August the trial Court stayed execution under R. 6 (2) of O. 41 treating the properties attached as security with the proviso that if as a result of a proceeding under O. 21, R. 66 those properties be found to be short of the decretal amount, additional properties will be demanded of the judgment-debtor by way of security up to the decretal amount. The decree-holder on the 20th August filed the application which was dismissed in the order now impugned. He further appealed to the High Court against the order of stay of execution and his application was rejected.

Mr. Rajkishore Prasad on behalf of the appellants urges that there is no bar in law against the two forms of execution proceeding simultaneously; and, secondly, that his discretion was not rightly exercised by the learned Subordinate Judge. We may agree with the first point and cases may conceivably occur in which simultaneous execution by two or more methods might be in reasonable and feasible. On the second point, however, the argument is less well founded. Manifestly there is already sufficient security for the realisation of the decretal amount and from the dates already given the procedure of the decree-holder savours rather of harassment than of a genuine desire to realise the decretal amount. It cannot therefore be stated that the learned Subordinate Judge exercised his discretion in an unreasonable manner. We have, however, examined the First Appeal No. 85 of 1934 and found that both parties have been lax in prosecution of the appeal. If this should continue and the hearing of the appeal be thereby delayed, the appellant might possibly have a case for more drastic action in the execution department; but for the present we see no reason to differ from the order under appeal merely stating that there appears to be no serious objection to execution being taken out against the moveable property forthwith.

The appeal is dismissed with costs.

Mohammad Noor, J.—I agree.

S.R. *Appeal dismissed.*

** A. I. R. 1936 Patna 29

(Full Bench)

COURTNEY-TERRELL, C. J., DHAVLE AND AGARWALA, JJ.

Johabaj Khan—Defendant — Appellant.

v.

Srikrishna Dey and *others*—Plaintiff —Defendants—Respondents.

Appeal No. 5 of 1932, Decided on 11th November 1935, from appellate decree of Addl. Dist. J., Cuttack, D/- 16th September 1934.

****Orissa Tenancy Act (2 of 1913), S. 74—Burden of proof—Chandnadar tenant—Landlord must prove usage or custom in support of ejectment:** 1 *Cuttack L T* 5 and 8 *Overruled.*

The onus of proving non-liability to ejectment that shifts in ordinary cases to the tenant when the landlord suing for ejectment proves his title as such, shifts again to the landlord in case of ejectment of a chandnadar and the landlord is not entitled to eject the chandnadar except when he proves local usage or custom in support: 1 *Cuttack L T* 5 and 8, **Overruled**; *Case law Discussed.* [P 33 C 1]

Pitambar Misra—for Appellant.

Manohar Lal, *G. P. Das* and *G. G. Das*—for Respondents.

Dhavle, J.—The question in this appeal is whether the landlord, a Lakhiraj bajiaftidar in a temporarily settled estate in Balasore, is entitled to eject a chandnadar after service of a notice to quit. The plaintiffs' title as landlords was challenged by the defence, but has been concurrently found against by the trial Court and the District Judge on appeal, and there is no further dispute about it. The defence also denied service of notice, but this too has been concurrently found against the defendants appellants, and there is no further dispute about it. The defendants have been recorded in successive Record of Rights (commencing with the Provincial Settlement) as chandnadars, and for the current settlement their rent has been raised from Re. 1 to Re. 1-4-0 (apparently in accordance with para. 126 of Mr. Dalziel's Final Report on the Revision Settlement of Orissa, 1922-1932). The trial Court decreed the suit on the ground that the landlord prima facie has a right to all the lands included in his mahal or tenancy, that the defendants have totally failed to show that by custom or usage they are entitled to remain on the land against the will of the landlord, that they are tenants at will, and that their

rights have been terminated by the notices served on them.

The District Judge on appeal found that there was absolutely no reliable evidence of any local custom or usage by which the defendants, who had appealed to him, could acquire any permanent right, and after negativing the contentions of permanency and of a right of occupancy that were urged before him on the authority of 17 Cal 144 (1), and S. 6, Act 10 of 1859, upheld the decree of the trial Court. There was then a second appeal to this Court, and James, J., before whom it was first placed, considered, doubtless in view of the general importance of the question raised, that the matter should be heard by a larger Bench. The appeal thus came before Fazal Ali and Varma, JJ., who were of opinion that the view taken in 1925 by Das J., (sitting with Foster J.,) in 1 Cuttack L T 5 (2), and in 1 Cuttack L T 8 (3), that the whole onus lies upon the chandnadar who resists the landlord's action for ejectment to establish a right to remain on the land either under contract or under custom requires consideration by a larger Bench in view of the intention and scheme of the Orissa Tenancy Act, and of certain observations in later decisions. The case has accordingly been placed before us for decision.

Now, there can be no doubt or controversy that in an action of ejectment, when the defendant is admittedly in possession of the land in dispute, the onus is initially upon the plaintiff to prove his title thereto It is also clear that when the plaintiff has proved his title as landlord the burden shifts to the defendant, if he claims to be a tenant to prove that the tenancy is not precarious but entitles him to continue in occupation. A chandna tenancy, as will be seen presently, is an essentially non-agricultural tenancy, and if nothing further were known about it, the tenant will have to be considered as holding from year to year, and liable to be ejected by a proper notice to quit. In an action of ejectment from homestead land decided before the passing of the Bengal Tenancy Act, in 3 Cal 696 (4), Garth, C. J., said at p. 699 :

> The truth is, that the terms of a holding, as between landlord and tenant, must always be matter of contract, either expressed or implied. If they enter into an express agreement of tenancy, either written or verbal, such agreement generally defines the terms of the holding. If, on the other hand, a tenant is let into possession without any express agreement, and pay rent, he becomes a tenant at will, or from year to year, or, in other words, holds by the landlord's permission upon what may be the usual terms of such a holding by the general law, or by local custom, and in such a case, he is of course liable to be ejected by a reasonable notice to quit. Occasionally there are local customs by which special terms and incidents are engrafted upon the contract of tenancy ; but the existence of the custom in such cases must be a matter of proof and no Judge has a right to act upon such customs unless their existence is duly established. In this case no such custom is even suggested, and as there was no express agreement of tenancy and no evidence of its origin, the defendants must be considered as holding from year to year, and liable to be ejected by a proper notice to quit.

In such circumstances the chandnadar, without an express agreement, could only resist the ejectment by proving a custom entitling him to continue in occupation. As Sir Lawrence Jenkins observed in delivering the opinion of the Judicial Committee in 43 Mad 567 (5) in an action of ejectment from ryoti land brought by a Government pattadar

> permanence is not a universal and integral incident on an under-ryot's holding ; if claimed it must be established. This may be done by proving a custom, a contract or a title, and possibly by other means.

It was also pointed out in that decision that if this is not established, the defendant who does not any longer dispute the plaintiff's title or the notice by which he purported to terminate the defendant's tenancy and who, according to the Record of Rights holds under, if not from, the plaintiff must fail, unless, as required by S. 101, Evidence Act, he proves the existence of a right to continue in occupation of the land. In actions of this kind it is for the tenant defendant to show why the landlord may not recover his property, and as Lord Hobhouse said in 16 Cal 223 (6),

> It is not the business of the plaintiff to explain the possession ; it is the business of the defen-

1. A. M. Dunne v. Nobo Krishna, (1890) 17 Cal 144.
2. Kedar Nath Mullick v. Bikal Prusti, 1 Cuttack L T 5.
3. Krishna Charan Mahanty v. Punai, 1 Cuttack L T 8.
4. Prosunno Coomaree Debea v. Sheikh Rutton Bepary, (1877-78) 3 Cal 696=1 C L R 577.
5. Seturatnam Aiyar v. Vankatachela Goundan, 1920 P C 67=56 I C 117=47 I A 76=43 Mad 567 (P C).
6. Secretary of State v. Luchmeswar Singh, (1889) 16 Cal 223=16 I A 6=5 Sar 275 (P C).

dants to show that it leads to the inference of a perpetual tenancy,

or it may be added of a tenancy that cannot be terminated by a notice to quit at the will of the landlord. Mr. Manohar Lal who appears for the landlords-respondents has also brought to our notice another Privy Council decision, 47 Mad 337 (7), which was further referred to by Das, J., in the decisions of 1925 and in which the same view was thus expressed.

It cannot now be doubted that when a tenant of lands in India, in a suit by his landlord to eject him from them, sets up a defence that he has a right of permanent tenancy in the lands, the onus of proving that he has such right is upon the tenant.

It is therefore beyond question that the onus at this stage would lie upon the tenant, but this is by no means an end of the matter. For clearly the position must be further examined in the light of the status of the chandnadar under the Orissa Tenancy Act. As to the origin and nature of the chandna tenancy, there is an oft-quoted passage from Maddox's Report on the Settlement of Orissa (para. 327) which says:

Tenants other than the khushbash or respectable thani and resident raiyats have always paid rent for their homestead lands. In the case of the cultivating classes such lands were generally part of the pahi holding, but the shopkeepers, artisans, and labouring classes, who having no arable land in the village, pay rent for homestead lands only, are called chandnadars' and their tenure chandna pahi raiyats also, who having their home in one village hold also house or homestead in other, are sometimes known as chandnadars of the latter village .... At the last settlement chandnadars were given leases securing to them fixity of rent for the term of settlement, and the incidents of the tenure do not materially differ from those of thani raiyats (which are found in para. 320 of the Report) except that they are governed by the Contract Act and not by Act 10 of 1859.

This points to two classes of chandnadars corresponding to Cls. 1 and 2, S. 236, Orissa Tenancy Act, as was said by James, J., in 149 I C 805 (8), a decision to which I was a party. Incidentally, Mr. Manohar Lal points out that the term "chandnadar" does not occur in the first clause of the section; but an actual instance of such a tenancy was dealt with by Rowland, J., in 14 P L T 688 (9). The second class of chandnadars, shop-keepers, artisans, and labouring classes who, having no arable lands in the village pay rent for their homestead lands only, now falling within Cl. 2 of the section, were essentially non-agricultural tenants, and were therefore at first excluded from the protection given to agricultural tenants by the Rent Act of 1859 and its modifications which were in force in Orissa down to 1913. The assets (as they are commonly called in revenue and other settlements) of such tenancies were however as they still are, included in the amounts which the proprietors have to collect and on which their revenue is assessed. For the first time the Orissa Tenancy Act of 1913 includes chandnadars in an agricultural Tenancy Act by providing in S. 4 that

there shall be for the purposes of this Act, the following classes of tenants, namely,

(1) tenure holders, . . . (2) raiyats, (3) under raiyats, ... (4) chanadars, ... and

the term 'chandnadar' itself being defined in S. 3 (3) of the Act as meaning

a person holding land which has been recorded as chandna in the course of a settlement of land revenue and for which a rent has been fixed for the term of that settlement; and also the successors in interest of such person.

Though the chandnadar is thus a tenant for the purpose of the Act, Cl. 2, S. 236, lays down that :

Save as otherwise expressly provided in this Act, the incidents of the tenancy of a chandnadar shall be regulated by local custom or usage and his rent shall be liable to re-assessment on each revision of a land revenue settlement.

General expressions, like "the incidents of a tenancy," sometimes lead to difficulties, as actually happened under S. 181, Ben. Ten. Act, in 1 Cal L J 138 (10) and 33 Cal 630 (11), decisions which were disapproved by the Privy Council in 13 Pat 254 (12). At the same time it would be surprising if the landlord's right to eject the tenant or the corresponding liability of the tenant to ejectment—if it is to arise in any circumstances at all—should in an agricultural tract be excluded from the incidents of the tenancy; and the Orissa Tenancy Act shows clearly enough that this right or liability was regarded as one of the incidents of tenancies. For the three classes of tenants that are

7. Nainapillai Markayar v. Ramanathan Chettiar, 1924 P C 65=82 I C 226=51 I A 83=47 Mad 337 (P C).
8. Chintamoni Rout v. Sriram Chandra Kar, 1934 Pat 422=149 I C 805.
9. Santan Sahu v. Bhaju Sahu, 1933 Pat 92=143 I C 271=14 P L T 688.
10. Mohesh Majhi v. Pran Krishna Mandal, (1905) 1 C L J 138.
11. Upendra Nath v. Ram Nath, (1906) 33 Cal 630.
12. Anup Mahto v. Mita Dusadh, 1934 P C 5=147 I C 977=61 I A 93=13 Pat 254 (PC).

mentioned along with chandnadars in S. 4 of the Act as tenants for the purposes of the Act are all governed by specific provisions in the Act as regards ejectment, and in more than one instance the matter is expressly dealt with as an incident of the tenancy. Thus, section 11 which occurs in the chapter relating to tenure-holders and provides that a holder of a permanent tenure shall not be ejected by his landlord, except on the ground . . . ., is the first section in a bundle of sections headed "Other incidents of tenures". S. 21 which provides that a raiyat holding at a rent or rate of rent fixed in perpetuity shall not be ejected by his landlord except on the ground. . . . is described in the margin as "incidents of holding at fixed rates". S. 29 which gives "protection from eviction, except on specified grounds" by providing that "an occupancy raiyat shall not be ejected by his landlord from his holding, except in execution of a decree for ejectment passed on the ground. . . . ." occurs in a bundle of sections headed "Incidents of Occupancy Right". Other sections governing and restricting the ejectment of tenants are S. 52 which provides that

> a non-occupancy raiyat shall, subject to the provisions of this Act, be liable to ejectment on one or more of the following grounds; and not otherwise. . . . .,

and S. 57 which impose "Restrictions on ejectment, of under-raiyats" by providing that "an under-raiyat shall not be ejected by his landlord except. . . ". For the ejectment of chandnadars, regarded as an incident of the tenancy, we have first to look to express provision in the Act and then to local custom or usage. The only express provision to which our attention has been drawn is found in S. 74, which provides that:

> When a tenant is a permanent tenure-holder, a bajiaftidar, a raiyat holding at fixed rates, a chandnadar or an occupancy raiyat, he shall not be liable to ejectment for arrears of rent, but his tenure or holding shall be liable to sale in execution of a decree for the rent thereof and the rent shall be a first charge thereon.

This is only a negative provision and saves the chandnadar, along with tenants possessing substantial interests and ranging from permanent tenure-holders to occupancy-raiyats, from ejectment for arrears of rent, unlike the other tenants, dealt within S. 75 as regards ejectment on this ground, and in Ss. 52 and 57 as regards ejectment generally. The landlord's right to eject a chandnadar is thus, unlike his right to eject other classes of tenants, not fully dealt within the Act, but has been left, subject to S. 74, to "be regulated by local custom or usage". At the same time we do know from the Act that a chandnadar has his rent fixed for the term of the current Land Revenue Settlement, that this rent is liable to reassessment on each revision of such a settlement, that the term chandnadar includes "the successors-in-interest of such person", and that the interest of a chandnadar is not extinguished by a suit, decree and execution for arrears of rent, but passes to the auction-purchaser in execution, like the interests of tenants down to occupancy raiyats. These are clear indications of some degree of permanence attached to a chandna tenancy under the Act; indeed the settlement authorities who investigated the permanent or precarious character of these tenancies at the last settlement came to the conclusion that the mere fact that the word 'istamrari' is not found in the entry of a chandnadar's status should be taken to imply that he is a mere tenant-at-will (see para. 63 of Mr. Dalziel's Report). As was pointed out by James, J., in 149 I C 805 (8), the view that a chandnadar is a mere tenant-at-will is inconsistent with Ss. 74 and 232 (1) (c) of the Act. Mr. Manohar Lal has urged that though under S. 74 the chandnadar may not be ejected for arrears for rent, there is nothing in the Act to save him from ejectment on other grounds or to prevent the landlord, in the absence of proof of local custom or usage to the contrary from ejecting him without giving any reason at all. To allow the latter however would render S. 74 nugatory; and as to the former, it must be borne in mind that it was one of the objects of the Tenancy legislation in these parts to give adequate security to the tenants in the enjoyment of their existing rights, both statutory and customary. As the Orissa Tenancy Act makes chandnadars tenants for the purposes of the Act and leaves the incidents of their tenancies generally to be regulated by local custom or usage, while expressly providing for the grounds on which tenants of all other classes may be ejected, it would seem to have been the intention of the legislature to allow

the ejectment of chandnadars in those cases only in which the landlord is supported by local custom or usage. This is the view that Fazl Ali and Varma, JJ., were inclined to take. The scheme of the Act suggests, as the learned Judges observed, that it could never have been contemplated by the legislature that a chandnadar should be in a worse position than even a non-occupancy raiyat as regards his liability to ejectment. Cl. 2, S. 236 does not itself indicate whether the local custom or usage regulating the ejectment of a chandnadar is to be proved by the landlord or by the tenant; but having regard to the status of the chandnadar as gathered from the definition and his express inclusion in Ss. 4 and 74, and to the fact that all other tenants under the Act are protected from eviction except on specified grounds, the clause ought, in my opinion to be taken to provide in effect that while the landlord is not entitled to eject the chandnadar for arrears of rent, his right to eject him on other grounds shall be regulated by local custom or usage and will only be available so far as is permitted by local custom or usage. The onus that shifts in ordinary cases to the tenant when the landlord suing for ejectment proves his title as such thus shifts again to the landlord in view not only of the way in which the Act has dealt with his right to eject by confining it to specified grounds in the case of all other tenants but also of the protection which the Act was designed to give to the chandnadar together with the measure of permanence expressly conferred on him, especially by S. 74 of the Act. This aspect of the matter was not considered by Das, J., when in concurrence with Foster, J. he remanded 1 Cuttack L T 5 (2) and 1 Cuttack L T 8 (3), for a reconsideration of the evidence after throwing the onus of proving local custom or usage on the defendant in accordance merely with the general proposition repeatedly laid down by the Privy Council. For these reasons I am unable to accept the view of Das, J. as a correct treatment of the chandnadar in the matter of ejectment under the Orissa Tenancy Act. In my opinion the landlord is not entitled to eject the chandnadar except when he proves local usage or custom in support.

It is curious to note that in para. 4 of the plaint the landlords stated that the defendants were in possession of the disputed property as chandnadars tenants-at-will and from year to year and had no permanent right "according to law and local usages" over it and were bad tenants, wherefor the plaintiffs gave them notice to quit. The decision of the case must however rest not on whether the plaintiffs undertook to discharge the burden of proving local usage in support of the ejectment—as a matter of fact the only evidence that was given on the point was (as the lower Courts have said) a statement obtained from one of the tenants defendants that he cannot say if chandna tenants can be ejected at the will of the landlord—but on whether it was for the landlords to prove a local custom or usage in support of the ejectment claimed or for the chandnadars to prove a local custom or usage to defeat the suit. In my opinion the former is the true position..

I would accordingly allow the appeal and dismiss the suit with costs in all Courts.

Courtney-Terrell, C. J.—I agree.

Agarwala, J.—I agree.

S.R. *Appeal allowed.*

A. I. R. 1936 Patna 33

AGARWALA, J.

Ghanshyam Das Agarwala — Petitioner.

v.

Kisturibala Debi and *another*—Opposite Parties.

Civil Revn. No. 134 of 1935, Decided on 15th August 1935, from order of Sub-Judge, Dhanbad, D/- 4th February 1935.

Commission—Application for evidence on commission—Interrogatories filed by applicant—Court directing opposite party to file cross-interrogatories in four days — Party objecting to commission instead — Court ordering issue of commission on applicant's paying Rs. 200 to opposite party as costs—Order held within Court's jurisdiction.

An application was made by a party to a suit for examination of his witnesses on commission. The Court directed the applicant to file interrogatories which he wished to put to the witnesses and these being filed the opposite party was directed to file cross-interrogataries within four days. Instead of filing these the opposite party objected to the issue of commission. The Court thereon ordered that commission should issue only on condition that the applicant paid Rs. 200 to the opposite party as his costs in attending the commission:

Held : that the order was within the competence of the Court : *Pat Civil Revn No.* 102 *of* 1926, *Rel on.* [P 34 C 1]

A. C. Roy—for Petitioner.

S. C. Mazumdar—for Opposite Parties.

Order.—The petitioner is the defendant in a suit on a mortgage in the Court of the Subordinate Judge of Dhanbad. He applied for the examination on commission of two of his witnesses who do not live within the jurisdiction of the Court, one residing at Gwalior and the other at Lucknow. The Court directed the defendant to file interrogatories which he wished to be put to the witnesses. When this had been done, four days time was granted for the plaintiff to file cross-interrogatories. Instead of filing cross-interrogatories the plaintiff objected to the issue of the commission. The Court then directed that the commission should issue only on condition that the defendant paid to the plaintiff Rs. 200 as costs of the plaintiff in attending the commission. In revision it is contended that that order is without jurisdiction.

It appears however that in a similar case, Civil Revn. No. 102 of 1926 (1), decided on 11th May 1926, Bucknill, C. J., held that an order like the present was within the competence of the Court. That decision appears not to have been overruled. In these circumstances the order of the Court below will be modified to this extent : that the money will not be paid directly to the plaintiff, but will be deposited in Court as security for such costs as may be payable to the opposite party in the matter of commission. With this modification the application is dismissed with costs.

S.R. *Application dismissed.*

1. Villiers, Ltd. v. C. J. Smith, Civil Revn. No. 102 of 1926.

A. I. R. 1936 Patna 34

ROWLAND, J.

Mt. Horil Kuer and *another*—Defendants—Appellants.

v.

Rajab Ali and *others*—Plaintiffs and Defendants—Respondents.

Appeals Nos. 137 and 138 of 1932, Decided on 30th October 1935, from appellate decree of Sub-Judge, Ranchi, D/- 30th June 1931.

Evidence — Admissibility — Witness examined in chief — Circumstances making cross-examination impossible — Deposition can be treated as evidence on record — Weight of such evidence depends on circumstances — Court should see if indications that cross-examination would seriously have shaken testimony exist.

The deposition of a witness who has been examined-in chief but has not been cross-examined on account of certain circumstances which made the cross-examination impossible, need not be ignored and can be treated as evidence on the record. The weight to be attached to such evidence depends on the circumstances and the Court should look at the evidence carefully to see whether there are indications that by a completed cross-examination the testimony of the witness was likely to be seriously shaken or his good faith to be successfully impeached.: *Rex* v. *Doolin*, *Jebb C C* 123, *Davies* v. *Otty*, 55 *Eng Rep* 875, 16 *C W N* 991, 1925 *Mad* 497, 1929 *Lah* 840, *Rel on* ; 5 *C W N* 230*n*, *Not Foll.* [P 35 C 2]

Ray Guru Saran Prasad and *Ray Parasnath*—for Appellants.

K. K. Banerjee and *R. S. Chatterji*—for Respondents.

Judgment.—The substantial issue of fact in the litigation out of which these two appeals arise was whether an alienation of immoveable property made by Mt. Jadubansi Kuer was a valid alienation for consideration and for necessity. The Courts below have decided this question in the affirmative relying on the evidence of Jailal Pande. If the Courts were right in considering the evidence of Jailal Pande the whole case is concluded by the findings of fact; but it is contended that the deposition of Jailal Pande was not evidence and should have been expunged from the record. The deposition was not taken in open Court but recorded by a Commissioner, the witness being too ill to come to Court. He was examined-in-chief and cross-examined in part. The cross-examination was adjourned and the witness died before cross-examination could be resumed. The Courts below have relied on the note in Woodroffe and Amir Ali's Indian Evidence Act (Edn. 9, p. 983) to the effect that

> where the witness dies or falls ill before cross-examination his evidence will be admissible though its weight may be slight

The note itself is based on Taylor on Evidence, S. 1469, and Phipson's Law of Evidence (Edn. 7, p. 459). The appellant has pointed out that there is reference in Phipson to a case in which Farwell, J., rejected in toto the deposition of a plaintiff who was giving evidence on his own behalf, who fainted

and could not be cross-examined. There might have been in this case some suspicion that the plaintiff was evading cross-examination. Another case is cited by Taylor in which the affidavit was tendered of a witness who had left the country and therefore could not be cross-examined. The affidavit was rejected. There was some comment to the effect so as to give the opposite party a proper opportunity for cross-examination. On the other hand in 53 E R 351 (1), where the affidavit sought to be used was by a deponent who had since died, it was observed that the affidavit ought to have been filed earlier so that the opposite party would have had an opportunity for cross-examining, but Romilly, M. R. held that he could not take the affidavit off the file though in the circumstances he would be disposed to attach less weight to it than to the other evidence. In Jebb. C. C. 123 (2) a prosecution witness was taken seriously ill while under cross-examination; his evidence was taken into consideration and it was held by the majority of the Judges that the conviction based on his evidence was good in law. This has been regarded as a leading case. In 55 E R 875 (3) the Master of the Rolls said :

> The evidence of Susannah Davies must be admitted. It appears that her evidence was given on the 28th August last year, and that she died two or three days afterwards, which made it impossible to cross-examine her ; but there being no impropriety and nothing wrong in examining her, and no keeping her out of the way to prevent a cross-examination, I must receive her evidence and treat it exactly in the same way that I should the evidence of any other witness who from any cause whatever, either had not been cross-examined, or whom it was impossible to cross-examine.

In India decisions bearing on this point are scanty. In one case, 5 CWN 230n (4), where the cross-examination was incomplete a deposition was excluded from consideration. It does not appear that this case was ever fully reported and I cannot find that it has been followed. In 16 CWN 991 (5) the fact that a witness had not been cross-examined was held no bar to the reception of his deposition in evidence. In that case the opposite party, perhaps wilfully abstained from cross-examining. The decision in 48 Mad 1 (6) is directly in point. The question was as to the admissibility of the deposition of a witness who it is stated (p. 137 of the report) :

> was ill when she was examined in chief and her examination was adjourned after a few sentences in cross-examination were recorded. She died before cross-examination could be resumed.

Kumaraswami Sastri, J. said :

> I do not think that the evidence can be rejected as in admissible though it is clear that evidence untested by cross-examination on a question like the present can have no value. I think the correct rule is that the evidence is admissible but that the weight to be attached to such evidence should depend on the circumstances of each case and that though in some cases the Court may act upon it, if there is other evidence on record, its probative value may be very small and may even be disregarded.

This decision which was followed in 1929 Lah 840 (7) seems to me, if I may say so with respect, to state the law correctly. I do not understand the observations of the learned Judge to mean that there is any hard and fast rule that the probative value of such evidence is small, and in my view there is no such rule. The weight to be attached to the evidence depends on the circumstances and the Court should look at the evidence carefully to see whether there are indications that by a completed cross-examination the testimony of the witness was likely to be seriously shaken or his good faith to be successfully impeached. In the present case no circumstances have been brought to my notice which would tend to the view that Jailal's evidence was not entitled to weight. Jailal was the nearest presumptive male reversioner. He was actually a signatory to the document of transfer. What he deposed was (if he was interested at all) against his own interest and the fact that at the time of his deposition he was on his death-bed makes it as the Courts below pointed out unlikely that he would have been actuated by any ulterior motive to distort facts in favour of the party for whom he deposed. There was some cross- examination and it was through no fault either of Jailal or of the party calling him that it could not

1. Abadom v. Abadom, (1857) 53 E R 351.
2. Rex v. Doolin, Jebb C C 123.
3. Davies v. Otty, (1865) 55 E R 875=34 L J Ch 252=13 W R 484=12 L T 789.
4. J. Boisagomoff v. Nahapiet Jute Company, Ltd., (1902) 29 Cal 587=5 C W N 230n.
5. W. Stewart v. New Zealand Insurance Co. Ltd., (1912) 16 C W N 991=17 I C 188.
6. Maharaja of Kolhapur v. S. Sundaram Ayyar, 1925 Mad 497=93 I C 705=48 Mad 1.
7. Mangal Sen v. Emperor, 1929 Lah 840=1929 C R C 568=118 I C 647=30 Cr L J 951.

be completed. Therefore there was no legal objection to receiving in evidence the deposition of Jailal, and the Courts below have fallen into no error of law in relying on his evidence.

In second appeal the appellants produced with an affidavit two documents : one is a lease purporting to have been executed in 1874 by Kirparam in favour of Rajab Ali. The other is a certified copy of a deposition given by Rajab Ali in 1892. It is said that these papers were discovered too late to be used in the Courts below and it is suggested that they would discredit the evidence of Jailal as to the date of death of Kirparam. Jailal in his examination in chief had said he could not give the date of death of Kirparam. In cross-examination he said that "it might perhaps have been in 1864." If this was erroneous it does not in my opinion in any way go to affect the credit of Jailal as a bona fide and honest witness. I find no sufficient cause for admitting this additional evidence.

The result is that the appeals are dismissed with costs.

S.R. *Appeal dismissed.*

A. I. R. 1936 Patna 36

MACPHERSON, J.

Dewan Singh and *others*—Accused——Petitioners.

v.

Emperor—Opposite Party.

Cr. Revn. No. 451 of 1935, Decided on 23rd September 1935, from order of Magistrate, Gaya, D/- 16th August 1935.

Criminal P. C. (1898), S. 106—Conviction under S. 147, I. P. C.—Numerous injuries to person by lathi—Apprehension of recurrence of trouble owing to violence of offending party—Order under S. 106 in appeal held proper and could stand.

Several persons armed with lathis attacked another. They were convicted under Ss. 147 and 323, Penal Code. There was every reason to apprehend that there may be recurrence of the trouble owing to the violence of the party of the offenders:

Held: that an order under S. 106, Criminal P.C., though passed at the appellate stage was proper, though passed without special notice to the parties: 1927 *Pat* 37 *Disting.* [P 37 C 1]

Pitamber Jha and *Rati Kanta Chaudhuri*—for Petitioners.

Manohar Lal and *Raj Kishore*—for the Crown.

Order. — This rule is limited to the question whether an order under S. 106, Criminal P. C, which was passed at the appellate stage should stand. The bond into which each of the prisoners is asked to enter is for Rs. 100 with one surety of the like amount to keep the peace for one year. The findings of fact are that when Tulsi Mahto collected mangoes from trees on plot 442 and sent intimation to the various maliks to make arrangements to take their respective shares, some of the amlas of one malik Hari Singh attended, but the first petitioner, who was the gomasta of Raghunandan Singh and other maliks, brought a mob, including the other petitioners; and on a claim that the trees belonged exclusively to his master removed the mangoes after assaulting with lathis the amlas of the first named malik. The petitioners were convicted under S. 147 and also under Ss. 323 and 379, I. P. C., and were sentenced under S. 147, the first two petitioners who used iron-bound lathis to three months rigorous imprisonment and the others to rigorous imprisonment for one month. No further sentence was passed under Ss. 323 and 379. Upon appeal the convictions under Ss. 147 and 323 were maintained, while that under S. 379 was set aside. The sentences were mentioned and the appellate Court then added the following:

> As the trouble may recur, I think that an order under S. 106, Criminal P. C., should be made, and under that section, I direct the appellants each to enter into a bond for Rs. 100 with one surety of the like amount to keep the peace for one year.

In support of the rules reliance is placed upon the decision in 1927 Pat 37 (1). For the opposite party the contention is that that case is easily distinguishable from the present case as being a petty matter in which the Magistrate of the Second Class convicted under S. 323 and imposed a fine of Rs. 50 and the District Magistrate in appeal reduced the fine to one of Rs. 10 and added an order under S. 106, Criminal P. C. The contention on behalf of the opposite party is clearly sound. The present is a very different case in which Beradar Lal, a servant of Hari Singh, a malik, received at least five lathi blows, and there is every reason to apprehend that there may be a recurrence of the trouble owing to the violence of the party of

1. Jai Singh v. Emperor, 1927 Pat 37=97 I C 424 =27 Cr L J 1112.

the petitioners. It is however objected further to the order under S. 106 that no notice was given to the petitioners before the order was passed and reliance is again placed upon the decision cited. I am however not prepared to accept the view that it is an incorrect procedure contrary to general principles of justice for the appellate Court to pass an order under S. 106 without a special notice to the parties. It may reasonably be supposed that the whole matter is peculiarly within the vision of the appellate Court after it has heard the advocate on behalf of the appellants and that the appellants, especially in a case of appeal from a Magistrate of the Second Class, must, in spite of S. 349, Criminal P. C., have always before their eyes the possibility that the appellate Court will think it necessary to pass an order which the trying Court not having First Class powers, was not authorized to pass. Neither on principle nor in the circumstances of the particular case is any ground made out to warrant interference with the order under S. 106 passed by the appellate Court. The application is therefore without merits and the Rule is discharged.

S.R. *Rule discharged.*

---

* A. I. R. 1936 Patna 37

ROWLAND, J.

Bechan Mahton and *others*—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 515 of 1935, Decided on 5th November 1935, from order of Addl. Dist. Magistrate, Patna, D/- 26th August 1935.

*** Attachment — Warrant of attachment issued without notice under O. 21, R. 22 (1), Civil P. C.—Reasons not recorded under O. 21, R. 22 (2)—Warrant is not illegal—Resistance to execution of warrant is offence within Penal Code.**

It is settled law that if there was no jurisdiction to issue a warrant, resistance to the execution of such an illegal warrant is no offence. But merely by reason of failure to record reasons under O. 21, R. 22 (2), Civil P. C., for issuing process at once without waiting for a notice under O. 21, R. 22, Cl. (1), the warrant must not be deemed to be without jurisdiction and every resistance in the execution of such warrant is an offence under the Penal Code : 1931 *Cal* 443, *Foll.* [P 37 C 2, P 38 C 1]

Baldeo Sahay—for Petitioners.

Asst. Govt. Advocate—for the Crown.

Order. — The facts found by the Courts below are that two civil Court peons armed with a warrant for the attachment of crops in execution of a money decree were resisted by a number of persons led by the present petitioners ; the drummer and others of the party were assaulted and the peons had to withdraw without effectively making the attachment. The objection taken to the conviction of the petitioners under Ss. 186 and 147, I. P. C., is that it is said the warrant in the hands of the peons was no lawful warrant but was an illegal process issued without jurisdiction. Therefore it is said resistance or obstruction to the attachment was not an offence under S. 186, and an assembly with the common object of obstructing such an illegal attachment was not an unlawful assembly and its members should not be convicted of rioting. The execution in which the warrant was instituted more than a year beyond the disposal of the last previous execution of the same decree and therefore in the ordinary course a notice under O. 21, R. 22, Cl. (1) should have been issued before taking further proceedings by way of arrest or attachment of property. There is of course in R. 22, Cl. (2), a power to issue any process in execution of a decree without issuing a notice under O. 21, R. 22, Cl. (1), if, for reasons to be recorded, the Court considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice. In fact, the Munsif had issued a notice under O. 21, R. 22, Cl. (1) and it had been served on Bechan, the principal judgment-debtor, on 26th November 1934, by affixing it at his house. That notice directed the judgment-debtors to show cause against execution of the decree within 15th December 1934. The attempt made by the peons to attach the crops took place on 27th November 1934, and Mr. Baldeo Sahay has contended that no such step could lawfully be taken until after the expiry of the period fixed for the accused to show cause against execution.

It is of course settled law that if there was no jurisdiction to issue a warrant, resistance to the execution of such an illegal warrant is no offence. Bu

apart from referring to the rules of Sch. 1, Civil P. C., on which he relied, Mr. Baldeo Sahay was unable to point to any decision in which it has been held that merely by reason of a failure to record reasons for issuing process at once without waiting for a notice under O. 21, R. 22, Cl. (1), the warrant must be deemed to be without jurisdiction. In fact the only authority cited at the hearing, which is directly in point, is 58 Cal 940 (1) and this is directly against the contention of Mr. Baldeo Sahay. The decision lays stress on the fact that the warrant was within the jurisdiction of the Munsif to make and that the mere fact that reasons ought to have been recorded cannot make the act of the Court entirely invalid solely because of the omission to give reasons. Following that decision I think it is not shown that the warrant was illegal or that the petitioners have been wrongly convicted. The rule will be discharged.

B.D. *Rule discharged.*

1. Rajanikanta Saha v. Emperor, 1931 Cal 443=1931 Cr C 795=132 I C 244=32 Cr L J 886=58 Cal 940.

A. I. R. 1936 Patna 38

ROWLAND, J.

Baldeo Narayan Chaudhary and *others* —Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 577 of 1935, Decided on 5th November 1935, from order of Sess. Judge, Darbhanga, D/- 25th September 1935.

(a) Landlord and Tenant—Standing trees—Landlord cannot disturb raiyat.

So long as the trees stand the raiyat is entitled to use and enjoyment of them, and the landlord is not entitled to disturb that enjoyment. [P 38 C 2]

(b) Criminal Trial — Revision— Object of criminal act is question of fact—Concurrent finding of lower Courts should not be disturbed.

The question whether the principal object of the criminal act was acquisition of property or interference with another person's enjoyment is primarily a question of fact for the Courts below and ordinarily would not be taken up in revision if the Courts below have concurred in finding that the acts proved and the intention with which they were done constituted the offence of theft. [P 38 C 2]

B. C. De and *R. Chaudhary*—for Petitioners.

H. P. Sinha, *P. Jha* and *R. K. Chaudhary*—for the Crown.

Order. — The petitioners, four in number, have been convicted under Section 379, Penal Code, and each fined Rs. 20 on a charge of cutting and removing four trees (total value Rs. 8) situated on a holding in village Larugaon said to be in the possession of Suba Lal Thakur under a lease dating from about 1907 granted to him by a lady named Bahuria Saraswati Kuer. The defence was that the case was false; no such occurrence took place; the prosecution story has been invented in order to put pressure on Bahuria Saraswati Kuar through the accused who are her relatives and servants. Saraswati Bahuria has brought a title suit claiming to recover possession of the land from Suba Lal Thakur on the ground that his lease was a nominal and fictitious transaction. This defence was negatived by both the Courts below.

The substantial point taken in revision here is that the dispute is a bona fide civil dispute. This has been argued with much ingenuity by Mr. B. C. De; but in fact it is a case which if there were any substance in it ought to have been put forward in the Court below. Mr. De could not show that Saraswati Bahuria Kuar or the accused on her behalf had any bona fide claim to present possession over the land or the trees. It is suggested that according to the custom of this part of the country a raiyat is not entitled to timber and that removal of timber by or on behalf of his landlord cannot therefore amount to theft. This seems to be a novel proposition. So long as the trees stand the raiyat is entitled to use and enjoyment of them, and the landlord is not entitled to disturb that enjoyment. It is suggested that the offence committed should be considered to be mischief only, and not theft if the object was interference with the enjoyment of another rather than the taking of property for one's self. This is in agreement with some decisions of the Calcutta High Court, but unfortunately for the petitioners it seems to me that the question whether the principal object of the criminal act was acquisition of property or interference with another person's enjoyment is primarily a question of fact for the Courts below and ordinarily would not be taken up in revision if the Courts below have concurred in finding that the acts proved

and the intention with which they were done constituted the offence of theft.

In all the circumstances of the case I find no cause to interfere with the decision of the Courts below, and the rule is accordingly discharged.

B.D. *Rule discharged.*

A. I. R. 1936 Patna 39

DHAVLE, J.

Doman Mia—Defendant—Appellant.

v.

Gunaram Mahata—Plaintiff—Respondent.

Appeal No. 1183 of 1932, Decided on 1st August 1935, from decision of Dist. J., Manbhum-Sambalpur, D/- 3rd March 1932.

Chota Nagpur Tenancy Act (6 of 1908), Ss. 64 (3) and 67—Person reclaiming land though by trespassing on another's—He acquires occupancy rights in reclaimed land.

Where a person reclaims portions of certain land though it involves trespass on the land of another, he acquires an occupancy right in the portions reclaimed: 1917 *Pat* 243 and 1928 *Pat* 87, *Rel on.* [P 39 C 2]

G. C. Das for *S. C. Majumdar*—for Appellant.

Narendra Nath Ray—for Respondent.

Judgment.—This appeal arises out of a suit for declaration of title to and recovery of possession of two plots, Nos. 4590 and 4591, of the last survey. Of the defences raised it is now necessary to refer only to one. Plot No. 4590 is to the east of plot No. 4591 and immediately to the south of these plots is defendant's plots No. 4610. Defendant's case was that he had prepared a paddy field by reclaiming the land and that the plots claimed by the plaintiff, 4590 and 4591, notwithstanding that they were recorded in the record-of-rights in the plaintiff's name, really belonged to the defendant. The defendant was not able to establish his title to the plots claimed by the plaintiff; but the learned advocate for the defendant, who is the appellant before me, has urged that on the finding of the lower Courts that the defendant had reclaimed the land and prepared a paddy field, the defendant was entitled under S. 64, sub-S. (3) and S. 67, Chota Nagpur Tenancy Act, to have a right of occupancy in the land reclaimed by him and falling within plaintiff's plots Nos. 4590 and 4591. In support of this contention the learned advocate has cited 38 I C 478 (1), a decision of Atkinson, J. which was followed by Ross, J. in Second Appeal No. 89 of 1925 *Akshay Mandal* v. *Phalari Bhumij* and applied to a case where the plaintiffs were sthitiban raiyats and not Zamindars of the village at all and also a decision of Allanson, J., 1928 Pat 87 (2), in which that learned Judge pointed out that the word used in S. 64, for the person who converts land into korkar is "cultivator," not "raiyat" and that a landlord is not the same as a proprietor, so that a tenant may also be a landlord as defined in S. 3 (*xiv*) of the Act. On these rulings it seems clear that by his reclamation of portions of plots Nos. 4590 and 4591, though it involved a trespass on plaintiff's land, the defendant has acquired an occupancy right in the portions reclaimed. The learned advocate for the respondent has endeavoured to distinguish the rulings referred to on the ground that in some of them the suit was brought at the instance of the zamindar and that an occupancy raiyat cannot under S. 64 of the Act be himself a landlord without the meaning of the Act. These considerations, it seems to me, are no longer open in view of the authorities which the learned advocate for the appellant has been able to cite and which were not brought to the notice of the lower Court. The korkar right as such was not pleaded in the written statement, but it was definitely urged in the Court of first appeal, and there were allegations in paras. 18 and 19 of the written statement which clearly raised the question: cf. 2 P L T 635 (3). There are also findings of the lower Courts as regards the factum of the reclamation. The learned Munsif says:

> It cannot be denied that the defendant has really prepared a paddy field in the disputed land and probably the work of reclamation is still in progress.

This must be taken with the fact that from 1926 onwards disputes have been going on between the parties resulting in a criminal case in 1926 and a title suit in 1928 which was withdrawn with leave to bring a fresh suit on the same

---

1. Rahamali Kalal v. Chintamon Kumar, 1917 Pat 243=38 I C 478.
2. Lai Sahi Palian v. Deba Munda, 1928 Pat 87 =105 I C 58.
3. Parashram Deogharia v. Pratap Udai Nath, 1921 Pat 506=63 I C 783=2 P L T 635.

cause of action. The learned District Judge on appeal also finds that the defendant has been re-claiming the land of his plot No. 4610, and in doing so has encroached upon the disputed plots which belonged to the plaintiff and that the Commissioner who was deputed in the case has found, notwithstanding the evidence adduced on behalf of the defendant that he had re-claimed the land of his own holding only, that the defendant had encroached upon some portions of plots Nos. 4590 and 4591 belonging to the plaintiff. The learned District Judge held that in spite of this reclamation the defendant had no right to the portion encroached upon, and for this view he gave three reasons, which are all covered by authorities cited by the learned advocate for the appellant. It is clear therefore that this appeal must succeed. Difficulty has however arisen by reason of the fact that the Commissioner's nomenclature is unintelligible with reference to his map and that neither of the advocates before me has been able to show from the Commissioner's report and his map what portions of plots Nos. 4590 and 4591 exactly have, according to the Commissioner, been converted into a paddy field. The only course open to me, in these circumstances, is to allow this appeal, set aside the decree of the lower Courts and direct that the plaintiff's title be declared in respect of such portions of plots Nos. 4590 and 4591 as may appear not to have been reclaimed. For this purpose it will be necessary to send the case to the trial Court, and it will be open to that Court to recall the Commissioner and ascertain from him in the presence of the parties, after a further deputation, if necessary, what portions of these plots exactly he found converted into a paddy field. The learned advocate for the respondent suggests the addition of the words "by the defendant". But in the first place that would not be within the competence of the Commissioner, and, secondly, having regard to the character of the plots and the course of litigation, so far it is quite clear that the reclamation of conversion to korkar has been by the defendant only. There will be no order for costs about the hearing in this Court, and no party will pay any costs to the other in respect of the hearings in the lower Courts so far; but the costs of the further hearing in the trial Court will be in the discretion of that Court.

S.R. *Order accordingly.*

A. I. R. 1936 Patna 40

WORT, J.

Gopi Nath Varma—Defendant 3—Petitioner.

v.

Manaur Husain and *others*—Plaintiff and Defendants—Opposite Parties.

Civil Revn. No. 393 of 1935, Decided on 6th November 1935, from order of Munsif, Third Court, Patna, D/-12th July 1935.

Practice—Pleading—Judgment or order not in conformity with pleadings—Successful party should be asked to amend his pleadings.

If a judgment or order is made which is not entirely in conformity with the pleadings, the party in whose favour the judgment is pronounced should be called upon to amend his pleadings. [P 40 C 2]

Rajeshwari Prasad—for Petitioner.

B. C. Sinha, *Azizulla* and *K. Dayal*—for Opposite Parties.

Order.—This rule is misconceived. The action was for hire of a taxi. The plaintiff in the first place brought his action against defendants 1 and 2. At a later stage, whilst the action was pending, he joined defendant 3, against whom judgment had been pronounced, but omitted to amend his plaint in conformity with the evidence which he ultimately gave against defendant 3. For reasons best known to himself defendant 3 failed to defend the suit and in his absence the Judge gave judgment against him without formally calling upon the plaintiff to amend his plaint. The fact that there was no formal amendment is the only possible point that could be made against the decision of the Court below. But as it was merely a formality in the circumstances it was immaterial although it ought to be noted by Judges who try these cases that if a judgment or order is made which is not entirely in conformity with the pleadings, the party in whose favour the judgment is pronounced should be called upon to amend his pleadings. For those reasons the rule must be discharged with costs; hearing fee one gold mohur.

S.R. *Rule discharged.*

---

* A. I. R. 1936 Patna 41

MOHAMMAD NOOR AND SAUNDERS, JJ.

Bahuria Ram Sakhi Kuer — Plaintiff —Appellant.

v.

Bindeswari Saran and *others*—Defendants—Respondents.

Appeals Nos. 4 and 149 of 1934, Decided on 25th September 1935, from original decree of Sub-Judge, First Court, Chapra, D/- 4th February 1933.

*** (a) Administrator —Alienation prior to — Letters of administration — Alienation prior to grant is not binding on estate — Estate mortgaged prior to grant for paying court-fees for getting letters of administration—Hence mortgage is binding on estate.**

A person to whom letters of administration of an estate are subsequently granted is an absolute stranger to the estate till the grant, and therefore he has absolutely no power to alienate the estate prior to such grant and the alienation if made cannot be binding on the estate. But where the estate is mortgaged prior to the grant by a person for the payment of court-fees payable by the estate, for obtaining letters of administration, the mortgage is valid and binding on the estate. [P 43 C 1]

(b) Contract Act (1872), S. 16—Undue influence—Probate proceedings—Grant made subject to payment of court-fees—Lawyers advancing money on mortgage of estate — Mortgage held not made under undue influence.

In a probate proceeding the grant was made to the applicant subject to the condition that he paid court-fees due therefor. The lawyers employed by the applicant in the proceeding advanced the money to the applicant on a mortgage of the estate in question :

Held : that it could not be said that the lawyers took advantage of their position and that the mortgage was executed under undue influence. [P 43 C 2]

G. P. Das, Jadubans Sahay, Rajeshwari Prasad, Pitambar Misra and *Sukhdeo Prasad*—for Appellant.

Harnarayan Prasad and *Jaleshwar Prasad*—for Respondents.

Mohammad Noor, J. — The facts leading to these two appeals are these : One Trigunanand Upadhya died on 26th July 1915, leaving a will of the same date. His two granddaughters, Babui Rajeshwary Kuer and Babui Bhagwati Kuer (daughter's daughters) obtained, on 4th June 1921, an order for grant to them of letters of administration of the estate of the deceased. It appears that at that time under some previous order of the District Judge the properties were in the possession of the Court of Wards who was asked to pay the court-fee payable on the letters of administration. On 26th November 1921, the Collector of the District representing the Court of Wards replied that he was not prepared to pay the court-fee. It seems that the two ladies then executed a mortgage-deed in favour of Bindeshwari Saran and Harihar Saran, the principal respondents in these two appeals for a sum of Rs. 10,000 mortgaging the properties of the estate. The object of the loan as mentioned in the mortgage-deed was the payment of the court-fee which amounted to Rs. 9,636 ; the balance was stated to have been taken for costs of the execution of the document and its registration and for some sundry expenses. This deed is dated 19th December 1921, and the court-fee was paid in Court on 21st December 1921, and letters of administration were issued on 3rd January 1922. The mortgage was not redeemed and the mortgagees, viz. Bindeshwari Saran and Harihar Saran, had to institute a suit for enforcement of that mortgage (mortgage suit No. 119 of 1928), which was decreed on 25th July 1930, and the decree was made absolute on 25th July 1931. Thereafter Bahuria Ramsakhi Kuar, widow of the testator, brought a suit for a declaration that the mortgage created by the two ladies, Rajeshwari Kuar and Bhagwati Kuer, was not binding upon the estate of her husband and that the mortgagees were not entitled to sell the mortgaged properties of the estate in execution of their decree and for a permanent injunction against them not to do so. Her case was that the court-fee was paid by the two ladies after pledging their ornaments. The learned Subordinate Judge who heard the suit, though he practically dismissed it, has in form passed a decree that the plaintiff, Bahuria Ram Sakhi Kuar was entitled to redeem the mortgage. The term of the decree runs thus :

> The suit is decreed. The plaintiff will be entitled to pay to defendants 1 and 2 (the mortgagees) the money due to them under the decree passed by the Court in Suit No. 119 of 1928, within six months from this date.

I am unable to appreciate this order, nor can I appreciate his observation that the plaintiff (Ramsakhi Kuar) was entitled to avoid the mortgage only by paying the mortgage decree money on the amount which has already been realized by the mortgagees. Everybody

affected by a simple mortgage decree can avoid its effect by paying up the decree. For this no decree of a Court is needed. The only effect of this decree was that the period of grace was extended but it was of no practical advantage to the plaintiff Bahuria Ramsakhi Kuer and she has preferred an appeal against this decree and it is First Appeal No. 4 of 1934. The only point to be determined in this appeal is whether the mortgage decree obtained by the principal respondents, viz., Bindeshwari Saran and Harihar Saran is binding upon the estate of the testator Babu Trigunanand Upadhaya.

Coming to Miscellaneous Appeal No. 149 of 1934, it seems that the two ladies, Rajeswari Kuar and Bhagwati Kuar to whom letters of administration were granted did not perhaps carry on the administration properly. Therefore, the letters of administration were revoked and fresh letters of administration have been granted to Babu Sukhdeo Prasad, an Advocate of the Court. Babu Sukhdeo Prasad was added in the execution proceedings of the mortgage decree as a judgment-debtor. He objected under S. 47, Civil P. C., to the execution being taken out against the estate on the ground that the two ladies had no power to mortgage the property of the testator's estate they not being then the administrators appointed by the Court, and that even had they been properly appointed administrators, they had no power to mortgage the properties without the sanction of the Court and further that the two ladies were not sued in their capacity as administrators of the estate and therefore the decree was not executable against the estate and the new administrator ought not to have been added as judgment-debtor. The learned Subordinate Judge has overruled these objections and the administrator has come up in appeal (Miscellaneous Appeal No. 149 of 1934). We are informed that since then the bulk of the decretal money has been realized and a very small portion, something like about Rs. 1,400 only, is still to be realized. The question to be decided in this miscellaneous appeal is also practically the same as in the first appeal, viz., whether the mortgage decree obtained by the two respondents, Bindeshwari Saran and Harihar Saran, is binding on the estate, and if so, to what extent the execution could legitimately be taken against that estate.

It is clear that at the time of the execution of the mortgage the two ladies, Rajeshwari Kuar and Bhagwati Kuar, were not administrators of the estate the letters of administration not having been granted to them till then. The law in this respect as it then stood was contained in S. 90, Probate and Administration Act of 1881 (corresponding to S. 307, Succession Act of 1925). An administrator is not empowered to alienate the property under his charge without the sanction of the Court. Here, however, we have a case in which the act complained of was the mortgage created prior even to the issue of the letters of administration to the ladies. Under S. 14 of the Act of 1881 (corresponding to S. 220, Succession Act, 1925) letters of administration entitled the administrator of rights belonging to the intestate as effectually as if the administration had been granted at the moment after his death. The principle of this section and of S. 15 (now S. 221, Succession Act, 1925) applies also to administration grants with the will annexed. But this section has no reference whatsoever to the administrator's power of making a transfer prior to the grant of administration. It only says that all the rights which were vested in the intestate will vest in the administrator as if the administration has been granted to him immediately on his death. The next section says that letters of administration do not render valid any intermediate acts of the administrator tending to the diminution or damage of the intestate. No doubt an alienation of property obviously causes diminution of the estate. It is settled law that the power of the executor is derived from the will whilst the power of an administrator is derived from the Court and nothing can be done by him until the administration is granted. A person to whom letters of administration are subsequently granted is an absolute stranger to the estate till the grant, and therefore, the two ladies, in my opinion, had absolutely no power to mortgage the properties of the estate, and we hold that the mortgage as such was not binding upon the estate. But the matter does not end here. The money was borrowed, according to the

recital in the mortgage deed for paying the court-fee which was payable by the estate of the deceased. The decree has to a very large extent been realised and the question whether the money was realizable as a mortgage debt or as a simple debt has now become of a purely academic interest. The only question now to be decided is whether the money has been rightly realised under the execution of the decree and whether the decree-holders were to refund any amount to the estate of the deceased, and, if so, how much.

In Part 2, Book 1, Ch. 1, of Williams on Executors, the law on this point is thus stated: "An administrator derives his title wholly from Court; he has none until the letters of administration are granted, and the property of the deceased vests in him only from the time of the grant; but if during the time when there is no personal representative of the estate of a deceased person, services have been rendered which not only were for the benefit of the estate, but also were rendered under a contract with some one who subsequently by becoming administrator became authorized to bind the estate and who ratified the contract, the estate of such deceased person is liable for such services." Therefore the mortgagees Bindeshwari Saran and Harihar Saran having advanced money for the payment of the court-fee payable by the estate of the deceased are entitled to get back the money not only the principal but also interest at a reasonable rate and the cost of realisation. No doubt in her suit Bahuria Ramsakhi Kuar denied the genuineness of the mortgage and characterised it as fraudulent, but her learned advocate Mr. Gajendra Prasad Das with his usual fairness has not thought it fit to press that point before us. In fact there is no substance in this part of her case as has been held by the learned Subordinate Judge. The learned advocate has, however, contended that as one of the mortgagees, Mr. Bindeswari Prasad was a lawyer for her in some stage of the probate proceeding and the father of another mortgagee (Babu Jagarnath Saran) was also a lawyer for her in that case, they were not entitled to any interest whatsoever as they took advantage of their position. I am unable to accept this contention. First of all this point was not raised before the lower Court nor is there any material to show that the two gentlemen were the plaintiff's lawyers in the proceeding in question. But apart from this there is no question of any undue advantage being taken by these two gentlemen. The position was that letters of administration were ordered to be given to the two ladies but they had no money to pay the court-fee, and if these two gentlemen came up to advance the money, there was nothing in this which can be characterised as unfair. Now, the interest under the bond is 18 per cent per annum, simple. In my opinion however the mortgagees are not entitled to get interest on the basis of contract as at the time when the money was advanced the two ladies were not in a position to enter into a contract on behalf of the estate. They are entitled to interest on the general ground that a man who advances money to another is entitled to get a reasonable amount of interest. In my opinion interest at 15 per cent. per annum simple is a reasonable amount which they are entitled to get.

In First Appeal No. 4 of 1934 the order will be that the plaintiff's suit be decreed and it be declared that the mortgage decree was not binding upon the estate, but that the estate was bound to pay defendants 1 and 2 of that suit the principal sum of Rs. 10,000 together with interest at the rate of 15 per cent. per annum, simple interest, from the date of the loan till the date of realisation together with the costs of the suit awarded in the mortgage decree and that the parties will bear their own costs throughout.

Misc. Appeal No. 149 *of* 1934.

The decision given above governs this appeal also. The only additional point urged in this appeal was that the two ladies Rajeshwari Kuar and Bhagwati Kuer, were sued not as administrators but in their own individual capacity. I am, however, of opinion that the learned Subordinate Judge has rightly held that the plaint clearly showed that the suit was intended to be against the estate as represented by the administrators. The order therefore will be that the appeal be partly allowed. Though the decree-holders were not entitled to execute their decree as a mortgage decree against the estate of the deceased, they were

entitled in execution of their decree to realise the principal sum of Rs. 10,000 together with 15 per cent. per annum simple interest, from the date of the loan till the date of realisation together with the costs of the mortgage suit. I would direct that an account be prepared on these lines; interest on the sum of Rs. 10,000 should be calculated from the date of the loan till the date on which any money was paid towards the satisfaction of that debt; if the amount paid was not more than the interest due on that date, the entire amount paid will be credited towards the interest and the principal will continue to carry interest at the rate specified above. To the sum found due on the date of the last payment will be added the amount of cost allowed in the mortgage suit; if the respondents have realised anything in excess according to the above calculation they will have to refund it to the administrator with interest at the rate of 12 per cent. per annum from the date of such excess payment till the date of refund. Parties will bear their own costs of this appeal also.

Saunders, J.—I agree.

S.R. *Order accordingly.*

A. I. R. 1936 Patna 44

JAMES AND SAUNDERS, JJ.

Kinei Majhi and *others*—Petitioners.

v.

Gobind Prasad Singh and *others* — Opposite Parties.

Criminal Ref. No. 40 of 1935, Decided on 12th November 1935, from order of Sess. Judge, Cuttack, D/- 21st September 1935.

Criminal Trial — Breach of peace — One party filing complaint against another — Complaint dismissed under S. 203, Criminal P. C.—On report to Superintendent of Police, enquiry issued — Magistrate on report from police starting proceedings under S. 144, Criminal P. C.—Institution of enquiry under S. 147, Criminal P. C., dates back only when breach of peace was brought to notice of Magistrate.

One party filed a complaint against another who had dispossessed the complainant of his rights of ferry. On enquiry the complaint was dismissed under S. 203, Criminal P. C. The complainant made a report against the other party to the Superintendent of Police. On police enquiry it was discovered that there was a likelihood of breach of peace between the two parties. On the police report Magistrate started enquiry under S. 147 and passed orders. Question was as to what date the institution of enquiry of the Magistrate related back:

Held : that the date of the institution of the enquiry is the date when the likelihood of a breach of the peace was brought to his notice, and not the date when he dismissed the complaint. [P 44 C 2]

S. C. Bose—against the Reference.

Judgment.—The petitioners formerly exercised a right of ferry on the Brahmani river, but they were turned out by the tahshildar of the Aul estate in October 1934. On the 26th October one of them reported at the local police station that they had been dispossessed from this ferry, on the ground that both banks of the river had now become part of the Aul estate, and that the petitioners had no longer any right to ply a ferry there. No action was taken on this report by the police. On the 29th October a complaint was made before the Magistrate charging the opposite party with theft and assault and acts of mischief. The Magistrate after enquiry found that the facts stated in the complaint had not been substantiated, and dismissed the complaint under S. 203, Criminal P. C. An application to the Sessions Judge for an order for further enquiry was rejected ; but the Sessions Judge remarked that as there was tension between the parties, action under one of the preventive sections of the Criminal Procedure Code might be found advisable. On 19th February 1935 the petitioners applied to the Superintendent of Police that action might be taken. The petition was sent to the local Sub-Inspector for necessary action, and the Sub-Inspector on the 28th February submitted a report to the effect that there was danger of a breach of the peace and that proceedings should be taken under S. 144, Criminal P. C. Subsequently an enquiry was instituted under S. 147, Criminal P. C., where in the Magistrate found that although the petitioners had been enjoying a right of ferry until they had lost possession in October 1934, he must maintain the possession of the opposite party, because the petitioners had not enjoyed possession within three months from the institution of the enquiry. The Sessions Judge has referred the proceedings to this Court under S. 438, Criminal P. C., on the ground that the learned Magistrate erred in treating as the date of the institution of the enquiry, the date when the likelihood of a breach of the peace was brought to his notice.

In our judgment the view taken by the learned Magistrate was correct. It cannot be said that the existence of a dispute likely to cause a breach of the peace was brought to the notice of the Magistrate before the police report was received on 28th February 1935. The learned Sessions Judge suggests that it was open to the Magistrate to draw up formal proceedings under S. 147, as soon as the police report was received on the complaint of theft and assault; but as we understand from the papers before us, that report was to the effect that the complaint of assault and theft was untrue, and there is nothing to indicate that the report recommended that action should be taken under any of the preventive sections of the Code. Still less is there anything to indicate that any such action was taken. It cannot be said that the enquiry was instituted by the act of dismissing the complaint under S. 203, when action under S. 147 was not even contemplated ; and the decision cited by the learned Sessions Judge has no application to the facts of this case. We cannot interfere with the order of the Deputy Magistrate of Kendrapara and the reference is discharged.

B.D. *Reference discharged.*

** A. I. R. 1936 Patna 45

(Full Bench)

COURTNEY-TERRELL, C. J. AND WORT, MACPHERSON, MOHAMMAD NOOR, DHAVLE, AGARWALA AND VARMA, JJ.

Gabriel Christian—Defendant 1—Appellant.

v.

Chandra Mohan Missir and *another*—Plaintiffs and Defendant 2—Respondents.

Appeal No. 1216 of 1932, Decided on 22nd November 1935, from appellate decree of Special Sub-Judge, Ranchi, D/- 30th May 1932.

**** Limitation Act (1908), S. 12— 'Time requisite for obtaining copy of decree appealed from' means time necessary in any case for obtaining copy of decree— Period under appellant's control is not time requisite—Judgment delivered on 6th December —Decree signed on 13th—Copy obtained on 15th—Period between 6th and 15th held beyond appellant's control and should be excluded :** 6 *P L J* 350=1921 *Pat* 175=62 *I C* 649, *Overruled.*

The words 'time requisite for obtaining copy of the decree appealed from' in S. 12 mean the time which would have been necessary in any case for obtaining the copy of the decree appealed from. No period which may be under the control of the appellant between the date upon which the judgment is pronuonced and the date upon which the appeal was filed can be considered as the time requisite within the meaning of S. 12. [P 46 C 1]

A judgment was delivered on the 6th December but the decree was not signed until the 13th. The copy of the decree was delivered to the appellant on the 15th:

Held: that the period between 6th and 15th December was not under the control of the appellant and should be excluded while computing the period of limitation. Therefore the appeal was within time: 1928 *P C* 103, *Rel on*; 6 *P L J* 350 = 1921 *Pat* 175 =62 *I C* 649, **Overruled.** [P 46 C 2]

A. B. Mukharji and *U. N. Bannerjee* —for Appellant.

B. C. De, *K. K. Bannerjee* and *L. K. Choudhury*—for Respondents.

Judgment.—This appeal has been dismissed as time barred and the question before us is one of limitation and whether the appellant is entitled to an allowance of time under S. 12, Lim. Act. The judgment of the trial Court was dated 6th December 1930; the decree was not signed until 13th December. Meanwhile on 10th December, the appellant applied for a copy of the judgment and decree. The copy was not ready for delivery until 15th December and the appeal was filed on 13th January. Under Art. 152 the time for lodging the appeal is 30 days from the date of the judgment. The last date for filing the appeal was the 11th January; the 12th January was a Sunday and the appeal was filed on the 13th. If the appellant is not entitled to the benefit of Art. 12 in respect of the period between judgment and his application for a copy thereof, his appeal is out of time by one day. The Subordinate Judge allowed the appellant six days from the 10th to the 15th, that is to say from the date of application for copies until the copies were delivered and declined to allow any period prior to the date of application.

The decision of the Subordinate Judge came on second appeal before one of us, Dhavle, J., and the appellant contended that a Full Bench decision of this Court

in 6 Pat L J 350 (1) had virtually though not specifically, been overruled by subsequent decisions of the Privy Council. Dhavle, J., directed that the matter be heard before a larger Bench and came before the Chief Justice, Dhavle, J., and Agarwala, J. In view of the fact that the Full Bench decision referred to was decided by a Bench of five Judges, it was considered desirable that the case should be reheard before a full Court. We have heard the arguments at length and all the authorities have been cited to us. The difference of opinion has arisen over the construction of the words in S. 12, sub-Ss. (2) and (3)—"the time requisite for obtaining copy of the decree appealed from" and the choice is between two alternative constructions depending upon whether (a) the proper emphasis is upon the word 'requisite' so that the meaning is "the time which would have been necessary in any case" or (b) whether the emphasis should be upon the word 'obtaining' with the result that the meaning is as though the words were "the time actually employed by the appellant" and hence that no time preceding the application for copies by the appellant can be considered. In our opinion the former of these alternatives is the correct construction and that it is correct is shown by the observations of their Lordships of the Judicial Committee in 6 Rang 302 (2). The result is that no period which may be under the control of the appellant between the date upon which judgment is pronounced (which is the date of the decree under the Civil Procedure Code) and the date on which the appeal was filed can be considered as the time requisite within the meaning of S. 12. In most cases the decree of the trial Court follows upon the judgment without the parties being required to do anything in the interval; and in such cases the appellant will be entitled to the exclusion of the time between the judgment and the decree. In exceptional cases, such (for instance) as cases of partition and mesne profits, the drawing up of the final decree may depend upon the filing of the necessary stamp paper or court-fees; in such cases the execution of time in favour of the party who is to file the court-fees will depend upon the circumstances, but other parties to whom no responsibility attaches for the delay will be entitled to exclude the time.

In this case the period between the 6th December the date of delivery of the judgment and the 15th December, the date upon which the copy of the decree was delivered to the appellant was not under the control of the appellant and should be excluded in computing the period of limitation, and the appeal being filed on 13th January which was within the period of limitation thus computed was within time. To the extent that the Full Bench decision in 6 Pat L J 350 (1) decided that the period between the date of judgment and the application for copy of the decree can in no case be excluded it was wrongly decided. The case will be remitted to the lower Court to be dealt with on the merits. No order will be made as to costs incurred in the High Court.

S.R. *Appeal allowed.*

1. Jyotindranath Sarkar v. Ledna Colliery Co. Ltd., 1921 Pat 175=62 I C 649=6 Pat L J 350=2 Pat L T 361 (F B).
2. Jijibhoy N. Surty v. T. S. Chettyar Firm, 1928 P C 103=109 I C 1=55 I A 161=6 Rang 302 (PC).

A. I. R. 1936 Patna 46

JAMES AND SAUNDERS, JJ.

Hari Mahto—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 457 of 1935, Decided on 5th November 1935, from order of Sess. Judge, Bhagalpur, D/- 29th July 1935.

(a) Criminal Trial—Jury—Misdirection—Case under S. 366—Father of girl lodging information to police—He not suspecting till then that daughter taken away for illicit intercourse as girl serving as maidservant at accused's—Hence suspecting no foul play—Court asking jury during direction to consider explanation in arriving at conclusion—Court's statement held no misdirection.

In a case under S. 366, I. P. C., the father of the girl, who first reported the matter to the police did not suspect upto the time of lodging the information of the offence at the police station, that his daughter had been taken away for the purpose of being forced to illicit intercourse since she had already been working as a maidservant in the house of the accused. So he did not suspect any foul play. The Assistant Sessions Judge in his direction to the jury told them to consider this explanation in arriving at their conclusion.

Held: that there was no misdirection in the Court's statement to the jury. [P 47 C 2]

(b) Criminal Trial—Jury—Misdirection—No failure of justice by misdirection—Appellate Court is not bound to set aside verdict.

An appellate Court is not bound to set aside the verdict of a jury merely because there was a misdirection unless it also finds that the misdirection had in fact occasioned a failure of justice. [P 47 C 2]

(c) Criminal Trial—Evidence—Defence obtaining copy of prosecution witness's statement—Statement favourable to accused—Witnesses not questioned on point during trial—Jury's verdict of guilty—Defence held could not utilise statement to invoke High Court's revisional powers and interfere with verdict.

Where the defence had obtained a copy of a statement of a prosecution witness which statement was in their support, but they did not question that witness or any other on the point during the trial, and the accused was declared guilty by the jury:

Held: that the defence could not make use of that statement in revision for invoking High Court's powers of revision to interfere with verdict of the jury. [P 48 C 1]

(d) Criminal Trial—Prosecution citing 9 witnesses on certain point—Examining only 3—Presumption adverse to prosecution held could not be drawn from that fact.

The prosecution had cited 9 witnesses for evidence on a certain point, but they examined only 3 and gave up the rest:

Held: that no presumption adverse to the prosecution could be drawn from the fact that they did not consider it necessary to examine all the witnesses. [P 48 C 2]

(e) Criminal Trial—Jury—Verdict of guilty—Jury recommending accused to mercy—Recommendation held did not imply that they believed accused not guilty.

The jury returned a verdict of 'guilty' but attached to their verdict a rider recommending the accused to mercy:

Held: that this recommendation for mercy did not imply that the jury did not believe the accused guilty at all. [P 48 C 2]

(f) Criminal Trial—Sentence—Case under S. 366, I. P. C.—Accused sentenced to 4 years R. I.—Abducted girl travelling willingly with accused's servant subsequent to offence—Lighter sentence held sufficient.

In a case under S. 366, I. P. C., the accused was sentenced to four years rigorous imprisonment. Subsequent to the commission of the offence it appeared that the abducted girl had been travelling willingly with the servant of the accused:

Held: that a lighter sentence would meet the ends of justice and should be reduced to 6 months rigorous imprisonment. [P 48 C 2]

H. P. Sinha and *R. K. Chaudhuri*—for Petitioner.

Asst. Govt. Advocate—for the Crown.

James, J.—The petitioner has been convicted by the Assistant Sessions Judge of Bhagalpur, sitting with a jury, of an offence punishable under S. 366, I. P. C., and has been sentenced to four years' rigorous imprisonment. The appeal by the petitioner to the Sessions Judge was dismissed. The learned Sessions Judge in the course of his judgment in appeal held that certain remarks by the learned Assistant Sessions Judge in his address to the jury amounted to misdirection ; but he considered that they could not have misled the jury or have led to any failure of justice.

The case for the prosecution was that the petitioner Hari Mahto had taken away by force from her father's house the girl Sagia. When the father returned to his house late at night he learnt from his wife that his daughter had been dragged away by Hari Mahto. After attempting to recover her from Hari Mahto's house he reported at the police station that Hari Mahto had taken her away and would not permit her to return. The expression used by the Sub-Inspector 'bolake legya' may imply that he called her and took her away without the use of force though it does not necessarily imply that force was not used. It was suggested on behalf of the prosecution that up to the time of lodging information at the police station, the father did not suspect that his daughter had been taken away for the purpose of being forced to illicit intercourse, since she had already been working as a maid-servant in Hari Mahto's house and the father did not suspect what the Assistant Sessions Judge calls foul play. He told the jury to consider this explanation in arriving at their conclusion. It is difficult to see any misdirection in his statement to the jury ; and I do not understand why the learned Sessions Judge regarded it as such. But he considered that it could not have misled the jury or have led to a failure of justice, in which view he was certainly right. The learned advocate for the petitioner suggests that having found that there had been misdirection, the learned Sessions Judge was obliged to set aside the verdict ; but by the provisions of S. 537 (d), Criminal P. C., he could not do that unless he found that the misdirection had in fact occasioned a failure of justice.

S. N. DAR,
Vakil High Court.

It is suggested in the second place that we should exercise extrarodinary revisional powers and interfere with the verdict of the jury, because the girl, a fortnight after the institution of the case, is said to have told a police officer that before she was abducted she had had a love affair with the petitioner. The suggestion is of course quite impracticable. It appears that two days before the trial opened, the defence obtained a copy of this statement, on which the girl or the Sub-Inspector might have been questioned. They preferred to keep silent upon the matter ; and it is quite impossible to make use of that statement now. It certainly cannot be suggested that the learned Assistant Sessions Judge erred in not mentioning to the jury facts which had not been proved in Court. The witness Rasul Buksh remarked in the committing Magistrate's Court that when the girl was found by the police she said that she had been taken by force and also that she had gone away willingly. It is suggested that in some way or other the jury have been misled regarding the evidence of this witness ; but the learned Assistant Sessions Judge clearly says that the evidence of the witness did not support the girl's story that she told him that she was being forcibly taken away by the two accused. It is suggested that the jury were not told with sufficient clearness that they must find that the girl was taken away by force ; but there is no ambiguity in the manner in which the learned Assistant Sessions Judge has dealt with this question. Their verdict must be treated as a finding that the allegation that the girl had been taken away by force had been proved.

When the father made his first statement to the police station he named certain witnesses and he named other witnesses when he lodged his first information after the girl had been found. Only three of these witnesses were examined in Court and the prosecution was criticised on the ground that a number of witnesses named in the sanha and first information had not been examined. On this point the learned Assistant Sessions Judge remarked that there was no bar to the examination of witnesses not mentioned in the first information ; and that as regards the witnesses who were named therein and not examined, it did not appear that they would have given evidence material to the case. He remarked that if the accused had wanted these witnesses to be produced they could have applied to the Magistrate or to him ; and he would have called them if it had been suggested to him that the witnesses were wanted. There is nothing to indicate in the sanha or in the first information report on what particular points these witnesses were to be examined ; and when the informant and the investigating officer were in the witness-box no questions were put to them on this matter. It is suggested that these were witnesses who would have given evidence regarding the dragging away of the girl from her father's house. If this was so, it is sufficient to say that three witnesses were examined on this point ; and no presumption adverse to the prosecution can be drawn from the fact that they did not consider it necessary to examine nine. If the defence desired that these witnesses should be treated as necessary witnesses, they should have elicited from the first informant or from the Sub-Inspector on what points they were giving evidence. They did not do so and the learned Assistant Sessions Judge has dealt with this matter quite correctly in his charge to the jury.

The jury attached to their verdict of guilty a rider recommending the accused persons to mercy ; but the learned Assistant Sessions Judge imposed a sentence of four yours' rigorous imprisonment. We cannot agree with the learned Advocate for the petitioner that this recommendation for mercy really implied that the jury did not believe the prisoners to be guilty at all. But they probably recommended Hari Mahto to mercy on account of his youth; and we consider that a lighter sentence might have met the ends of justice in this case, since although the girl may have been dragged by force from her father's house, she appears to have been subsequently travelling willingly with the servant of the petitioner. The sentence may be reduced to one of six months' rigorous imprisonment.

Saunders, J.—I agree.

S.R./R.K. *Sentence reduced.*

A. I. R. 1936 Patna 49

FAZL ALI AND LUBY, JJ.

Panday Bisambhardeo Narayan Singh and *others*—Appellants.

v.

Hitnarayan Singh—Respondent.

Appeals Nos. 887, 1207, 1072, and 1043 of 1932, Decided on 2nd October 1935, from decision of Dist. Judge, Shahabad, D/- 19th May 1932.

(a) Second Appeal—New facts cannot be investigated.

New facts cannot be investigated in second appeal. [P 50 C 1]

(b) Contribution—Doctrine of—Liabilities arising out of joint wrong—Equities of case not in plaintiff's favour—Doctrine cannot be enforced.

The only cases in which the doctrine of contribution will not be enforced are those in which a liability arises out of a joint wrong or where the equities of the case demand that the plaintiff should not recover as where the party sued was merely a formal defendant in the previous suit and not personally interested in the result of it : 1919 *Pat* 165, *Rel on* ; *Case law discussed.* [P 51 C 2]

(c) Contribution—Suit for—Suit dismissed against one defendant—Appeal—His name not appearing in memo of appeal—Court granting decree against him by applying O. 41, Rr. 20 and 33, S. 151 Civil P. C.—Provisions held not applicable—Hence claim against defendant disallowed.

In a suit for contribution, the claim of the plaintiff was disallowed against one of the defendants and the suit was dismissed as against him. In appeal by the plaintiff the name of this defendant was not mentioned in the memorandum of appeal but the appellate Court granted a decree against the defendant by applying provisions of O. 41, Rr. 20 and 33 and S. 151, Civil P. C., to the case:

Held : that the provisions of O. 41, Rr. 20 and 33 and S. 151 were not applicable to the case and the claim against the defendant should be disallowed. [P 52 C 1]

(d) Contribution—Apportionment—Contribution decree—Appeal by some defendants—Plaintiff's prayer to increase proportionately contribution amount against others if appeal of any defendant granted—Prayer held could not be granted without hearing absentee defendants not preferring appeal—Further that plaintiff should not be allowed to throw additional burden at late stage of second appeal.

In appeals preferred by some of the defendants against a decree in a suit for contribution a point was raised by the respondent that if the appeal of any of the appellants was allowed the amount of contribution decreed against the others should be proportionately increased:

Held : that the prayer could be granted upon hearing against the defendants in the suit who have not appealed and have not entered appearance in the appellate Court.

[P 52 C 2]

Held further : that though in appropriate cases the liability may be apportioned in unequal shares, the plaintiff-respondent should not be allowed to throw an additional burden upon any of the appellants at such a late stage of the litigation as the second appeal : 1919 *Pat* 165, *Rel. on.* [P 52 C 2]

Anand Prasad, *Brahmdeo Narayan*, *K. K. Banerjee*, *Yusoof* and *I. B. Saran*—for Appellants.

S. N. Bose and *K. Dayal*—for Respondent.

Fazl Ali, J.—These appeals arise out of a suit for contribution instituted by the respondent under the following circumstances : The defendants first party in the present action being proprietors of mahal Pipra Jaipal instituted a suit (Title Suit No. 106 of 1914) in the year 1914 for a declaration that they were entitled to raise boro (a kind of pady) in a jaikor known as Panchdah which according to them appertained to their mahal. Their case was that a small river known as the Gangi branched itself into five streamlets which were known by the name of Panchdah and although these streamlets flowed through different villages, the jaikar right in the Panchdah had been recognised as a separate estate and being assessed with a separate revenue had been attached to mahal Pipra Jaipal. Title Suit No. 106 of 1914 was resisted by the plaintiff and a number of other persons who had been impleaded as defendants, these being mostly persons through whose estates the river flowed. The subordinate Judge who tried the suit held that the plaintiffs in that suit (defendants first party of the present action) were entitled to the boro produce of 11½ bighas only. From the decision of the Subordinate Judge two appeals were preferred to this Court, one (Appeal No. 35 of 1917) by the plaintiffs of Title Suit No. 106 (defendants in the present action) and the other (Appeal No. 31 of 1917) by the present plaintiff and certain other defendants of Suit No. 106. Appeal No. 35 was allowed with costs against the contesting respondents excepting one of the respondents who was held to be entitled to recover his costs from the plaintiffs (the defendants-first party in the present action) and the other appeal (Appeal No. 31 of 1917) was dismissed. Subsequently the defendants-first party executed their decree for costs against the present plaintiff alone and

realized from him the sum of Rs. 2,732. The plaintiff thereupon brought the present suit for contribution against some of the defendants in Suit No. 106 of 1914 or their heirs whom he described as defendants-second party. These appeals are preferred by some of the defendants against whom the suit has been decreed. I shall first deal with Appeal No. 1207 which has been preferred by defendant 5 who was defendant 79 in the suit of 1914. Only two points have been urged in this appeal and these are: (1) that the present suit is not maintainable because the plaintiff has not joined certain necessary parties in the suit and (2) that a defendant cannot by suit enforce contribution for costs against a co-defendant.

The first point does not require any elaborate examination. The lower appellate Court has considered the point fully and has held that all the necessary parties have been joined in the suit as defendants. I find that certain persons were specifically named in the written statement filed by defendants 5, 6 and 7 as persons who ought to have been made defendants and in the grounds of appeal which have been filed in this Court it is reiterated that those persons were necessary parties to the suit. The trial Court on the basis of this contention disallowed the plaintiff's claim as to the costs of the original Court. In appeal however the learned District Judge admitted in evidence the order-sheet of the case and held that all the contesting defendants had been made parties and as no costs had been allowed against the non-appearing defendants, they were not necessary parties. It was not stated in this Court that any of the persons specifically named in the written statement were among the contesting defendants ; but at a late stage of the argument it was suggested that one Kalika Prokash, an heir of original defendant 77, and defendant 115 of the suit of 1914 should have been impleaded in this action. This argument has been fully met by the learned Advocate for the respondent on its merit; but the short ground on which it may be disposed of is that these names should have been mentioned in the Court below and new facts cannot be investigated in second appeal.

The second point raises a difficult question of law. It is now a well recognized principle that ordinarily there is no right of contribution between joint tort-feasors and relying upon this rule it has been held in some cases that a defendant cannot realise from a co-defendant his quota of costs for which both the defendants were held jointly liable. In (1881) 18 Ch D 236 (1) at p. 237, Fry, J., observed :

> I shall follow the dictum which has been cited to me from the Court of Appeal in (1881) 18 Ch D 362 (2) and hold that a defendant cannot proceed against a co-defendant for contribution in respect of costs to which both are equally liable.

In 19 All 462 (3), a Division Bench of the Allahabad High Court dismissed a suit for contribution by one defendant against his co-defendants and the learned Judges who delivered the judgment in that case observed :

> It appears to us that it lay upon the plaintiff to show that there was either some contract between him and the defendants or some equity which created a duty on those defendants to contribute to the costs in question as between themselves. Apparently the plaintiff and the defendants here were wrong-doers. They were holding on to the property to which, the plaintiff in the former suit was entitled and to which they or either any of them were not entitled. Each was acting independently and for his own benefit in setting up a title against the plaintiff to the former suit which was independent of and separate from and inconsistent with the title set up by the other defendants. Their claims were mutually exclusive. There was no contract between them. One was not acting as servant of the other and there was no equity between these persons whose cases were antagonistic to each other.

This decision was followed by another Bench of the same Court in 40 All 672 (4) and the same view appears to have been taken in some cases of the Madras High Court also. There are however a series of cases in which it has been pointed out that it cannot be laid down as a general rule that a defendant can in no case recover costs from a co-defendant and though the case-law on the subject is highly conflicting it is now well established that a distinction should be drawn between the cases where the tort-feasors were aware of the fact that they were acting without a semblance of right in themselves and those cases where the tort is committed more or less innocently and in good faith with a semblance of

1. Dearsly v. Middlewick, (1881) 18 Ch D 236.
2. Real and Personal Advance Co. v. McCarthy, (1881) 18 Ch D 362=30 W R 481=45 L T 116.
3. Fakire v. Tasanduq Husain, (1897) 19 All 462 =1897 A W N 107.
4. Nanda Lal Singh v. Beni Madhab Singh, 1918 All 328=47 I C 980=40 All 672=16 A L J 689.

one's rights, although these rights did not actually exist. In some cases a distinction has also been drawn between the position *inter se* of two co-plaintiffs who are

all in the same boat pulling together. Their objects, aims and interests are *ex necessitate*, identical and mutual "and the defendants" who have been pushed into the same boat whether they like it or not and if their interests are adverse *inter se*, they cannot pull together.

[See 45 All 99 (5).] It is said that where two or more persons join in an attack, it may be presumed that there was an implied contract between them that they will share in the gain or the loss but no presumption can be raised where the interests of the various co-defendants are not identical but conflicting. These distinctions are useful, but I think that there is a more vital distinction which should not be overlooked and that is the distinction between cases of contribution for damages as between two joint tort-feasors and cases where contribution is claimed for costs or damages as between two co-defendants after a decree has been passed holding them both jointly and severally liable. This distinction was drawn in very forceful language by Lord Herschell in 1894 A C 318 (6) in which defendant was held entitled to claim contribution of half the damages and half the costs against a co-defendant on the ground that his claim rested on a decree which created a civil debt. In that case Lord Herschell pointed out that although it is too late to question the decision in 8 T R 186 (7) (upon which the general rule of non-contribution as between tort-feasors is founded) it did not appear to be based on any principle of justice or equity which would justify its extension to the jurisprudence of other countries.

This remark has been quoted as authority for not extending the principle of 8 T R 186 (7), beyond certain limits in this country in various cases (See 38 All 237 (8), 102 I C 835 (9) and 4 Pat L J 486 (10). It appears to me that the decision of Sir Dawson Miller in the last mentioned case fully meets the points which have been raised before us in the present appeal and having regard to the clever and well-reasoned decision of his Lordship we have no hesitation in adopting his view for the purpose of deciding the present case. In that case the learned Chief Justice expressed his views in these terms:

It seems clear therefore that the doctrine of contribution is well recognised in this country and that the only cases in which it will not be enforced are those in which a liability arises out of a joint wrong or where the equities of the case demand that the plaintiff should not recover as where the party sued was merely a formal defendant in the previous suit and not personally interested in the result of it.

These remarks merely emphasise the fact that the claim of the plaintiff being based not upon any contract but upon the principle of equity cannot be enforced against a person against whom it will be inequitable to enforce it. Keeping this principle in view we have to decide whether there is any equity in favour of defendant 5 who is the appellant in Appeal No. 1207. As the argument advanced on behalf of this defendant is only the general argument that no suit for contribution can lie against a co-defendant and we can find no special circumstances in his favour, I think his appeal must be dismissed with costs.

Different considerations, however, apply so far as the remaining three appeals are concerned and in my opinion these appeals should be allowed. Appeal No. 1043 has been preferred on behalf of defendants 14 and 15 who were defendants 116 and 117 in Suit No. 106 of 1914. It appears that they were minors when they were substituted as defendants in place of their deceased father and a written statement was filed on their behalf through a pleader-guardian. The written statement has been placed before us and although certain formal objections appear to have been taken in the earlier paragraphs of their written statement to the claim of the plaintiff, para. 5 was to this effect:

That these defendants have unnecessarily been made party-defendants in the suit. These defendants beg to submit that they have no concern whatsoever with the Gangi rivulet or its streamlet and branches nor have they any concern with the mahal in suit. These defendants are malik in Chandwa which has separate tauzi and khewat except that these defendants are tenant residents of village Pakri.

5. Parsotam Das v. Lachmi Narain, 1923 All 67 =69 I C 688=45 All 99=20 A L J 890.
6. Palmer v. Wick and Pulteney-Town Steam Shipping Co., 1894 A C 318=71 L T 163.
7. Merryweather v. Nixan, (1799) 8 T R 186=16 R R 810.
8. Nihal Singh v. Collector of Bulandshahr, 1916 All 160=33 I C 165=38 All 237=14 A L J 275.
9. Narain Murti v. Chandrayya, 1927 Mad 790= 102 I C 835=53 M L J 174.
10. Mahabir Prasad v. Darbhangi Thakur, 1919 Pat 165=51 I C 697=4 Pat L J 486.

It appears to me that these defendants never intended to contest the suit and even though their names may have been by inadvertence included in the list of contesting defendants, it will be inequitable to decree the plaintiff's claim as against them. The appeal of these defendants must therefore be allowed. Appeal No. 887 has been preferred on behalf of defendant 7 whose father was defendant 81 in Suit No. 106 of 1914 but he died during the pendency of the appeal in the High Court. Defendant 7 thereupon brought a title suit before the Subordinate Judge for a declaration that the decree passed by the High Court was not binding upon him, as it had been passed against a dead person. He ultimately succeeded in getting this declaration from the High Court and he also got a declaration as to his title as owner in the stream in dispute. Another point in favour of defendant 7 is that the present suit was dismissed against him by the trial Court and his name did not appear in the memorandum of appeal which was filed by the plaintiff before the District Judge. The learned District Judge, however, has granted a decree against him applying the provisions of O. 41, Rr. 20 and 33 and S. 151 as against him. In my opinion, however, none of these provisions were properly speaking applicable and the appeal would have been competent against defendant 7 only if the Court below had extended the period of limitation as against him under S. 5, Lim. Act. In the circumstances of the case I think that the plaintiff's claim should be disallowed so far as defendant 7 is concerned and his appeal should also be allowed.

Appeal No. 1072 has been preferred on behalf of defendant No. 10 who was impleaded as defendant 121 in Suit No. 106 of 1914. It appears that one Mt Walihan, the mother of this defendant, was defendant 107 in the suit and after her death this defendant was impleaded as defendant 107 also. Defendant 107 has been treated throughout as a contesting defendant, but it appears that only one written statement was filed by defendant 10 and on the basis of that written statement the suit was dismissed against him and he was awarded costs against the plaintiffs of Suit No 106 of 1914. He also did not join the plaintiffs of the present action and the other contesting defendants in appealing to the High Court from the decision of the Subordinate Judge in Suit No. 106 of 1914. The Courts below have allowed the plaintiff's claim against defendant 10 on the ground that he had a dual capacity. Technically this may be so, but we find that he filed only one written statement and he evidently succeeded upon that written statement and remained satisfied with the decision of the Subordinate Judge. In my opinion it will not be equitable to grant contribution against him and his appeal must also be allowed.

A point was taken on behalf of the respondent that if any of the present appeals is allowed the amount of contribution decreed against the other defendants should be proportionately increased. In my opinion in the special circumstances of the case the plaintiff's prayer cannot be granted. The prayer can be granted only upon hearing many of the defendants in the suit who have not appealed against the decision of the Court below and have not entered appearance in this Court and besides the amount which has been decreed as against defendant 5 and the other defendants who have not appealed is very much in excess of the amount which was claimed by the plaintiff in the schedule attached by him to the plaint. Besides, as was pointed out in 4 Pat L J 486 (10) in appropriate cases the liability may be apportioned in unequal shares and it appears to me that the plaintiff should not be allowed to throw an additional burden upon any of the defendants at this stage of the litigation. I would thus dismiss S. A. No. 1207 with costs and allow the other appeals and dismiss the plaintiff's suit as against defendants 7, 10, 14 and 15 but direct that in appeals other than Appeal No. 1207 each party should bear his own costs throughout.

Luby, J.—I agree.

S.R./R.K. *Order accordingly.*

A. I. R. 1936 Patna 52

AGARWALA, J.

Ram Ranjan Ray—Appellant.

v.

Haku Mian and *others*—Respondents.

Appeal No. 1134 of 1932, Decided on 1st October 1935, from decision of Dist-Judge, Purulia, D/- 11th June 1932.

(a) Estoppel — Tenant borrowing money from plaintiff and paying off encumbrances —Subsequent transfer of half holding to wife and son—Surrender of half to cosharer landlord who settled it with plantiff—Plaintiff's suit for possession of his share—Suit resisted by wife and son—Validity of their title held depended upon legality of tenant's transactions—Hence they could not challenge transactions while maintaining advantages therefrom.

A tenant borrowed some money from the plaintiff and paid off certain encumbrances on his holding and then transferred half of his holding to his wife and son and surrendered the other half to a cosharer landlord, who thereon settled the surrendered portion with the plaintiff. The plaintiff instituted a suit for possession of the portion settled with him. The suit was resisted by the wife and son of the tenant:

Held : that as the validity of their own title depended upon the legality of the transactions entered into by the tenant it was not open to the wife and son to challenge the transactions while maintaining the advantages which they gained under them. [P 54 C 1]

(b) Chota Nagpur Tenancy Act (1908), S 257—Each of two landlords receiving his share of rent by arrangement—Surrender of half holding to one landlord is valid.

Where by an arrangement between each of the two sets of landlords each is in receipt of his own share of rent so that their position in law is that of co-owners a surrender by a tenant of half of his holding to one of the landlords is valid. [P 54 C 1]

S. C. Muzumdar—for Appellant.

R. S. Chatterji—for Respondents.

Judgment.—One Kasim Ali had a holding, the rent of which was Rs. 2-4-0 and cesses. The landlord's interest belonged as to eight annas to Sindhubala and as to the remaining eight annas to four brothers (Gurus) three of whom are pro forma defendants. The fourth brother is dead and his widow is Mt. Bhanumati. It appears that by arrangement with the holders of the landlord's interest Kasim Ali paid half of the rent and cesses to Sindhubala and the other half to the Gurus. On 3rd January 1930, he entered into two transactions which have given rise to this litigation. By one of these transactions he borrowed Rs. 750 from the plaintiff to clear off the encumbrances on his holding. It is not disputed that the money so borrowed was used for this purpose. He next transferred to his wife and son, defendant 2, half of the holding and then surrendered the other half to the Gurus. The latter settled this half with the plaintiff. Kasim Ali being dead, his wife and son resisted the plaintiff's attempt to obtain possession of his half share of the holding. Hence this present suit for possession by the plantiff which was decreed in the trial Court. The Court of appeal below has reversed the trial Court's decision.

The question that arises is whether the plaintiff has a good title to the half share of the holding settled with him by defendants 3 to 6. It may be mentioned that Kasim Ali's transfer to his wife and son of half of the holding was with the permission of the Deputy Commissioner so that the fact that the transfer was only of a part of the holding does not invalidate that transfer. The document by which the transfer was made recited that the rent for the portion of the holding transferred was payable to Sindhubala. Half of the holding having therefore been thus validly transferred to Kasim Ali's wife and son, the question of law is whether the surrender of the remainder to defendants 3 to 6 was valid. One objection that was raised with respect to this may be dealt with at once. It was said that with regard to eight annas of the landlord's interest owned by the Gurus it was not only defendants 3 to 6 who were interested but also the wife of their deceased brother and that no surrender had been made to her, so that it was argued that the surrender, even of the half portion which remained after the other half had been transferred to Kasim Ali's wife and son, was a surrender to only some of the holders of the half share. It was admitted however in the trial Court that one of these brothers acted as a manager for the family so that he would represent the widow who was living jointly with the family in the transaction. Furthermore, the objection is raised not by defendants 3 to 6 who are merely pro forma defendants or by the widow of their deceased brother who is not a party to the suit, but by the son and wife of Kasim Ali. As the validity of their own title depends on the legality of the transactions entered into by Kasim Ali it is not open to them to challenge those transactions while maintaining the advantages which they gained under them. With regard to the validity of the surrender of the half share, it was contended that there can be no surrender of a portion of the holding to some of the landlords. Although S. 257, Chota Nagpur Tenancy Act requires that when two or more persons

are joint landlords, they must act jointly in respect to acts required or authorized under the Act, the section cannot apply to the circumstances of this case where by arrangement between the parties each of the two sets of landlords was in receipt of his own share of rent, so that their possession in law was that of co-owners. The fifth sub-section of S. 72, contemplates cases of partial surrender of a holding by arrangement between a raiyat and his landlord. In so far as the portion of the holding surrendered is concerned, the landlords were the Gurus and the widow who were holding their eight annas interest separately from the eight annas interest in which Sindhubala was interested, and as has already been indicated the whole of the Gurus' interest was represented by the member of the family who was the manager and who accepted this transfer from Kasim Ali. There does not appear therefore to be any objection in law to the surrender which was made to the Gurus or to the settlement which they subsequently made with the plaintiff. The only persons who object to the plaintiff obtaining possessions under the settlement are the wife and son of Kasim Ali who, as I have already said, are retaining the benefit of the transactions which he entered into and under which the encumbrances on the holding were cleared off with Rupees 750 which Kasim Ali borrowed from the plaintiff. Neither in law nor in equity does there seem to be any reason for keeping the plaintiff out of the fruits of these transactions. In the result the appeal succeeds and the appellant is entitled to his costs. Leave to appeal is refused.

S.R./R.K. *Appeal allowed.*

A. I. R. 1936 Patna 54

WORT, J.

Jagdeo Narain Singh and *others*—Plaintiffs—Appellants.

v.

Tula Singh and *others*—Defendants—Respondents.

Appeal No. 582 of 1934, Decided on 1st November 1935, from decision of Addl. Dist. Judge, Gaya, D/- 28th March 1934.

(a) Bengal Tenancy Act (1885), S. 30 (a)—340 tenants with same area of land of same quality and with same privileges paying various rents—No prevailing rate held existed within S. 30 (a).

340 tenants occupying almost about the same number of bighas of land of the same quality and enjoying the same privileges paid rent at varying rates:

Held: that it could not be said that there was a prevailing rate of rent within the meaning of S. 30 (a). [P 55 C 1]

(b) Appeal—Suit for enhancement of rent—Lower Court holding that no prevailing rate existed—High Court held could not interfere with finding.

In a suit for enhancement of rent the lower Courts come to the conclusion that there was no prevailing rate of rent.

Held: that the High Court could not interfere in second appeal with the finding. [P 55 C 2]

(c) Bengal Tenancy Act (1885), S. 30 (h)—Rent—Enhancent—Landlord found entitled to enhancement of Rs. 0-3-9 per bigha—Enhancement of only Rs. 0-1-0 allowed on principle of economic depression—Rent already low—Principle held did not apply.—*Obiter*.

In a suit for enhancement of rent the landlord was entitled to an enhancement of Rupees 0-3-9 per bigha but enhancement of only 1 anna was allowed by the Court on the principle of economic depression. The rent of the land was already low.

Held: that the principle relating to economic depression did not apply by reason of the rent being low—(*Obiter*). [P 55 C 2 P 56 C 1]

(d) Precedent—Bench decision cannot be overruled unless by properly constituted Bench.

A previous decision arrived at by a Bench connot be overruled unless a Bench having power to overrule it is properly constituted. [P 55 C 2]

S. M. Mullick, *S. N. Rai* and *A. H. Fakhruddin*—for Appellants.

B. N. Mitter, *K. Sahay* and *Rajkishore Prasad*—for Respondents.

Judgment. — This is the landlord's appeal in an action for enhancement under S. 30 (a) and (b), Ben. Ten. Act. So far as Cl. (a) of the section is concerned, the Courts below have not allowed any enhancement because they have come to the conclusion that there was no prevailing rate. I have just listened to a very elaborate argument of Mr. S. M. Mullick and Mr. Rai on behalf of the appellants and of Mr. Mitter on behalf of the tenant-defendants, but in dealing with the case I propose to express myself in as few words as possible. The contention of Mr. Mullick in the first instance was that the learned Judge in the Court below has misdirected himself in law as he appeared to be of the opinion that unless a prevailing rate was in some sense a customary rate recognized as such, an enhancement could not be

allowed. On the face of it there would be, if I may say so, some justification for that argument; but on a closer investigation of the judgments of the trial and the appellate Courts and also of the report of the Commissioner it seems to me that the argument is unjustifiable. The matter is not without difficulty. It is not quite clear what the learned Judge in the Court below meant. But I have read the Commissioner's report not for the purpose of coming to any conclusion on facts, but for the purpose of better understanding the judgments with which I have to deal. It is quite clear from an investigation of the Commissioner's report that what the learned Judge in the Court below meant was that the Commissioner's report could not be relied upon because, what the Commissioner had done in fact was to take an average of the rents paid for a certain class of land in the village and that an average rent could not be the prevailing rate of rent within the meaning of S. 30, Cl. (a) of the Act.

To take a case in point: the Commissioner appears to have divided the lands into various classes naming them as certain schedules. Taking the case of Sch. A, there were something like 340 tenants of that particular class of land, and they were in fact paying rents for that class of land, enjoying the same privileges, at rates varying from 11 annas to Rs. 15-12-0. It is almost unbelievable, but that is the fact. In looking through the schedule which the Commissioner annexed to his report and all the different rates of rent, varying as they were, it could not possibly be said that any one rate was a prevailing rate. There were instances of as many as eight or nine tenants paying the same rate of rent. But when we take 340 tenants occupying almost about the same number of bighas of land of the same quality, it cannot be said that there was a prevailing rate within the meaning of S. 30, Ben. Ten. Act. The Commissioner has taken Rs. 4-12-0 as the prevailing rate for that class of land, but exactly how he arrived at that figure it is impossible to say unless he commenced from the end of his schedule going backwards till he got majority of tenants, taking a lowest rate paid by them and fixing that rate as the prevailing rate. Even that does not conform with Cl. 3, of the rules laid down in the decision which the Commissioner states he followed — the decision in 2 Pat L J 124 (1). Towards the end of his judgment the late Mullick, J., said in stating the rules to be followed:

> If no one prevailing rate can be found in any village, then to ascertain what is the lowest rate paid by land of similar description with similar advantages.

I am not prepared to say that the rule is justified on any construction of S. 30, Ben. Ten. Act. But it is a case which has never been overruled for the very reason that no Bench having any power to overrule the decision has ever been constituted. The case has been commented upon and referred to in a number of other cases and I propose to refer to them in passing. They are the decisions in 10 P L T 693 (2), 11 P L T 335 (3), 13 P L T 244 (4) and 14 P L T 645 (5). The learned Judge in the Court below has come to the conclusion that the decision reported in Vol. 2 Patna Law Journal (1) has been overruled. For the reason I have already stated that is an impossible proposition. When a Bench is properly constituted for the purpose, the case may be considered from that point of view. Having regard however to the point in question, as the Courts below have come to the conclusion that there was no prevailing rate owing to the method which was adopted by the Commissioner, it seems to me that it is impossible for this Court in second appeal to interfere. The second question related to enhancement under Cl. (b), S. 30, Ben. Ten. Act. An enhancement of 1 anna has been allowed although it was in the first instance decided by the trial Court that the landlords would be entitled to an enhancement at the rate of 3 annas 9 pies per bigha. This has been reduced by applying the decision of the Full Bench of this Court. The Court of appeal below has been of the opinion that the learned Munsif was not wrong in fixing the rate of enhancement at 1 anna having regard to the economic

1. Brij Behari Singh v. Sheo Sankar Jha, 1916 Pat 120=39 I C 85=2 Pat L J 124.
2. Kamala Prasad Singh v. Bankey Prasad Singh, 1929 Pat 702=124 I C 390=10 P L T 693.
3. Sri Radha Kishunji v. Hari Charan Ahir, 1930 Pat 332=126 I C 297=9 Pat 803=11 P L T 335.
4. Bindeshwari Prasad v. Nanhku Mahton, 1932 Pat 179=139 I C 537=11 Pat 557=13 P L T 244.
5. Kameswar Singh v. Soney Misser, 1933 Pat 529=148 I C 1199=14 P L T 645.

depression. It is contended that even in the Full Bench decision of this Court the principle relating to the economic depression does not apply for the reason that the rent was low, and I am pressed to come to a similar decision. In the circumstances however I do not propose to interfere.

The appeal is dismissed with costs. This decision will govern Second Appeals Nos. 582 to 589 of 1934. Having regard to the difference of opinion expressed particularly with regard to Cl. (a), S. 30, Ben. Ten. Act, I propose to give the appellants leave to appeal under the Letters Patent.

S.R./R.K. *Appeal dismissed.*

A. I. R. 1936 Patna 56

MACPHERSON, J.

Bachalal

v.

Emperor

Criminal Ref. 35 of 1935, Decided on 25th September 1935, reference made by Sess. Judge, Purnea, D/- 30th August 1935.

Criminal P. C. (1898), S. 195—Complaint before Magistrate by person found false on inquiry by police—Magistrate asking Sub-Inspector to tile complaint against person under Ss. 182 and 211, I. P. C.—Magistrate's action held illegal as Sub-Inspector was not his subordinate there being no privity—Proper authority to file complaint was Magistrate himself—Also Magistrate's order to Sub-Inspector held not complaint within S. 195.

A Magistrate asked a Sub-Inspector of Police to file a complaint under Ss. 182 and 211, I. P. C.,against a person who had filed a petition of complaint before him which petition was found to be false on inquiry by the police:

Held : that the action of the Magistrate was illegal. The proper authority to file a complaint under S. 182, was the Magistrate himself to whom the alleged false complaint was made. There was no privity between the Magistrate and the Sub-Inspector who could not remove the bar under S. 195 (1) (a). [P 56 C 2]

Held further : that the Magistrate's order to the Sub-Inspector was not a complaint within meaning of S. 195. [P 56 C 2]

Order.— Uuder the provisions of S. 438, Criminal P. C., the Sessions Judge of Purnea has referred two orders of the Subdivisional Magistrate of Purnea dated 21st February and 13th June 1935, summoning Bachalal in respect of an offence under S. 182, I. P. C., with a recommendation that the proceedings thereunder against Bachalal be quashed. Bachalal filed a petition of complaint before the Subdivisional Magistrate of Kishungunj on 4th January last which the Magistrate sent for a police inquiry. Before any police report was received, the complainant filed on the 18th January a petition challenging the police investigation and a Deputy Magistrate who was in charge of the office of the Subdivisional Magistrate during his absence, directed issue of summons under S. 379—a very unwise procedure in the circumstances. Subsequently the police reported the original complaint to be false, and on the 13th February the Subdivisional Magistrate apparently not knowing that summons had been issued subsequently at the instance of the petitioner, directed the Sub-Inspector to file a complaint against the petitioner under Ss. 182 and 211, I. P. C., and the latter did so with the result that on the 21st February Bachalal was summoned under S. 182, I. P. C. The trial initiated by the Deputy Magistrate resulted in the acquittal of the accused, the Magistrate who tried the case, remarking that they were at least entitled to the benefit of the doubt. On the 13th June the Subdivisional Magistrate directed that summons should be issued upon Bachalal, the case against whom under S. 182 had been kept pending. This summons was unnecessary because he was already on bail.

The learned Sessions Judge considers that the Subdivisional Magistrate's action in asking the Sub-Inspector to file a complaint under Ss. 182 and 211 and in acting upon the complaint filed by him is illegal. He is of opinion that the proper authority to file a complaint under S. 182 was the Magistrate who is the public servant to whom the alleged false complaint was made. This view is correct, as has frequently been decided. There was no privity between the complainant and the Sub-Inspector of Police who accordingly cannot remove the bar under S. 195 (1) (a), Criminal P. C., to take cognizance of the alleged offence under S. 182. Nor was the Subdivisional Magistrate's order to him a complaint within the meaning of the provision. The learned Sessions Judge has given other reasons for the reference which appear to be less sound, but it is unnecessary to examine them. The reference is accepted and it is directed that the proceedings against

Bachalal under S. 182, I. P. C., initiated on 21st February 1935 be quashed.

S.R./R.K. *Order accordingly.*

A. I. R. 1936 Patna 57

ROWLAND, J.

Ramgolam Singh—Appellant.

v.

Charan Mahton and *others*—Respondents.

Appeal No. 1466 of 1932, Decided on 13th August 1935, from decision of Sub-Judge, Patna, D/- 29th April 1932.

(a) Presumption—Document — Consideration—Execution not denied—Executant dead—No evidence showing want of consideration — Document produced by person in whose favour it was executed—Consideration may be presumed.

The execution of a deed was not denied. The executant thereof was dead and there was no evidence to show that the consideration for the document did not pass to the executant. The document itself was produced by the person in whose favour it was executed:

Held: that it should be presumed that the document was for consideration. [P 57 C 2]

(b) Civil P. C. (1908), O. 41, R. 27—Appellate Court admitting additional evidence should give reasons therefor — Opposite party not objecting to such evidence—Papers admitted, public documents—Admission is not objectionable to same degree as private documents—Procedure is not bad though Court fails in giving reason for admission.

No doubt the Court admitting additional evidence at the stage of appeal should give reasons therefor but where the opposite party does not object at the hearing to reception of such evidence and the papers admitted are public documents the admission of which is not objectionable to the same degree as the private documents which could be prepared at any time, the procedure is not bad though the appellate Court fails to record its reasons for admitting the additional evidence. [P 58 C 1]

(c) Record of Rights—Presumption—Draft entries by Khanapuri and Attestation Officer—Final entries in Record of Rights—Latter carry more weight.

Draft entries made by the Khanapuri Officer and the Attestation Officer are not entitled to more weight than the final entries made in the Record of Rights: 1929 *Pat* 460, *Rel. on.* [P 58 C 2]

(d) Record of Rights—Burden of proof—Record of Rights describing party as under-raiyat with occupancy rights—Burden held not on party to prove custom supporting entry's correctness—Other party held ought to prove absence of custom and disprove correctness.

A party to a suit was described in the Record of Rights as an under-raiyat having occupancy rights in his holding:

Held: that it was not for the party to prove custom or usage supporting the correctness of the entry in the Record of Rights but it was for the other party to disprove the correctness of the entry by proving absence of custom or usage and thereby establishing that the Record of Rights was incorrect. [P 58 C 2]

B. P. Sinha and *Rajeshwari Prasad*—for Appellant.

Kapildeo Narayan Lal—for Respondents.

Judgment.—The plaintiff-appellant is entered in the Record of Rights finally published in 1912 as the raiyat of Khata No. 50 in village Chak Gaj Faridiawan bearing a rent of Rs. 16-10-0. The defendant is entered as an under-raiyat having occupancy rights and paying batai rent. The plaintiff served on the defendant a notice to quit under S. 49, Bengal Tenancy Act treating him as an under-raiyat liable to be evicted on notice. The defendant did not vacate the land, hence the suit. The defendants resisted the suit denying that plaintiff had any title to the land and setting themselves up as occupancy raiyats. The Munsif decreed the suit holding that the defendants were under-raiyats under the plaintiff and holding that the entry of shikmi dakhalkar in the khata does not mean that the defendants have got occupancy right. On appeal the Subordinate Judge reversed the finding of the Munsif and held that the defendants were not under-raiyats, that the plaintiff was not the landlord of the defendants and dismissed the suit. The holding had formerly been the raiyati holding of the father of defendant 1 but was sold by him on 6th June 1890, to the plaintiff by a registered sale-deed. The execution of this deed is not denied, the executant is dead and there is no evidence that the consideration for it did not pass. The document is produced by the plaintiff and it may be presumed from this that the document was for consideration. There is also the presumption of correctness attaching by statute to the entry in the Record of Rights. The lower appellate Court's judgment does not refer to the presumption arising from custody of the document of title. As regards the presumption of correctness attaching to the Record of Rights the Subordinate Judge thinks it is rebutted by what he has found in evidence admitted in his Court at the appellate stage consisting of the records of disputes in the survey proceeding.

In second appeal it is contended that the lower appellate Court has erred in

law in not considering the presumption as to consideration arising from the custody of the document and has erred in law in admitting additional evidence at the appellate stage to improve the case of the defendants and has erred in law in holding that the proceedings before the survey officer in the earlier stages of preparation of Record of Rights could rebut the correctness of the final entry. As regards the presumption arising from custody of the document, this was undoubtedly a matter which the Subordinate Judge ought to have considered. As regards the taking of additional evidence reference is made to the Privy Council decision in 10 Pat 654 (1) and to O. 41, R. 27, Civil P. C. The Privy Council have pointed out that additional evidence is only to be admitted under this rule where the appellate Court requires it. The legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but, 'when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent.' It is also pointed out that whenever the Court adopts this procedure and allows such evidence to be produced, the Court shall record its reason for so doing. In the judgment all that the Subordinate Judge has to say about the procedure followed by him is "Additional evidence was however admitted in this Court." The Subordinate Judge should have given reasons but the appellant's criticisms of the procedure followed are weakened by the fact that the appellate Court's order-sheet shows that at the hearing the defendants (the respondents) did not object to the reception of the additional evidence, also the papers admitted being public documents, their admission is not objectionable in the same degree as if they had been private papers which could be prepared at any time.

The third objection to the judgment of the lower appellate Court is a substantial one. It was held in 9 Pat 347 (2), "that the civil Court is not a Court of Appeal from the decision of the officer who frames the Record of Rights." This was in answer to the argument that the civil Court having before it the materials upon which the settlement officer arrived at his decision should make a fresh examination of those materials and come to its own finding. The Full Bench decision makes it quite clear that that is not a correct procedure, to do this is to ignore the presumption of correctness attaching to the Record of Rights. The Subordinate Judge has proceeded on the footing that the draft entries made by the Khanapuri Officer and Attestation Officer are entitled to more weight than the entry in the final record. This view is clearly contrary to the law as laid down by the Full Bench. The finding must be set aside. I have no doubt that the Munsif was right in finding on the basis of the Record of Rights that plaintiff was raiyat and the defendant was under-raiyat in respect of the suit lands.

For the respondent it is contended that the Munsif has fallen into an error in not giving effect to that part of the entry which represents the defendant as having occupancy right. The words are shikhmi dakhalkar. The Munsif says:

> The mere entry of shikmi dakhalkar in the khatian does not mean that the defendants have got occupancy rights which an under-tenant can only acquire by custom or usage, of which there is no evidence in this case, nor is it the case of the defendants.

As to this not being the case of defendants, the comment seems rather technical. The defendants all along asserted their occupancy rights though claiming them in the status of raiyats and not of under-raiyats. If the defendants do not succeed in the matter of status, it does not follow that the claim of occupancy rights should not be examined on the merits with reference to the status which is found to be theirs. The defect in the other comment of the Munsif is that he has manifestly fallen into the error of thinking that it was for the defendants to prove the custom or usage which would support the correctness of the Record of Rights whereas he should have put it on the plaintiff to disprove the correctness of the entry by proving the absence of custom and usage and thereby establishing that the Record of Rights was incorrect. Therefore, it should have been held that the defendants have occupancy rights as entered in the record and accordingly cannot be evicted. The result is that the suit must fail and the decree of the Subordinate

1. Parsotam Thakur v. Lal Mohar Thakur, 1931 P C 143=132 I C 721=58 I A 254=10 Pat 654 (P C).
2. Tengaroo Sukul v. Chathu Bhar, 1929 Pat 460=118 I C 316=9 Pat 347=10 P L T 769 (FB).

Judge dismissing it is correct, but as the defendants took a false defence denying the plaintiff's title altogether, I think it proper to order that the parties do bear their own costs throughout.

S.R./R.K. *Appeal dismissed.*

A. I. R. 1936 Patna 59

ROWLAND, J.

Inderdeo Narayan and *others* — Petitioners.

v.

Durga Prasad Singh and *others*—Opposite Parties.

Criminal Revn. No. 612 of 1935, Decided on 29th November 1935, from order of Dist. Magistrate, Gaya, D/- 24th October 1935.

Criminal P. C. (1898), Ss. 144 and 147 — Party's right to drain off surplus water enclosed by alang of other party—Other party with right of irrigation—Dispute—Whether former party could drain off water by cutting alang and to what depth—Magistrate issuing notices under S. 144—Case held fell under S. 147 and not S. 144—Notices held should be considered equivalent to notices under S. 147 (1).

On a report of Sub-Inspector of Police, it appeared that a dispute existed between two parties as to whether the one had a right to drain off surplus water by cutting an alang erected by the other party, and if the right existed whether the other party having a right of irrigation was entitled to require that the cutting should be limited in depth so as not to allow escape of all the water and damage the bundh erected by them and thus affect their irrigation. The Subdivisional Officer issued notices under S. 144 to both the parties in order to prevent immediate breach of the peace and also to show cause if any :

Held: that the case fell not within S. 144, but exactly within the provisions of S. 147 and the Magistrate should have proceeded to make a judicial decision of the dispute; [P 60 C 1]

Held further : that the notices issued should be considered equivalent to the notices to be issued under S. 147 (1) : 1918 *Pat* 663, *Rel. on.* [P 60 C 1, 2]

Manohar Lal and *Ram Sarup Sinha* —for Petitioners.

Baldeo Sahay and *K. Dayal*—for Opposite Parties.

Order. — The proceedings out of which this application arises were proceedings taken under S. 144, Criminal P. C., in consequence of a dispute between the first party (petitioners in this Court) who are the mukarraridars of village Hasanpore and the second party (opposite party here) the mukarraridars of Sisamba. The dispute concerned an alleged right of irrigation. Disputes regarding this right led to a civil suit in 1908 which was compromised in 1909. There were disputes at the time of survey and preparation of Record of Rights in or about 1913 and there were disputes leading to proceedings under S. 144, Criminal P. C., in 1933 in the Court of the Subdivisional Officer of Jahanabad, in 1934 in the same Court and in 1935 in the same Court. These last proceedings are the subject matter of this reference, the main contention being that whereas S. 144 may be an appropriate remedy when a sudden emergency arises and an immediate order has to be passed for the preservation of the peace, the repeated use of the section in successive orders dealing with the same matter is not justified by the mere fact that on each occasion on which the section is used it saves the Magistrate a certain amount of trouble in recording evidence and coming to a regular decision of permanent value under S. 145 or S. 147. In this case I think it is quite time to call a halt to the succession of proceedings under S. 144 dealing with the same matter. In this year the proceedings started with a report dated 22nd July 1935 by the chaukidar of Hasanpur-Mirzapur to the effect that there was an apprehension of a breach of the peace regarding the cutting of the ridge of a pyne which issues from the Morhar river and flows into the river Baldaya. The Sub-Inspector who went to the spot on 3rd August 1935 recommended that a proceeding under S. 147 should be taken and that in the meantime immediate notices should be given to both parties under S. 144. The first party are interested in keeping the alang intact because by it and the bundh which they themselves erected in the river Baldaya water is retained and caused to flow down the Hasanpur bundh to plot No. 1073. The second party are interested in cutting the alang in order that the water which comes from the Morhar river shall flow into the river Baldaya and not be raised to a level at which there might be danger of overflowing the banks of the pyne and damaging the crops.

The Sub-Inspector's report was that in the previous year, i. e. 1934 the Sisamba party had made cuts in the alang which permitted water to escape but that the Hasanpur party had been able to irrigate their village with the water of the

Baldaya river, but that this year the cuts in the alang had been carried down to such a depth that the whole of the water of the pyne passed into the Baldaya river affecting the irrigation of Hasanpur and causing danger of damage to the bundh of the Hasanpur people. The points which appear to arise for inquiry on the report of the Sub-Inspector are whether the Sisamba party have the right to drain off surplus water by cutting the alang; and if so, whether the Hasanpur people having a right of irrigation are entitled to require that the cutting should be limited in depth so as not to allow he escape of all the water, and damage to the bandh. On receipt of the Sub-Inspector's report the Subdivisional Officer issued notices under S. 144 to both parties in order to prevent immediate breach of the peace. At the same time he called on both parties to show cause, if any, by 26th August 1935. On that date written statements were put in by both sides, each party asserting their own rights and contesting the rights of their opponents. The first party suggested that the proceedings be converted into proceedings under S. 147. This, as I have pointed out above, was what the Sub-Inspector had recommended. However the Magistrate thought S. 147 inappropriate. It seems to me he was in error. This is a case falling exactly within the provisions of S. 147 under which the Magistrate should have proceeded to make a judicial determination of the dispute.

It is difficult to distinguish the notices issued by the Magistrate calling on the parties to show cause by 26th August from the notice contemplated by S. 147, Cl. (1) requiring the parties to attend and put in statements of their claims. The position is similar to that in 3 Pat L J 243 (1) where the notices issued were treated by the High Court as equivalent to the preliminary notices under S. 145, Cl. (1). In this case I think the proper direction would be that the notices issued on 6th August 1935, be considered equivalent to the notices to be issued under S. 147 (1). The parties have appeared and filed written statements and the Magistrate should now inquire into the matter in the manner provided by law. The order under S. 144 being spent it is not required to be set aside, but the proceedings initiated as above will be considered to be pending proceedings before the Magistrate,

S.R./R.K. *Order accordingly.*

1. Kaniz Amina v. King-Emperor, 1918 Pat 663 =47 I C 65=19 Cr L J 869=3 Pat L J 243.

---

* A. I. R. 1936 Patna 60

FAZL ALI AND LUBY, JJ.

Ramdayal Sen and *others*—Plaintiffs—Appellants.

v.

Chakrapani Nandi and *others*—Defendants—Respondents.

Appeal No. 168 of 1931, Decided on 23rd August 1935, from appellate decree of Sub-Judge, Manbhum, D/- 7th August 1930.

(a) Transfer of Property Act (1882), S. 92 —S. 92 is retrospective.

The language of S. 63, Amending Act (20 of 1929) seems to suggest that S. 92 may be applied retrospectively: 1932 *All* 489, *Rel. on.* [P 61 C 2]

*** (b) Limitation — Subsequent mortgagee from one of 3 sons taking possession of house under sale in his decree on paying off prior mortgage by father—Claim by heirs of other two sons for possession of 2/3rd share on paying proportionate sum—Art. 148, Limitation Act held applicable as subsequent mortgagee held 'mortgagee' within Art. 148 by subrogation.**

A mortgagee from one of the three sons took possession of a house mortgaged to him under the sale in execution of his mortgage decree after paying off the prior mortgage created by the father. A suit was brought by the heirs of the other two sons claiming to be entitled to possession of the 2/3rd share of the house on payment of the proportionate sum:

Held: that the subsequent mortgagee had been subrogated to the rights of the prior mortgagee by paying him off and was therefore a mortgagee within the meaning of Art. 148, Lim. Act, therefore Art. 148 applied to the suit and not Art. 144. [P 61 C 2]

A. K. Roy and *R. S. Chattarji*—for Appellants.

A. B. Mukharji and *S. C. Mazumdar* —for Respondents.

Luby, J.—The appellants Ramdayal Sen and others (hereinafter referred to as the Sens) brought a suit for possession of 2/3rds share of a house in Purulia. Their contention was that they should get possession on paying Rs. 400 to Chakrapani Nandi and others, the principal defendants, (hereinafter referred to as the Nandis) in redemption of a mortgage. The facts may be briefly stated as follows: The house in suit belonged to one Madhusudan Sen who gave it in usufructuary mortgage to Ramkumar De for Rs. 600 in 1892. Madhusudan's son

Radhhaballav joined in the execution of the mortgage deed. It is said that Radhaballav joined in the execution because the property had been acquired in his name by his father Madhusudan and the mortgagee therefore insisted that Radhaballav should join in the execution. The Sens are the successors in interest of Madhusudan's other two sons, Haladhar and Ananta.

In 1905 Radhaballav's heirs gave a simple mortgage on this house and other property to Joy Gopal Nandi father of the defendants-Nandis by a registered deed in which it was asserted that all the properties covered by the deed belonged to Radhaballav's heirs. Subsequently Joy Gopal Nandi got a decree on that mortgage and put it into execution and the mortgaged property was sold at auction subject to the usufructuary mortgage of Ramkumar De. The sale was confirmed on 26th February 1913. After that Joy Gopal applied for delivery of possession, but the delivery of possession was resisted and Joy Gopal found it necessary to pay off De's mortgage. Accordingly he paid Rs. 600 to De and got possession of the house in suit and has been in possession ever since. Two representatives of the Sens filed petitions under O. 21, R. 100 and they were partly successful So the Nandis filed a suit in 1915, which suit was dismissed. Ananta Sen in his turn brought a suit in 1916 with regard to a part of the disputed property and was successful. In the suit which is now under appeal, the Nandis did not dispute the proposition that the Sens as successors-in-interest of Haladhar and Ananta inherited 2/3rds share of the house in suit. But the Sens' suit has been dismissed by the Munsif on the ground of limitation; and on appeal the Additional Subordinate Judge has upheld the Munsif's order. In this Court only the question of limitation has been argued.

In the first place the learned Advocate appearing for the appellants contends that the limitation for such a suit is determined by Art. 148, Lim. Act and not by Art. 144, as the lower Courts have held. Art. 148 provides a limitation of 60 years for a suit against a mortgagee to redeem or to recover possession of immovable property mortgaged. The question is therefore whether Joy Gopal, after he had paid off De's mortgage, was himself a mortgagee within the meaning of Art. 148. For the Nandis it is argued that as by that time both the mortgages had been paid off there was no longer any "mortgagee;" and further that no one could bring a "suit to redeem," because redemption had already taken place. But under S. 92, T. P. Act, Joy Gopal on paying off De's mortgage would be entitled to be subrogated to the rights of the mortgagee, and thereby would himself become a "mortgagee" within the meaning of Art. 148. And the Sens being owners of a portion of the mortgaged house would be entitled to recover such portion from Joy Gopal on paying to him their quota of the mortgage money. And their suit for redemption would be governed by Art. 148, Lim. Act, as was decided by the Allahabad High Court in the very similar case of 8 All 295 (1). It is true that S. 92, T. P. Act was not enacted until 1929. But the language of S. 63, Amending Act (20 of 1929) seems to suggest that S. 92 may be applied retrospectively. This was the view taken by a Full Bench of the Allahabad High Court in the case of 54 All 897 (2). I am inclined to hold, therefore, that Joy Gopal was a "mortgagee" within the meaning of Art. 148, and the Sens were entitled to bring their suit within 60 years from the time when the right to redeem accrued. However it is really unnecessary to decide those points in the present case because the Sens' suit would not be time-barred even if governed by Art. 144, as I shall now proceed to show.

The learned Additional Subordinate Judge has held that the suit is governed by Art. 144 and is barred by limitation, because it was not filed within 12 years from the date when the Nandis took possession through the Court on 4th May 1913. The limitation provided by Art. 144 is 12 years from the time when the possession of the defendant becomes adverse to the plaintiff. In the present case the lower Courts have held that the possession of Nandis became adverse from the date of their taking possession through the Court, or anyhow from the time when the Sens filed their claims under O. 21, R. 100. But this finding seems to indicate a misunderstanding of the terms

1. Nura Bibi v. Jagat Narain, (1886) 8 All 295 =1886 A W N 98.
2. Tota Ram v. Ram Lal, 1932 All 489=139 I C 107=1932 A L J 627=54 All 897 (F B).

"adverse possession." The Nandis got possession of the whole house under the orders of a competent Court. And having paid off De's mortgage in full, they were entitled to remain in possession of the whole house (including the 2/3rd share belonging to the Sens) until the Sens contributed their 2/3rd share of the mortgage debt. Whether they are to be regarded as "mortgagees" or as charge-holders, they were in lawful possession of the whole house, and cannot be regarded as trespassers in any sense of the word. Possession is not to be considered adverse when it can be referred to a lawful title. The lower Courts have made much of the subsequent litigation between the Sens and the Nandis ; but that litigation related not to the house in suit but to other properties which had been included in Joy Gopal's mortgage. In my opinion the possession of the Nandis was not adverse possession—so even if Art. 144, Lim. Act, and not Art. 148, applies to this case, the suit is not barred by limitation. I would therefore allow the appeal and set aside the judgments and decrees of the lower Courts ; and I would decree the suit and declare that the plaintiffs-appellants are entitled to redeem their 2/3rds share of the house in suit on payment of Rs. 400 to the Nandi defendants. The appellants will get their costs in all Courts from the Nandi defendants. A period of six months' grace is allowed. Let a preliminary decree for redemption be prepared accordingly.

Fazl Ali, J.—I agree.

S.R./R.K. *Appeal allowed.*

A. I. R. 1936 Patna 62

MOHAMMAD NOOR AND SAUNDERS, JJ.

Sheonath Prasad—Applicant--Appellant.

v.

Benares Bank, Ltd.—Opposite Party—Respondent.

Appeal No. 60 of 1934, Decided on 1st October 1935, from order of Sub-Judge, Gaya, D/- 16th December 1933.

(a) Civil P. C. (1908), O. 21, R. 17—Time and place of verification omitted — Defect held trivial and application not bad thereby.

In an application for execution of a decree the time and place of verification were omitted to be mentioned:

Held: that the defect was a trivial one and the application could not be said to be not in accordance with the law : 1926 *Pat* 533, *Disting.* [P 63 C 1]

(b) Civil P. C. (1908), O. 21. R. 17—Person signing verification as agent need not produce power along with application — Application signed by person authorised is in order—Production of power ordered by Court—Non-production — Application may be dismissed — Valid application not rendered invalid thereby.

There is no rule under which it is necessary for a person signing a verification in an execution application as an agent, to produce his power along with the execution application. If the application is signed by a properly authorised person it is in order. Non-production of the power if its production was ordered by the Court may entail dismissal of the application but it will not render an application otherwise valid, invalid. [P 63 C 1]

(c) Practice—New plea—Jurisdiction—Properties of all three judgment-debtors sold in execution—Price sufficient to satisfy decree — Another decree-holder of two judgment-debtors getting rateable distribution in price — Contention that decree was satisfied as against 3rd debtor as rateable distribution order was not against him — Question held not allowable in second appeal as not raised before—Jurisdiction of rateable distribution order held not challengeable at that stage.

In execution of a decree against three judgment-debtors the properties belonging to them were sold and price fetched was sufficient to satisfy the decree. But another creditor who held a decree against judgment-debtors 1 and 2 claimed rateable distribution and a portion of the amount realised was utilised towards satisfying his decree. It was contended that so far as the 3rd judgment-debtor was concerned the decree must be held to have been satisfied as the order of rateable distribution was not against him:

Held : that the question could not be entertained in second appeal as it was not raised in Courts below ; [P 63 C 2]

Held further : that the 3rd judgment-debtor could not be allowed to agitate the justification or otherwise of the order of rateable distribution at the stage of the second appeal. [P 63 C 2]

G. S. Prasad and *Raj Kishore Prasad* —for Appellant.

D. L. Nandkeolyar — for Respondent.

Mohammad Noor, J.—This appeal arises out of an execution proceeding. The only question involved is whether the application for execution is barred by limitation and its decision depends upon the decision whether a previous application for execution filed on 29th April 1933 and registered as No. 71 of 1933, was in accordance with law. After that application had already been registered, there was a note by the serishtadar pointing out that the time and place of its verification were not mentioned and that the power under which the Agent of the Bank signed it on its behalf was not produced. Time was given to the decree-holder to remedy

the defects pointed out in the note. This was not done, and the application was dismissed. This was followed by the present application for execution. The judgment-debtor contended that the previous application just referred to was not in accordance with law and, therefore, the present application was barred by limitation. This objection has been overruled by the learned Subordinate Judge and hence the present appeal by the judgment-debtor.

In my opinion, the learned Subordinate Judge has rightly decided the point. The defect of the omission of the time and the place of verification, if it can be called a defect, was a trivial one ; and for this omission the application cannot be said to be not in accordance with law. The learned Advocate for the appellant has relied upon a decision of this Court in 7 P L T 350 (1), but there is much difference between the defects in the application of execution there and the defect, if any, in the application before us. There various important and necessary information was wanting. The column in which the mode of execution is to be mentioned was very seriously defective. In my opinion therefore the omission of time and place of verification was not such a defect as to invalidate the application for execution. Coming now to the non-production of the power of the Agent to sign the verification, it is only to be said that there is no rule under which it is necessary that such power should be produced along with the application for execution. If the application was signed by a properly authorized person, it was in order. Non-production of the power if its production was ordered by the Court may entail the dismissal of the application, but it will not render an application itself, otherwise valid, invalid. It is not disputed that the Agent who signed the petition was in fact authorized to do so. As a matter of fact the present application has also been signed by him.

The learned Advocate for the appellant has, however, raised another point which was neither specifically raised before the learned Subordinate Judge nor was it decided by him and it is that the decree has become incapable of execution against the present appellant (judgment-debtor 3). It seems that upon a sale of the properties of the judgment-debtors 1 and 2 and of the appellant judgment-debtor 3 sufficient money was realised for the satisfaction of the entire decree, but a portion of it was subsequently utilized towards the payment of a decree of the Bank of Bihar against the judgment-debtors 1 and 2, which claimed rateable distribution. The learned Advocate therefore contended that so far as the appellant is concerned the decree must be taken to have been satisfied as the order of rateable distribution was not against him. I think this question cannot be entertained at this stage, firstly, on the ground that it was not raised in the Court below and secondly, the appellant cannot be allowed to agitate the justification or otherwise of the order of rateable distribution at this stage. In my opinion there is no merit in this appeal. I would therefore dismiss it with costs.

Saunders, J.—I agree.

S.R./R.K. *Appeal dismissed.*

1. Bhupendra Narain Mander v. Janesh Mander, 1926 Pat 533=90 I C 761=7 P L T 350.

A. I. R. 1936 Patna 63

WORT, J.

Baijnath Prasad Singh—Appellant.

v.

Muneshwar Singh and *others*—Respondents.

Appeal No. 1653 of 1932, Decided on 24th October 1935, from decision of Special Sub-Judge, Ranchi, D/- 5th September 1932..

(a) Merger—Cosharer landlord purchasing holding from occupancy tenant—No merger occurs.

Where a cosharer landlord purchases a holding from an occupancy tenant a merger does not ensue. [P 64 C 2]

(b) Possession—Suit for possession subject to redemption—Suit cannot fail merely because substantially it is redemption suit.

A suit in which possession of mortgaged property is claimed subject to redemption is not prevented from succeeding merely on the ground that it was in substance an action for redemption : 1914 *Cal* 894, *Rel. on.* [P 64 C 2]

(c) Chhota Nagpur Tenancy Act (6 of 1908), S. 46—No provision that mortgage beyond five years is illegal.

There is nothing in the Chhota Nagpur Tenancy Act which provides that the morogage of his right in his holding by a raiyat for a period exceeding five years is illegal. [P 65 C 1]

(d) Mortgage—Whether mortgage is valid or not mortgagee is only a mortgagee unless he sets up adverse title.

In a mortgage transaction whether the mortgage is valid or not, the position of the mortgagee is that of a mortgagee and nothing more unless some adverse title is set up by him.

[P 65 C 1]

(e) Limitation Act (1908), Art. 148—Tenant mortgaging holding to another—Purchaser's suit against mortgagee for possession on redemption—Mortgagee contending that mortgage was invalid hence suit for possession barred as not within 12 years—Mortgagee's position held that of mortgagee—Hence right to redeem not extinguished till 60 years.

A tenant created a mortgage on his holding and subsequent to the mortgage transferred the holding by way of sale to a third person. The vendee instituted a suit against the mortgagee for possession of the mortgaged property subject to redemption. The mortgagee contended that the mortgage was invalid and therefore the action for possession could not succeed for the reason that it was brought beyond the period of 12 years and was therefore barred by limitation:

Held: that the position of the defendant was that of a mortgagee therefore the right to redeem was not extinguished until a period of 60 years had elapsed under Art 148, Lim. Act.

[P 65 C 1]

B. P. Sinha—for Appellant.

Harinandan Singh—for Respondents.

Judgment. — This is the plaintiffs' appeal in an action for redemption. The plaintiff purchased the property in dispute from the original occupancy tenant. The vendor of the plaintiff had previously mortgaged the property to one of the cosharer landlords who is the respondent before this Court. That mortgage transaction took place more than 25 years ago. Just prior to the action out of which this appeal arises the plaintiff paid the mortgage money into Court, and by his action he claimed possession subject to redemption. The trial Court gave judgment for the plaintiff. On appeal however to the Special Subordinate Judge the decision was reversed on a point which the learned advocate representing the respondent in this Court fairly admits he cannot support. The decision was based on a complete misapprehension of the law. In substance it is this. The learned Judge states that

The plaintiff is met with another difficulty and that is that he is a cosharer landlord of the village, and under S. 20, Chota Nagpur Tenancy Act, he had no right to hold the disputed land as a tenant, but could hold it as a proprietor. It may be noted that the provisions of this Act are now analogous to the provisions of the Bengal Tenancy Act and so on.

Then proceeding to refer to the well-known Midnapore Zamindary Company's case, he said that the purchase would be held to be a purchase for the benefit of all the cosharer landlords. I need say no more than to observe that the learned Judge in the Court below appears to think that in the purchase by the landlord of a holding a merger ensued. That is a complete misapprehension of law. No merger did in fact take place and the learned advocate for the respondent does not support the judgment on that point, but argues another question which at any rate to some extent was dealt with by the Court below. His contention was in the first place that the mortgage was for more than five years, and that by the provisions of the Chota Nagpur Tenancy Act a mortgage for more than five years is invalid. There was no mortgage for the plaintiff to redeem, and as it was an action for redemption and not in substance an action for possession, the action must in any event fail. It would be somewhat astounding to me if I had to come to the conclusion that the law of this country is such as to prevent a plaintiff, in the circumstances such as the present, from succeeding where in fact he has claimed possession subject to redemption, merely on the ground that it was in substance an action for redemption. I need only refer in this connexion to the decision in 19 C L J 532 (1). That is a decision of the Calcutta High Court and Harington, J. in delivering the judgment of the Court—a judgment which was affirmed by the Divisional Court—made this statement in answer to the argument addressed to him:

It appears to me that a suit for possession on redeeming a usufructuary mortgage is in substance a suit for possession of the land.

If the plaintiff establishes his title and the only answer the defendant has is that the mortgage is void in point of law, still nevertheless the plaintiff would be entitled to get the land. The defendant-respondent therefore in this case is on the horns of a dilemma, and if he contends and successfully contends that the mortgage was invalid and that no Court could take cognizance of it, the plaintiff would be entitled, subject to questions of limitation, to succeed in his action without the payment of mortgage money. But it is contended in this case that the action for possession cannot succeed for the reason that it was brought beyond the period of 12 years and was therefore

1. Annada Hait v. Khudiram Hait, 1914 Cal 894=25 I C 558=19 C L J 532.

barred by limitation. Mr. Sinha who appears on behalf of the plaintiff-appellant contends however that the mortgage is valid. The section of the Chota Nagpur Tenancy Act relied upon by the respondent is S. 46 which provides:

> No transfer by a raiyat of his right in his holding or any portion thereof by mortgage or lease for any period, expressed or implied which exceeds or might in any possible event exceed five years .... shall be valid to any extent.

Now two points arise: first, that the mortgage is an invalid transfer and it is invalid not only by reason of S. 46, but by reason of the fact that under the Transfer of Property Act and the Registration Act, although this mortgage was for a sum less than Rs. 100, as there was a deed, it was necessary to register that deed, and non-registration makes the transaction invalid. In my judgment that argument is based upon a fallacy. There is nothing in the Chota Nagpur Tenancy Act which provides that a transaction of this kind is illegal. In the first place there is no doubt that the transaction was a mortgage transaction: in other words the mortgagee went into possession as a usufructuary mortgagee. The fallacy which underlies the argument is this that in some way (that way being unexplained) the fact that the transaction itself is invalid made the position of the mortgagee adverse. There is no foundation in my judgment for that contention. Whether the transaction was invalid or not, whether the landlord was bound to recognize it or not, the position of the mortgagee was that of a mortgagee and nothing more. There is no suggestion in this case, nor indeed was there any evidence, of any adverse possession by the mortgagee. It is a well-established principle enunciated in numerous cases, and indeed enunciated in every case that ever dealt with the particular aspect of this matter, that the mortgagee's possession remains that of a mortgagee until some adverse title is set up by him. There is nothing of that kind in this case and in my judgment this point entirely fails.

When once it is held that the position of the defendant was that of a mortgagee, it is quite clear that the right to redeem is not extinguished until a period of 60 years lapses under Art. 148, Lim. Act. For these considerations which I have stated it seems to me the point which the respondent contends in this case fails. It would be rather shocking if this Court were bound to hold otherwise particularly in the circumstances of this case, for it must be remembered that it is not the landlord qua landlord who is setting up this contention, but the very person who the Act enjoins to have his own transaction of mortgage carried out in a particular manner. And I say it will be in my judgment shocking to have to come to a contrary conclusion in a case of this kind where all the justice of the case is on the side of the plaintiff who comes into Court offering to redeem the mortgage. The Courts below, so far as this point is concerned, have held against the respondent and in my judgment their decision on this point is right; and, as no support can be given on the decision of the Court below holding that the plaintiff should fail, the net result is that the appeal must be allowed and there will be order for costs throughout. Leave to appeal under the Letters Patent is refused.

S.R. *Appeal allowed.*

A. I. R. 1936 Patna 65

AGARWALA, J.

Dharam Nath Missir and *others*—Appellants.

v.

Mangla Pershad Singh — Respondent.

Appeals Nos. 218 and 219 of 1934, Decided on 26th September 1935, from decision of Sub-Judge, Chapra, D/- 1st December 1933.

Bengal Tenancy Act (8 of 1885), S. 153 (a) —Mafi claimed as given as Brahmins—Plea not established—Amount claimed less than Rs. 100—S. 153 (a) held bar to appeal.

Where in a rent suit mafi is claimed as given on the ground that the defendants were Brahmins and not that they were under an obligation to render services as jeth-raiyats (an incident of their holding) and the amount claimed as mafi is less than Rs. 100, S. 153 (a) is a bar to second appeal: 1917 *Pat* 504, *Foll.*; 1920 *Pat* 212, *not Foll.* [P 66 C 1, 2]

G. P. Singh—for Appellants.

Ganesh Sharma—for Respondents.

Judgment.—These two second appeals Nos. 218 and 219 of 1934 arise out of two suits for rent numbered respectively 887 and 888. The defendants in both suits pleaded that they were entitled to a deduction of certain amount from the rent claimed as mafi. It was not specified in the written statement whether the claim was on the basis of their being jeth-raiyats or being Brahmins to whom the zamindar had agreed

to make a deduction from the normal rent. The fact that mafi was allowable in respect of the two holdings in suit was recorded in the Record-of-rights, and the 1st Court, finding that there was evidence that until 1335 mafi had actually been allowed to the defendants and that until 1332 at least they had been performing the duties of jeth-raiyats, held that they were entitled to the deduction claimed as jeth-raiyats. In appeal the learned Subordinate Judge has disallowed the claim. With regard to suit No. 887 he was mistakenly under the impression that the suit had not been contested by defendant 1 and with regard to suit No. 888 he disallowed the claim for a reason which it is difficult to understand. He said that the defendant in this suit had recently acquired a proprietary share in the village, and that from this he deduced that it was beneath dignity of this defendant to render the services required of him as a jeth-raiyat. That there was no evidence to the effect that the defendant had refused to perform the duties either for this or any other reason does not appear, so that the only ground on which the learned Court below has disallowed the plaintiff's claim is one that is not sustainable on the evidence.

It was contended by the learned Advocate for the respondent however that no second appeal lay in this case, relying on the decision in 1 Pat L J 504 (1), in which it was held that mafi is not rent but a payment for services rendered and therefore that in a case where mafi is claimed, the amount of rent is not in question in dispute between the parties within the meaning of the exception to S. 153, Ben. Ten. Act. It has been pointed out however in a later case 57 I C 621 (2), that, that exception does not apply to a case in which the mafi is claimed not as a personal right of a tenant but as an incident of the holding and as a deduction which they are entitled to make from the rent claimed by the landlord. In the present case the claim to deduct mafi was not pleaded on the basis of its being an incident of the defendant's holding. In these second appeals however the learned Advocate for the appellants has contended that the real ground on which the mafi was given in this case is that the defendants were Brahmins and not that they were under an obligation to render services as jeth-raiyats. That however has been negatived by both Courts. In view of the pleadings in the case, it is not possible to hold that the decision in 57 I C 621 (2) applies. The result is that the case is governed by the earlier decision in 1 Pat L J 504 (1), and as the amount claimed in each of the suits was less than Rs. 100, the appeals are barred by Cl. (a), S. 153, Ben. Ten. Act. Appeal No. 219 is dismissed without costs as the respondent has not appeared, and Appeal No. 218 with costs. Leave to appeal is refused.

S.R./R.K. *Order accordingly.*

1. Safait Hussain v. Waizuddin, 1917 Pat 504=37 I C 670=1 Pat L J 504.
2. Jagdish Missir v. Maharaja Sir Rameshwar Singh, 1920 Pat 212=57 I C 621.

A. I. R. 1936 Patna 66

WORT, J.

Moti Singh and *others* — Plaintiffs — Appellants.

v.

Deoki Singh and *others*—1st, 2nd and 3rd Parties—Defendants—Respondents.

Appeal No. 63 of 1933, Decided on 21st November 1935, from decision of Sub-Judge, 3rd Court, Patna, D/- 14th September 1932.

(a) Transfer of Property Act (1882), S. 3—Palm and date trees are immoveable property.

Palm and date trees are trees the produce of which can be got and hence cannot be considerd as timber and are therefore immoveable property, 1926 *Pat* 125, *Rel. on.* [P 67 C 1]

(b) Adverse Possession — Tenant-in-common—Other tenants in possession—Tenant not ousted by them—Tenant is deemed in possession though living at great distance and without any concern with property.

The mere fact that a person is tenant in common with others who are in possession of the property is sufficient to show that the person is in possession even if he lived a great distance from where the property is situated and even if he had nothing whatever to do with the property unless it can be shown that other co-tenants had ousted the person from the property. [P 67 C 2 ; P 68 C 1]

(c) Co-tenants — Ouster — Co-tenant demanding rent from lessee—Demand is no evidence of ouster.

Demand of rent by co-tenant from a lessee of the property is not evidence of ouster by the co-tenant of the other co-tenants whether such demand is made on his behalf or on behalf of the others. [P 68 C 1]

G. P. Das, P. Misra, K. N. Lal and *P. N. Gour*—for Appellants.

B. N. Mitter and *Syed Hasan* — for Respondents.

Judgment. — This is the plaintiff's appeal in an action in which they first of all claimed title to a quarter share of 58 palm trees and 61 date trees. The plaintiffs claimed partition after establishing their title to the one-fourth share in the trees. The Judge in the Court below has come to the conclusion that the action was barred by limitation in the sense that neither the plaintiffs nor their predecessor-in-title had been in possession within twelve years and therefore the action was out of time under Art. 142. At first there was some discussion in the case as to whether the trees could be considered as a moveable property and whether the action was governed by Art. 142 or Art. 144, and, if not, whether the action in its present form was misconceived. Now this matter, for the purposes of this Court at any rate, has been decided by my brother Ross, on 8th July 1925 in Appeal No. 91 of 1923 (1) and was reported when at its later stages it came before a Division Bench of this Court which confirmed my brother Ross's decision so far as the particular point with which, I am dealing is concerned. It was there decided that fruit trees the produce of which is got, as is the case in the matter before me, could not be considered as timber and therefore were not excluded from immoveable property as defined in the Transfer of Property Act. Under the Registration Act immoveable property does not include standing timber, growing crops or grass. The question which arose in this case was whether interest in an immoveable property, apart from the interest in the land itself, could be acquired as alleged by the plaintiffs in this case. The decision of this Court to which I have referred establishes that matter, and in that decision reliance was placed upon the well-known case of 1 C P D 35 (2). That is all I propose to say on that matter..

The plaintiff claimed a partition, as I have said, of their interest in the trees. Mr. Mitter presses upon me the decision of the learned Judge in the Court below which in effect is .that after considering the oral and documentary evidence of the parties it has not been established that the plaintiffs or their predecessor-in-title have been in possession within twelve years. It is contended that that finding is conclusive and being binding as a decision of facts cannot be disturbed by this Court. Now, had the case been different from what it really is, there is no doubt the argument which Mr. Mitter advances would have to be given effect to, as I am not entitled to go into the evidence to see whether the judgment of the learned Judge is justified on this point but to take the finding as it is and decide the case accordingly. But this case is different. The plaintiffs claimed title from one of three brothers who together with wife of one of them had interest in these trees. It is suggested that their interest was a divided and separate interest. At one stage of the case in the Court below it appears to have been argued that they were members of a joint family. We are not concerned with the decision of the trial Court; but the learned Judge of that Court came to the conclusion that the plaintiffs were not entitled to argue that they were members of a joint family as they had not alleged that in their plaint. The appellate Court, however considered the matter and came to the conclusion that the plaintiffs were wrong as regards their allegation that their predecessors' interest was a separate interest, and in the circumstances of the case, held that the three brothers and the wife were tenants in common.

It is impossible to accept the argument of Mr. Mitter that because the plaintiffs failed to establish a particular title of their predecessors which they alleged, their action must now fail although it is now established that these persons or one of them had some title to pass on to the plaintiffs. There is no doubt that the plaintiffs did acquire some interest, whatever it might have been, from Rameshwar, and in the events which happened it is clear that what they acquired was a tenancy in common of these trees. Now that finding of the learned Judge in the Court below clears the way for the disposal of all the other questions in the case. From the moment the Judge found that they were tenants in common the question of possession within 12 years did not arise in the form in which it was decided. The mere fact that they were tenants in common would show that they were in possession even

1. Ashloke Singh v. Bodha Ganderi, 1926 Pat 125=90 I C 769.
2. Marshall v. Green, (1876) 1 C P D 35=45 L J C P 153=33 L T 404=24 W R 175.

if they lived a great distance from the village as was suggested and even if they had nothing whatever to do with these trees, unless it could be shown by the defendants that the other co-tenants had ousted the plaintiffs predecessor from this property. Now it is quite clear that the learned Judge in the Court below proceeds to decide this case on that basis and quite rightly. Then, having come to a certain conclusion with regard to that, he deals, in my judgment in an erroneous manner, with the other questions which arose.

He dealt with a number of documents the earliest of which was of 1919 which was brought by the defendants to show that one of the other persons, i. e., persons other than Rameshwar, had made demand for five years' rent from the persons tapping these trees. That was to prove that by the making of this demand of rent there was an ouster by that person. No argument is necessary on a point like that. It is quite clear that a demand of rent by a co-tenant cannot be evidence of ouster in any circumstances. Demand of rent is an equivocal act. At most it may be a demand by the person himself which amounts to nothing. On the other hand it may be a demand by an agent or co-tenant. In any event, whether such a demand is made on his behalf or on behalf of others, it is not evidence of any ouster by him of the other co-tenants. The other documents which came at a later date were of no greater value. But assuming that Exhibit K, which was the first document of 1919, was evidence of ouster, it was so on that date, i. e., 1919, and that is the earliest instance which the defendants had to rely upon in order to prove ouster. All that need be said with regard to the matter is that it was too late because 1919 was yet within the period of 12 years before the suit and, as the plaintiffs had been shown, by what I have already said, to be in possession by their co-tenants before that date, it is quite clear that the action would not be barred by limitation. As I pointed out, the Judge approaches the case in that way and then proceeds to decide the case in an omnibus statement on a different ground altogether. In the circumstances of this case, although as a general proposition it was for the plaintiffs to prove that they were in possession, their possession has been proved by the finding of the Judge that they were co-tenants, and it was therefore in the circumstances necessary, as I have already stated, for the defendants to prove ouster. If the conclusion of the Judge had been that on a consideration of oral and documentary evidence an ouster of the plaintiffs had been proved there would have been an end of the matter. But the statement the Judge makes in his judgment is something quite different, viz., the plaintiffs had failed to establish or prove that they were in possession. Quite clearly, from the facts which I have already stated, the plaintiffs had established that they were in possession. In those circumstances it seems to me quite clearly that the judgement of the learned Judge in the Court below is wrong in law and must be set aside. The plaintiffs are entitled to succeed in their action in the circumstances, and the result will be that the learned Judge's judgment be set aside and the plaintiffs will be entitled to a preliminary decree for partition with costs throughout.

Leave to appeal under the Letters Patent is refused.

S.R./R.K. *Appeal allowed.*

A. I. R. 1936 Patna 68

FAZL ALI AND LUBY, JJ.

Mukhram Rai and *others*—Plaintiffs—Appellants.

v.

Chandradeep Rai and *others*—Defendants—Respondents.

Appeal No. 782 of 1931, Decided on 3rd September 1935, from appellate decree of Subordinate Judge, Shahabad, D/- 27th January 1930.

(a) Hindu Law—Partition—Presumption—Partition suit—Parties in possession of and exercising ownership rights over separate lands for long time—Court may presume partition.

Where parties have been in possession of and exercising rights of ownership over separate blocks of land for a long time the Court might well presume that these lands have already been divided and rights of parties defined in regard to them in such a manner as to preclude their being re-partitioned. 1929 *P C* 8 (*P C*), *Rel. on.* [P 69 C 2]

(b) Adverse Possession—Partition suit—Parties divided in status but not in properties—Defendant in exclusive possession of disputed land for over 12 years—Art. 127 or Art. 144, Lim. Act held applied and defendant held got title to land.

There was a division of status but no division of immoveable properties between parties to a partition suit. The defendant had been in exclusive possession and enjoyment of disputed lands for over 12 years before suit:

Held: that either Art. 127 or Art. 144, Lim. Act applied and that defendant had acquired title to the disputed lands. [P 70 C 1]

(c) Costs—Party prolonging suit deliberately—Court refusing to grant him costs though successful—High Court held could not reasonably interfere with order.

A party to a suit had deliberately prolonged the proceeding and wasted the time of the Court which refused to grant costs to him on this ground though they had succeeded in the suit:

Held: that granting of costs was within discretion of the trial Court being in possession of all facts of the case. Hence High Court could not reasonably interfere with the Court's order as to costs. [P 70 C 1]

G. S. Prasad and *K. Dayal*—for Appellants.

S. M. Mullick and *B. P. Sinha*—for Respondents.

Fazl Ali, J.—This appeal arises out of a partition suit in which the District Judge of Shahabad has upheld the decision of the trial Court and dismissed the suit with regard to the bulk of the properties sought to be partitioned and decreed the suit with regard to those properties which were admittedly held in common. The parties are admittedly descendants of a common ancestor Gandhu Rai who had two sons Sampat Rai and Bisesar Rai. The plaintiffs are the descendants of Bisesar Rai and the defendants are the descendants of Sampat Rai. The plaintiffs' case was that they and the defendants were co-parceners of a joint family governed by the Mitakshara school and that the properties sought to be partitioned were all joint family properties. The defendants on the other hand contended that there had been disruption of the family long before the institution of the suit and that the properties had been partitioned some 90 years before the suit.

Both the Courts below have held that the parties separated in status many years before the suit and the lower Appellate Court has also disbelieved the defence case that there was a partition about 90 years ago. The decision of the first Court is that the defendants have succeeded in proving that the plaintiff had been separate from them in family status, in ownership of properties and in possession except in respect of the lands admitted in the written statement to be held by both parties in common tenancy. The learned District Judge affirms these findings but as he has also definitely found that there was no formal partition between the parties, the decree passed by him is assailed on the ground that even co-sharers, though separate in status, may claim partition of the family properties which have not been partitioned by metes and bounds. The facts of the present case, however seem to me to be somewhat similar to the facts of the case of 53 Bom 213 (1), which was decided by the Privy Council in 1928. In the present case the parties have been in possession of and have been exercising rights of ownership over separate blocks of land for such a long time and in such a manner that a Court might well presume that these lands have been already divided and the rights of the parties defined in regard to them in such a manner as to preclude their being re-partitioned. But in any event the finding of the learned District Judge that the defendants have acquired title to the lands of which they have been in exclusive possession for more than 12 years seems to me to be sufficient to dispose of his appeal.

The learned District Judge has referred to certain disputes between the parties in the course of the last survey proceedings which took place sometime in 1908 and he has pointed out that Hari Pragash, one of the plaintiffs never asserted in the course of these proceedings that the family was joint but had in fact admitted that there had been a separation in status more than 8 or 10 years before the survey proceedings. It is also pointed out by him that the defendants in the course of the survey proceedings had asserted in clear terms that they were entitled to remain in possession of the lands, which were, ultimately recorded in their name, as a matter of right. As I have already stated the survey proceedings took place more than 12 years before the institution of the present suit and thus, as the learned District Judge has pointed out, the defendants have not only been in possession of the disputed lands for more than 12 years but have been asserting at least since the survey proceedings that these lands belong exclusively to them.

1. Yellappa Ramappa v. Tipanna, 1929 P C 8 = 53 Bom 213 = 114 I C 18.

To such a case as was indicated in 53 Bom 213 (1), Art. 127, Lim. Act would seem to apply. That article provides that a suit by a person excluded from joint family property to enforce a right to share therein must be instituted within 12 years of the date when the exclusion became known to the plaintiff. I am, however, conscious of the fact that a question may arise whether Art. 127, will apply where there has already been a division of status but no division of immoveable properties by metes and bounds. But in any case if Art. 127, does not apply, Art. 144 will apply and the decision of the learned District Judge is, therefore, substantially correct. In these circumstances I would dismiss this appeal with costs.

There is also a cross-objection preferred on behalf of the respondents against the decree of the Courts below refusing to pass a decree for costs in their favour. The learned Subordinate Judge refused cost to the defendants on the ground that the defendants had deliberately protracted the trial and wasted the time of the Court unnecessarily. It is true that ordinarily cost must follow the result, but it is also to be remembered that the granting of cost is within the discretion of the trying Court that Court being in possession of all the facts of the case. I do not think that I can reasonably interfere with the order passed by the Courts below. The cross-objection will also be dismissed with costs.

Luby, J.—I agree,

S.R./R.K. *Appeal and Cross-objection dismissed.*

A. I. R. 1936 Patna 70

DHAVLE, J.

Bengal Nagpur Railway, Co.—Appellant.

v.

Janki Das Marwary—Respondent.

Civil Revn. Nos. 89, 107 and 108 of 1935, Decided on 30th September 1935, from order of Sm. C. C. Judge, Raghunathpur, D/- 24th November 1934.

Railways Act (1890), S. 72, Risk note H—Misconduct — Standing orders requiring wagons with flap doors and windows not to be used in monsoons for damageable goods—Windows of C type wagons required to be securely fastened and care taken that there was no likelihood of rain penetrating—Damageable consignment loaded in C type wagons damaged by rain—Wagons not established water-tight—Breach of rules held amounted to misconduct.

Standing orders of a railway company required that wagons with flap doors and windows should on no account be used for carrying damageable traffic during the monsoons and that in C type wagons special care must be taken to see that the windows are securely fastened and that there is no likelihood of rain penetrating. Certain consignments of damageable goods loaded in C type wagons were damaged by rain water. It was not established that the wagons were water-tight:

Held: that non-observance and breach of the rules was such as to amount to misconduct within the meaning of Risk Note. Form H.: 1930 *Pat* 283 and 559, *Disting*; *Lewis V. G. W. Rly. Co.* (1877) 3 *Q B D* 195, *Foll*; *Case Law discussed.* [P 71 C 2,P 74C 1]

S. M. Mullick, *Natai Chandra Ghosh* and *Baidyanath Sinha*—for Appellant.

L. C. Majumdar and *A. B. Mukharji*—for Respondent.

Order. — These are three applications under S. 25, Small Cause Court Act, arising out of three suits against the petitioner, the B. N. R. Co., for compensation for damage by wet to 3 consignments of *ata*, flour and *suji* which were carried by the petitioner from Ramkrishtopur Station to Jaychandipahar Station on its own line in May, August and September, 1933. There was no dispute that damage was actually caused to the consignments, and it was in fact assessed by an Assistant Commercial Inspector of the petitioner. The consignments were covered by Risk Notes in Form H, under which the Railway Administration is to be held harmless and free from all responsibility for any damage to the consignments

> from any acts whatsoever, except upon proof that . . . . .damage arose from the misconduct of the Railway Administration's servants.

The lower Court found that the petitioner's servants had acted in violation of various rules in connexion with these consignments and that damage was caused by

> rain water entering into the wagons, which were either leaky or were not securely closed and made water-tight owing to the negligence of the defendant company and their servants.

Relying on 1933 Pat 630 (1), the lower Court held that the defendant was therefore not absolved from liability for the damage. The learned Advocate for the petitioner has urged that the findings of fact of the Court below are open to excep-

---

1. Jamunadas Ramjas v. E I Ry. Co. Ltd., 1933 Pat 630=148 I C 396.

tion, but in my opinion, there is no substance in the contention. It appears that two of the consignments, which were loaded in August and September, were carried in *C* type wagons, regarding which there was a special standing order issued in May 1931, (Ex. 4) and repeated in May 1933, (Ex. J), laying down that special care must be taken to see that the widows are securely fastened and that there is no likelihood of rain penetrating. The evidence adduced on behalf of the plaintiffs was to the effect that the flap doors, windows and roofs of the wagons had let in the water that had damaged goods. Against this we have the statements of an Assistant Train Examiner at Shalimar, D. W. 1, and a Siding Clerk at Ramkrishtopur Station, D. W. No. 3, for the petitioner, that they had examined the wagons and found them in good condition ; the exmination of the Assistant Train Examiner was as the lower Court has pointed out, of a very cursory character, though there was a special standing order regarding the careful inspection of the roofs of vehicles, while the Siding Clerk, who admittedly made no note about his alleged examination of the wagons in August and September, has naturally so little knowledge of the particular wagons that he only claims that the wagons loaded by him had an iron sheet roofing because most of the *C* type wagons have such roofing and he "cannot say if water goes inside the wagons in case the doors are left loose;" another witness examined for the petitioner was a Shed Clerk at Ramkrishtopur Station, who speaks of loading the consignment of May 1933, in a wagon of the *A*-2 type ; he was unable to define this type of wagon, and while he admits that he made no note of the examination of the wagon and that there is no paper to show that the wagon had a steel sheet roof (as claimed by him) and not a corrugated iron roof (as claimed by the plaintiffs), his professed inability to say if the bags were dry or wet when they were loaded makes him a thoroughly unreliable witness.

The only other witness examined for the petitioner was the Assistant Commercial Inspector, who takes up the impossible position that corrugated roofs and flap doors are not prohibited in the rainy season, which is directly opposed to Cls. (b) and (f) of para. 11 of the "Special precautions to be observed in dealing with damageable traffic during the monsoon" issued in May 1931, and reported, so far as flap doors are concerned, in Cl. (e) of R. 11 of the standing orders of May 1933, which lays down that wagons with flap doors and windows should never be used. I have already referred to another clause in the standing order which requires that in *C* type wagons or foreign Railway wagons of similar types special care must be taken to see that the windows are securely fastened and that there is no likelihood of rain penetrating. There is also a rule requiring Station Masters and goods clerks to examine the condition of all wagons before loading and satisfying themselves that the wagons supplied are water-tight and serviceable, and to make an entry in the Station Diary to show that they have done so. The plaintiffs called for these entries but none was produced, and it is obvious that this rule also was not observed in connexion with any of the three consignments in question. It is true that the earliest consignment was carried in May and not during the monsoon ; but the papers show that in this case there were 12 bags found damaged by water near the flap door of the wagon, and no attempt was made on behalf of the petitioner to show why such goods were loaded near the flap door and the latter, as one may well infer in the circumstances of this case, not securely fastened. The finding of fact of the lower Court that damage was done by rain water entering into the wagons, which were either leaky or were not securely closed and made water-tight, is clearly right on the evidence.

The only question in these cases thus is whether on this finding the petitioner has been rightly held liable as upon proof that the damage arose from the misconduct of the Railway Administration's servants. The learned Judge below has indeed held the petitioner liable for damage "owing to the negligence of the defendant company and their servants" but this was because Jwala Prasad, J., in the case from 1933 Pat 630 (1) held that a mere neglect of duty will charge the Railway Administration or its servants with misconduct and bring the case within Risk Note *H* or *A* (which latter uses the same phraseology, so far as is mate-

'rial at present). "Misconduct would ordinarily," said the learned Judge,

mean failure to do what is required of a person to do. Certainly it was the duty of the Railway Administration to provide against such ordinary contingency, such as rain water forcing itself into the wagon and causing damage to grain, etc., in it. The fact that the rain water did enter the wagon and caused damage to the plaintiff's consignment is itself sufficient to show that proper and requisite precautions were not taken by the Railway Administration to provide against such contingency.

It has been urged by the learned advocate for the petitioner that this is not the law, and that the misconduct contemplated by the risk note involves "wilful neglect" at the very least, as was held by two Division Benches of this Court in 11 P L T 161 (2) and 12 P L T 810 (3). These cases however are perhaps distinguishable on the ground that they were cases not of damages, but of loss, which latter is governed by a special provision in the risk-notes relating to proof of "misconduct on the part of the Railway Administration or its servants." But apart from this, "misconduct" is not a term of art. In ordinary parlance it means bad management or mismanagement, being often used quasi-specifically (as may be seen from the Oxford English Dictionary) in the sense of malfeasance or culpable neglect of an official in regard to his office. The word is sometimes said to connote moral obliquity, but it seems to me that this is largely due to the fact that the word is also used in the sense of improper conduct or wrong behaviour especially adultery; the word "conduct" itself means not only "manner of conducting business, etc." but also "behaviour" specially in its moral aspect, as good or bad conduct. In an English case which is often quoted (1877) 3 Q B D 195 (4), dealing with the question of the "wilful misconduct" of Railway servants, Brett, L. J., said that wilful misconduct must mean,

the doing of something, or the omitting to do something, which it is wrong to do or to omit, where the person who is guilty of the act or the omission knows that the act which he is doing, or that which he is omitting to do, is a wrong thing, to do or to omit .... he is doing a wrong thing, and .... that is misconduct, and .... as he does it intentionally, he is guilty of wilful misconduct.

There is, I think little reference to ethics when misconduct in railway risk-notes is taken to mean the doing of a wrong thing; and it is clear that such misconduct may or may not be wilful. It was thus that in 58 Cal 585 (5), Suhrawardy, J. and Patterson, J., concurring, after referring to the English cases, held that the word "misconduct" in these risk-notes is wide enough to include wrongful commission and omission, intentionally or unintentionally any act which it wrongfully did or which it wrongfully neglected to do, or, to put it in another way, did what it should not have done and did not do what it should have done, or any unbusinesslike conduct including negligence or want of proper care. The learned advocate has relied on this case as an authority for the proposition that misconduct cannot be inferred from defects found in the wagon at the arriving station, if it is shown that the wagon was in a good condition when it left the starting station. But the present is not a case of that kind at all. Suhrawardy, J's. construction of the term "misconduct" was apparently considered too wide in 35 C W N 1250 (6), where Mitter, J., with whom Patterson, J., agreed, said that it was not necessary to consider whether an unintentional omission will amount to "misconduct", seeing that on the facts of the case under consideration there was clearly deliberate omission to padlock the wagon—deliberate in the sense that it was not accidental but the usual practice. Breaches of definite rules leading to damage have been repeatedly held to amount to "misconduct": see 49 C L J 551 (7), and another case between the same parties reported in 1932 Cal 70 (8), it is indeed difficult to imagine how "misconduct" could possibly be so construed as to exclude such breaches.

The learned advocate has also referred to 60 Cal 996 (9), in which Guha, J.

2. Durga Dutta Shri Ram Firm v. Secy. of State, 1930 Pat 283=124 I C 833=9 Pat 733 =11 P L T 161.
3. B. N. Ry. Co. v. Hukam Chand Hardat Rai, 1930 Pat 559=128 I C 798=12 P L T 810.
4. Lewis v. G. W. Ry. Co., (1877) 3 Q B D 195= 47 L J Q B 131=37 L T 774=26 W R 255.
5. B. N. Ry. Co. v. Moolji Sicka & Co., (1930) Cal 815=129 I C 769=58 Cal 585.
6. Secy. of State v. Dhokalmal Mahadihlal, 1931 Cal 734=134 I C 940=35 C W N 1250= 54 C L J 154.
7. B. N. Ry. Co., Ltd. v. Moolji Sicka & Co., 1929 Cal 654=122 I C 625=49 C L J 551.
8. B. N. Ry. Co. Ltd. v. Moolji Sicka & Co., 1932 Cal 70=134 I C 1268=54 C L J 314.
9. M. & S. M. Ry. Co., Ltd. v. Sundarjee Kali-Das, 1933 Cal 742=147 I C 752=60 Cal 996= 57 C L J 281.

(sitting singly) took it from the English cases that misconduct is not necessarily established by proving even culpable negligence and is something opposed to accident or negligence-dicta which however refer not to misconduct simpliciter but to wilful misconduct. The learned advocate has also cited 1933 All 460 (10), where Kisch, J., declined to infer "misconduct" from damage by wet to raw sugar because it did not appear that there was anything wrong with the wagon either at the beginning or at the end, the goods in question being inherently susceptible to the damp atmosphere during the monsoon season. This again is of no help to the petitioner in the circumstances of this case. The learned advocate also referred to 1934 Mad 715 (11), where Madhavan Nair J., declined to apply 1933 Pat 630 (1), and to infer "misconduct" from damage done to bags of rice in transit on account of rain blowing in through the crevices of the doors ; the wagon had been found water-tight at the preceding and also at the following periodical examination, and the learned Judge held that no inference of misconduct could fairly arise in the absence of proof that there was any breach of duty by the railway servants concerned, while the railway could do no more than what they had done, viz., provide a water-tight compartment. This again is inapplicable to the facts of the present case with its deliberate breach of the precautions prescribed. It is not necessary in the facts of the present case to say whether Jwala Prasad, J.'s construction of "misconduct" is not too wide in some respect, and in particular whether the risk-note permits the Court to find misconduct from the mere fact that rain water did enter the wagon and cause damage to the consignment : for the present is a case of definite breach of the rules for dealing with such consignments and of damage which is clearly traceable to such breach.

The learned Judge below called it "negligence," but it is obvious from his reference to the ruling in 1933 Pat 630 (1), that what he meant was misconduct within the risk-notes. Turning now to the two Patna cases relied on for the petitioner, 11 P L T 161 (2) was a case in which the Court of first appeal dismissed a suit for compensation for loss of a bale of cloth consigned over certain railways under risk note B on the finding that no wilful neglect had been proved. The risk-note spoke of misconduct, and in these circumstances Wort, J., (with whom Kulwant Sahay, J., agreed), held that if the plaintiff fails on the evidence to prove a wilful neglect, it must necessarily follow that he will equally fail in proving misconduct, which at any rate cannot be said to be something less than wilful neglect. In the case from 12 P L T 810 (3), James, J., (Chatterji, J., concurring) saw no reason to differ from this view, but said

> after all, wilful neglect is misconduct ; and I think that the reasonable view is to hold that the term "misconduct" means "wilful neglect" including a fortiori anything more culpable.

The facts of the case were that the lower Courts had concurrently found that the plaintiffs' loss was due to misconduct on the part of the Railway Administration in carrying the goods in a wagon which was not locked but only fastened with a rivet sealed with wire and lead, which could be broken open by an expert in 45 seconds, and the train moved at a very slow pace in that part of the journey in which the theft had occurred. It may be doubted in these circumstances how far the learned Judge intended positively to hold that misconduct cannot be anything less than wilful neglect, for he proceeded on the footing that "after all, wilful neglect is misconduct," and earlier in the judgment he had doubted the correctness of the dictum in 52 Bom 770 (12), that "misconduct" does not ordinarily cover acts of negligence, after pointing out, while dealing with the case of 54 Bom 105 (13), that the misconduct referred to in the risk-note is not such misconduct of railway servants as may amount to a failure of duty towards their employers, but such misconduct on the part of railway servants or the railway administration itself as amounts to a failure of duty towards the consignor. There is, at any rate, nothing in the observations of the learned Judge to show

10. Secy. of State v. Firm Jhaddu Lal Hazari Lal, 1933 All 460=144 I C 304=1933 A L J 995.
11. S. I. Ry. Co., Ltd. v. V. M. K. S. Dandayutham Chettiar, 1934 Mad 715=154 I C 453=67 M L J. 704.
12. Madras and S. M. Ry. Co., v. Jumakhram Parbhudai, 1928 Bom 504 = 118 I C 241=52 Bom 770=30 Bom L R 1104.
13. B. B. & C. I. Ry. v. Rajnagar Spinning Co. Ltd., 1930 Bom 129=124 I C 229 = 54 Bom 105=31 Bom L R 1426.

that an unexplained and habitual failure to act in accordance with rules or standing orders obviously designed to prevent damage by wet to goods in transit such as we have in the present case, does not amount to misconduct. The learned advocate for the petitioner has urged that the non-observance of rules need not amount to misconduct if the wagons in which the goods were loaded were absolutely water-tight and that the rules were only precautionary. But in the first place it has not been satisfactorily shown in the present case that the wagons were absolutely water-tight : the examination at Shalimar seems from Ex. D-2 to be sometimes at any rate directed to ascertaining merely whether the wagon is fit for running, and no railway witnesses speak even in the monsoon of testing the wagon for holes — and secondly, the special standing order that wagons with flap doors and windows should on no account be used for carrying damageable traffic during the monsoon itself shows that it is not enough to have a wagon with a water-tight roof. In my opinion the breach of rules established in the present case is such as to amount to "misconduct" even within the ruling in 12 P L T 810 (3). There is therefore no need to interfere in revision under S. 25, Small Cause Courts Act. The applications are accordingly dismissed with costs. Hearing fee 2 gold mohurs for all the three cases together.

S.R./R.K. *Applications dismissed.*

A. I. R. 1936 Patna 74

MACPHERSON, J.

Thakur Prasad and *another* — Petitioners.

v.

Emperor—Opposite Party.

Civil-Criminal Revn. No. 5 of 1935, Decided on 30th September 1935, from order of Sess. Judge, Monghyr, D/- 17th August 1935.

(a) Penal Code (1860), S. 186—Constructive obstruction to judicial officer in discharge of Judical functions—S. 186 does not apply.

Section 186 does not contemplate constructive obstruction to a judicial officer in the discharge of judicial functions, even when they are of a quasi-executive character or when the proceedings before him are in execution. [P 75 C 1]

(b) Criminal P. C. (1898), S. 195—S. 195 (1) (a) applies to non-judicial authorities—Cls. (b) and (c) apply to Courts—Subordinate Judge executing decree, directing issue of process of attachment by Nazir—Nazir deputing Naib Nazir for executing attachment order—Obstruction to execution by accused—Subordinate Judge filing complaint under S. 186 I. P. C. —Naib Nazir held not subordinate to Subordinate Judge— Hence no cognizance could be taken on latter's complaint

Section 195 (1) (a) applies to non-judicial authorities only while Cls. (b) and (c) apply to Courts. A Subordinate Judge in the exercise of his judicial functions was executing a decree and directed the issue of process of attachment for execution by the Nazir who deputed the Naib Nazir for executing the order of attachment. The Naib Nazir was resisted in execution of the order by the accused. The Subordinate Judge thereupon directed a complaint to be filed against the accused under S. 186, I.P. C.:

Held: that the Naib Nazir was not subordinate to the Subordinate Judge who issued the order of attachment which the Naib Nazir was executing. Therefore the complaint of the Subordinate Judge was inadequate to remove the bar to cognisance of the offence under S. 186, I. P. C., presented by the provisions of S. 195 (1) (a) and no cognisance could be taken upon the complaint of the Subordinate Judge. [P 75 C 2]

B. C. De and *K. N. Lall*—for Petitioners.

S. N. Sahai and *B. B. Saran*—for Opposite Party.

Order.— In an execution case the Subordinate Judge of Monghyr on receipt of an application purporting to be under S. 195 read with S. 476, Criminal P. C., relating to resistance to the Naib Nazir in attaching the property of the judgment-debtor held a sort of judicial inquiry and directed a complaint to be filed against the present petitioners of an offence under S. 186, I. P. C. As the valuation of the suit out of which the execution case arose exceeded Rs. 5,000, an appeal against his order was preferred to the High Court ostensibly under S. 476-B, and it was held that any appeal that lies must lie to the District Judge. The appeal was then preferred to the District Judge who having correctly pointed out that the complaint must be one under S. 195 (1) (a) so that no appeal lies under S. 476-B, opined more dubiously that the error was only technical since the matter would, in any case, come to him as the superior of the Naib Nazir. Having considered all the circumstances, he held that there was a prima facie case for a complaint and declined to intervene. The material facts are briefly as follows:

In an execution case following upon a mortgage suit Mt. Sundarbati filed an application to be substituted in place of a

judgment-debtor from whom she had purchased three villages and Rs. 10 was awarded against her as costs. The decree-holder to whom the costs were payable, filed an application to execute the decree by attaching certain moveable properties of Sundarbati and when the order of attachment was returned unexecuted by the peon, it was re-issued to the Naib Nazir. The Naib Nazir went to a house pointed out by the identifier as the place in which the moveables were and when the Naib Nazir was about to secure entry by breaking open the doors, he was resisted by the petitioner, Thakur Prasad, brother of the deceased husband of Sundarbati, and his men, one of whom is the second petitioner. Admittedly Sundarbati sometimes lives in that house. Mr. B. C. De raises certain question of fact. The facts are however the province of the Court which will try the complaint case. The substantial point for consideration here is whether S. 195 (1) (a) precluded the Magistrate from taking cognizance. Manifestly there has been much confusion in the minds of the legal practitioner of the decree-holder and the Subordinate Judge as to the position. S. 476 and the other provisions of Ch. 35, Criminal P. C. have no application. The only bar to a complaint under S. 186, I. P. C. is S. 195 (1) (a) which makes cognizance dependent upon a complaint in writing of the public servant who was obstructed in the discharge of his public functions or some other public servant to whom he is subordinate. In short, the point of investigation is whether either the learned Subordinate Judge has been obstructed in the discharge of his public functions or the Naib Nazir who was obstructed in the discharge of his public functions is the subordinate of the Subordinate Judge.

Section 186 does not appear to contemplate constructive obstruction to a judicial officer in the discharge of his judicial functions, even when they are of a quasi-executive character or when the proceedings before him are in execution. It is clear that the complaint referred to in S. 195 (1) (a) could have been lodged by the Naib Nazir or by the Nazir to whom he is subordinate or by the District Judge to whom all the nazarat staff is subordinate and probably also by the Munsif who under the order of the District Judge is in charge of the nazarat department. The question is whether the Naib Nazir was also when executing the order of attachment on deputation by the Nazir acting in pursuance of the order of the Subordinate Judge, who in the exercise of his judicial functions, was executing the decree and who in that connexion directed the issue of process of attachment for execution by the Nazir subordinate to the Subordinate Judge in any way. The Naib Nazir was indeed not subordinate to the Subordinate Judge administratively as he is to the Nazir, the Munsif in charge of the nazarat and the District Judge. Can he be said to be subordinate to the tribunal which issues an order of attachment which he is executing so far as that particular case or the particular process is concerned? On the whole, I am of opinion that the answer is in the negative. Certainly if the Naib Nazir had done something in connexion with the particular process worthy of blame or of praise, the Subordinate Judge could not call him to account. All he could do was to report him to one of the superior administrative authorities named for punishment or reward, as the case might be. In my judgment S. 195 (1) (a) applies to non-judicial authorities only while Cls. (b) and (c) apply to Courts, a special procedure being provided under Ch. 35 of the Code in respect of the latter, including an appeal against the complaint.

On this view the complaint of the Subordinate Judge is in this instance inadequate to remove the bar to cognizance of an offence under S. 186 presented by the provisions of S. 195 (1) (a). No cognizance can be taken upon his complai There is, of course, nothing to prevent the Naib Nazir or the authorities to whom he is really subordinate within the meaning of S. 195 (1) (a), from preferring a complaint against the petitioner if so advised. The Rule is made absolute on the ground set out above.

S.R./R.K. *Rule made absolute.*

A. I. R. 1936 Patna 75

WORT, J.

Sashi Bhusan Prasad Singh — Plaintiff—Petitioner.

v.

Dalip Narain Singh and *others*—Defendants—Opposite Parties.

Civil Revn. No. 274 of 1935, Decided on 25th October 1935.

Waiver—Litigant can waive any right under any statute unless waiver makes any matter illegal.

There is nothing to prevent any litigant waiving any right he may have under the Civil Procedure Code or under any statute for that matter, unless the waiver of the right or the absence of the right makes any particular matter illegal. [P 76 C 1]

B. N. Mitter and *Rajkishore Pandit*—for Petitioner.

A. B. Mukharji and *B. B. Saran*—for Opposite Parties.

Order.—This is a hopeless application. The defendants during the course of the trial made an application under O. 33, R. 9, Civil P. C., to dispauper the plaintiff. Proper notice was given but was waived by the defendants. Now the petitioner comes before me praying that the order of the Judge dispaupering him be set aside on the ground that it was made without jurisdiction. As Mr. Mitter argues that the Rule is mandatory, I suppose the effect of that argument is that the law will now allow him to waive the benefit which he has under the Rule. That argument is entirely without foundation. There is nothing to prevent any litigant waiving any right he may have under the Civil Procedure Code or under any statute for that matter, unless the waiver of the right or the absence of the right makes any particular matter illegal. The Rule is discharged with costs : hearing fee two gold mohurs.

S.R./R.K. *Rule discharged.*

A. I. R. 1936 Patna 76

AGARWALA AND VARMA, JJ.

Damodar Das and *others*—Appellants.

v.

Bindeshwari Singh and *another*—Respondents.

Appeal No. 252 of 1934, Decided on 3rd December 1935, from order of Sub-Judge, Arrah, D/- 19th June 1934.

(a) Minor — Decree—Setting aside—Mortgage suit—Minor mortgagors properly represented—Decree—Minors' suit for declaration that decree not binding on them—Prayer to stay execution sale until disposal of suit—Mortgage-decree not challenged by minors for 6 years—Court staying sale holding security far exceeded decretal amount—Court held ought to have considered facts that mortgagor's liability was established in competent Court in their presence and that they took no steps challenging mortgage for 6 years.

A mortgage litigation had been fought out between the parties and a decree passed in favour of the mortgagee. During the suit the minor mortgagors were represented by a guardian-ad-litem. A suit was instituted by the minor for a declaration that the decree was not binding on them and they prayed that the sale in execution should be stayed until the disposal of their suit. Six years had elapsed before the minors took any steps to challenge the mortgage-decree. The Court passed an order starting the execution sale, holding that the value of the security was far in excess of the amount due under the decree:

Held: that while passing the order the Court ought also to have taken into consideration the facts that the liability of the mortgagors in respect of the mortgage had been established in a competent Court in the presence of the parties concerned and that six years had elapsed before they took any steps to challenge the mortgage. [P 77 C 1]

(b) Practice—Successful party to litigation is entitled to Court's assistance in reaping fruits of victory.

The successful party is entitled to look to the Court to assist him in reaping the fruits on his victory and the party who has lost is not entitled, as a matter of course, to obtain the assistance of the Court in frustrating the victorious party. [P 77 C 1, 2]

Manohar Lal and *D. N. Varma*—for Appellants.

C. P. Sinha and *G. P. Singh*—for Respondents.

Agarwala, J.—The appellants having obtained final decree for Rs. 36,000 on the foot of a mortgage in 1928 applied for execution of their decree. Thereupon, in 1930, Ramjasi Kuer, one of the mortgagor judgment-debtors, instituted a suit in which she prayed for a declaration that the decree was not binding on the mortgaged property and prayed for stay of the execution proceedings. The proceedings were accordingly stayed until October 1931 when Ramjasi Kuer's suit was dismissed. Thereupon the execution proceedings revived and eventually the properties were brought to sale. In 1933 however the High Court, on appeal from an order under O. 21, R. 90, set aside the sale and directed a fresh sale to be held. Accordingly a fresh sale proclamation was issued. Thereafter the execution proceedings were dismissed. On 19th June 1933, the execution proceedings re-started. The judgment-debtors preferred objections under S. 47, Civil P. C., which were eventually rejected both by the execution Court and by this Court on appeal. 4th June 1934 was fixed for sale. In the meanwhile the decree-holder had applied for the appointment of a receiver on the ground that the judgment-debtors were transferring

portions of their property and that the decretal dues were mounting up to such an extent as to render the security insufficient for their satisfaction. On 7th June 1934 a receiver was appointed, one of the grounds being that the mortgage security was insufficient for the decretal debt. On the same day the present suit was instituted for a declaration that the plaintiffs were not bound by the mortgage decree. The plaintiffs were two minors who had been represented in the mortgage suit by a guardian-ad-litem and another minor who was not born on the date of the mortgage. The plaintiffs, prayed for stay of sale until the disposal of their suit. On 19th June 1934 the Court passed an order staying the execution sale, on this occasion holding that the value of the security was far in excess of the amount due under the decree. Against that order the defendants have preferred the present appeal.

The learned Subordinate Judge who passed the order appointing a receiver and also the order appealed from has set out in his judgment the tests which in his opinion are applicable when deciding whether a temporary injunction should be granted to the plaintiffs or not. There can be no doubt that the tests applied by the learned Subordinate Judge, in so far as they go, are perfectly correct; but there are other circumstances which arise in a case like this, when a litigation has been fought out between the parties, and which have not been considered by the Court below. The liability of the mortgagors in respect of the mortgage has been established in a competent Court in the presence of the parties concerned and six years elapsed before the present plaintiffs took any steps to challenge that mortgage. These two important considerations have entirely escaped the notice of the Court below The learned Advocate for the respondents has contended that the balance of convenience lies in maintaining the status quo rather than in allowing the execution sale to proceed. In my opinion that is not so. When a litigation has resulted in one side succeeding that party is entitled to look to the Court to assist him in reaping the fruits of his victory and the party who has lost is not entitled, as a matter of course, as appears to be the conception of the Courts below, to obtain the assistence of the Court in frustrating the victorious party. In the present instance we can see no reason why the successful mortgagees should not be allowed to execute their decree which was obtained in the presence of the minor plaintiffs who were represented in the mortgage suit by a duly appointed guardian-ad-litem. We would accordingly allow the appeal and set aside the order of the Court below staying the sale. The appellants are entitled to their costs.

Varma, J.—I agree.

S.R./R.K. *Appeal allowed.*

A. I. R. 1936 Patna 77

AGARWALA AND VARMA, JJ.

Mukund Jha and *others*—Defendants—Appellants.

v.

Dhorup Narain Jha and *others*—Plaintiffs and another—Defendant—Respondents.

Appeal No. 1391 of 1931, Decided on 15th November 1935, from decision of Dist. Judge, Muzaffarpur, D/- 6th July 1931.

Partition—Zamindari—Bakashat land divided—Lands under tenancy undivided—Each Pattidar collecting separately his share of rent—Proprietary interest held completely partitioned.

The bakasht land in a zamindari were divided between the proprietors but the lands in the occupation of the tenants were not divided though each of the pattidars collected his share of rent separately:

Held*: that there was a complete partition of the proprietary interest: 7 *W R* 51, *Rel. on.

[P 77 C 2]

Satya Sunder Bose—for Appellants.

Agarwala, J.—This appeal arises out of a suit for partition of a zamindari property situated in mauzas Brindaban and Ladaura. From the judgment of the Court of appeal below it appears that it was an admitted fact that the bakasht lands of the estate were divided sometime previously but that the land in occupation of the tenants was not at all divided although each of the pattidars collected his share of the rent from the tenants separately. In second appeal it is argued that this finding amounts to a finding that there was a complete partition of the proprietary interest inasmuch as the bakasht land of which the proprietors were entitled to possession were admittedly divided and that as regards the tenants' land they had only the right to collect rents and this right was also

divided. This appears to be the case, as was held in 7 W R 51 (1), where it was held that lands held thus in joint possession cannot be divided under the batwara laws, nor can a partition be made by the civil Court irrespective of the revenue authorities. The result is that the decree of the Court of appeal below must be set aside and this appeal allowed. The appellant will have only half his costs as there is no appearance on behalf of the respondents.

Varma, J.—I agree.

S.R./R.K. *Appeal allowed.*

1. Doorga Kant Lahoory v. Radha Mohun Gooho, (1867) 7 W R 51.

* A. I. R. 1936 Patna 78

WORT AND ROWLAND, JJ.

Bahore Mahton — Defendant—Appellant.

v.

Juro Sahu and *others*—Plaintiffs—Respondents.

Appeal No. 655 of 1932, Decided on 10th December 1935, from appellate decree of Addl. Dist. Judge, Monghyr, D/- 3rd August 1931.

*** (a) Contract Act (1872), S. 16 (3)—Bond by father—Suit against son—No attempt to show that lender dominated father—Denial that father was under necessity to borrow at time of execution—Held, to shift burden on creditor to prove absence of undue influence, creditor's position to dominate borrower must be proved—Hence relief under S. 16 could not be given to son.**

In a suit against the son on a bond executed by the father not only that no attempt was made by the son to establish that the father was dominated by the lender at the time of the transaction but in his written statement the son expressly denied that his father was under any necessity to take the loan at the time of the execution of the bond:

Held: that in order to put the burden on the creditor to establish that the debt was not borrowed under undue influence it is essential in the first instance to show as a fact that the lender was in a position to dominate the will of the borrower. Hence it was impossible to give to the son any relief under S. 16: 1924 *P C* 60, *Rel. on*; 28 *All* 570 (*P C*), *Disting.* [P 80 C 2]

(b) Usurious Loans Act (1918)—Act is not retrospective.

Usurious Loans Act is not retrospective in its effect. [P 79 C 2]

B. B. Saran—for Appellant.

L. N. Singh and *D. C. Varma*—for Respondents.

Wort, J.—This appeal by the defendant arises out of an action on a bond dated 20th September 1916. The consideration for the bond was Rs. 190 which was made up of Rs. 55 then borrowed and a sum of Rs. 135 borrowed on an earlier bond dated 22nd September 1912. The interest under the later bond was at the rate of Rs. 2-5-6 per mensem with yearly rests. The plaintiffs however limited their claim to a sum of Rs. 2,100, whereas in fact the amount due under the bond, principal and interest at the date of the suit amounted to Rs. 3,600. The trial Court reduced the interest to Rs. 24 per annum, simple; but on appeal before the learned Additional District Judge the plaintiffs were given interest at the contract rate as the learned Judge was of the opinion that the Usurious Loans Act did not apply and as the necessary facts entitling him to exercise his jurisdiction under S. 19a, Contract Act, had not been established. S. 19a gives Court power to void a contract obtained by undue influence defined in S. 16, Contract Act, which imposes such terms and conditions as to a Court may seem just. The only substantial argument raised in this case is that as the contract on the face of it appears to be unconscionable, it must be deemed to have been obtained by undue influence, in exercise of our jurisdiction under S. 19a, Contract Act. Unfortunately for the defendant, although he set up certain substantial defences such as that there was no necessity for the loan (the loan having been obtained by the father of the present defendant), he omitted entirely to raise this question of undue influence. Had the question been raised and had the Court come to the conclusion that the necessary facts were existing to establish that prima facie the contract was obtained by undue influence, the onus would have been on the plaintiffs under sub-S. (3) of S. 16 to establish that it had not been obtained by undue influence. But it was necessary first of all for the plaintiffs to plead it and then, as has been pointed by their Lordships of the Judicial Committee of the Privy Council in 5 P L T 72 (1), to establish that the parties were in a position of the one dominating the will of another. That, if I may be permitted to say so with respect, is clear from a reading of section itself which provides :

1. Ragunath Prasad Sahu v. Sarju Prasad, 1924 P C 60=82 I C 817=51 I A 101=3 Pat 279=5 P L T 72.

A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

Sub-section (3) to which I have already made reference provides inter alia :

The burden of proving that such contract was not induced by undue influence shall lie upon the person to dominate the will of the other.

The learned Judge in the Court below has held that there is no evidence in this case, and neither is there any finding of the learned Judge of the lower Court, that the creditors were in a position to dominate the will of the other.

That being so, the matter is, in my judgment, concluded. If the finding had been to the effect that there is no evidence of undue influence, it might have been said by the defendant that the onus being on the plaintiff to establish how far the finding as to undue influence affected the case, the plaintiff would have to fail. But the finding as it stands is quite clear. There is no evidence, nor is there a finding (says the Judge), that one party dominated the will of the other. Reliance is placed upon Illus (c) to S. 16 which in my judgment in no way betters the case for the appellant. The illustration runs thus :

A being in debt to *B* the money-lender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on *B* to prove that the contract was not induced by undue influence.

Although illustrating the section, it cannot add to it, and it is clear from a reading of the section together with the illustration that it is an illustration of sub-S. (3) of S. 16 of the Act and does in no way affect the principle laid down by their Lordships of the Judicial Committe in the case to which I have referred that it is essential in the first instance to show as a fact that the lender was in a position to dominate the will of the borrower. For those reasons in my opinion the decision of the learned Additional District Judge was right. Whatever we may think of the transaction the defendant is not entitled to any relief at our hands. In those circumstances the appeal fails and must be dismissed with costs.

Rowland, J.—I agree. The Munsif thought it proper to reduce the rate of interest on finding that it was exorbitant. The District Judge quite rightly pointed out that this could not be done unless the case came within some statute or principle of law which would justify interference with the contract. The mortgage bond having been executed in 1916 was not a transaction to which the Usurious Loans Act of 1918 could apply. Therefore, as pointed out by the District Judge, it only remained to consider whether the borrower could be given relief under S. 16, Contract Act. He decided this point in the negative on finding that there was no evidence in the case, nor any finding by the Munsif, that the creditors were in a position to dominate the will of the debtor. It has been argued before us in appeal that, if we are to follow S. 16 Illus. (c), Contract Act, we ought to hold that the burden lay on the plaintiffs to show the absence of undue influence. The illustration in question is in these terms :

A being in debt to *B* the money-lender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on *B* to prove that the contract was not induced by undue influence.

In support of this contention reliance is placed for the appellant on the Privy Council decision of 28 All 570 (2). No doubt in the circumstances of that case it was held that the lender was in a position to dominate the will of the borrower and that the latter should be relieved from the terms of a bargain which appeared to be unconscionable. But there were in that case other circumstances besides the mere fact of previous indebtedness from which to draw the inference that the lender was in a position to dominate the will of his debtor. Where there is no such circumstance beyond the mere fact of antecedent debt, we get the position which was dealt with by the Privy Council in 5 P L T 72 (1). In this decision their Lordships examined the terms of S. 16, Contract Act, as amended in 1899 and said that:

Even though the bargain had been unconscionable (and it has the appearance of being so) a remedy under the Indian Contract Act does not come into view until the initial fact of a position to dominate the will has been established ;

and they refused to regard the mere relation of creditor and debtor as being a circumstance from which they would draw the inference of the former being in a position to dominate the will

2. Dhanipal Das v. Muneshar Bakhsh Singh, (1906) 28 All 570=33 I A 118 = 9 O C 188 P C).

of the latter. The illustrations, and in particular Illus. (c) to S. 16, were not referred to by their Lordships in that judgment, but that makes no difference to the binding nature of their Lordships' pronouncement. In the present case there was not only no attempt made by the defendant to establish that the borrower was dominated by the lender at the time of the transaction, but in his written statement the defendant expressly denied that his father was under any necessity to take the loan at the time of the execution of the bond. Therefore it is impossible to give the defendant any relief under S. 16, Contract Act. At the last moment, and as a sort of supplement to his argument, the learned Advocate for the appellant hinted that the rate of interest might be reduced on the ground that the loan being taken by the Karta of a joint family and the plaintiffs seeking to enforce it against the junior members of the family after the death of the borrower, it would lie on the plaintiffs to establish the necessity not only for borrowing money but also for borrowing at the high rate of interest entered in the bond. I express no opinion on whether this line of defence might have succeeded had it been taken in due time in the first Court or even in the lower appellate Court. But it raises questions of fact which ought to have been the subject of a separate issue, and it is too late to raise those questions now. Accordingly I agree that the appeal should be dismissed.

S.R./R.K. *Appeal dismissed.*

---

*A. I. R. 1936 Patna 80

MACPHERSON AND MOHAMMAD NOOR, JJ.

Latur Rai and another—Plaintiffs—Appellants.

v.

Bhagwan Das and others—Defendants—Respondents.

Appeal No. 1591 of 1931, Decided on 11th November 1935, from appellate decree of Sub-Judge, Muzaffarpur, D/ 30th March 1931.

***(a) Hindu Law—Widow—Mithila School—Immoveable property obtained in lieu of mortgage debt—Property belongs absolutely to widow—Immoveable property, purchased by widow with husband's money is her absolutely and goes to her stridhan heirs on her death.**

According to the Mithila law, immoveable property obtained by a widow, in consideration of a mortgage debt advanced by the husband, is her absolute property because the mortgage debt is the movable property over which the widow governed by the school obtains an absolute interest. So also the immoveable property purchased by the widow with the husband's money which is her absolute property, belongs to her absolutely, and on her death it goes to her stridhan heirs: 12 *Cal* 348; 5 *I A* 1; 1935 *Pat* 398 *and* 30 *Bom* 431, *Rel. on.*

[P 82 C 1, 2]

(b) Hindu Law—Alienation—Legal necessity—Widow succeeding to co-widow's share on her death—Alienating her's and co-widow's interest for performance of husband's sradh—Both widows were under religious obligation to perform sradha—If one did not, other's duty was to do it—Therefore alienation held valid as regards interest of both widows.

A widow succeeded to the share of her co-widow on the latter's death. She alienated her interest in the property held by her as well as the interest of the co-widow to which she had succeeded, for the purpose of performing the Gaya sradha of her husband:

Held: that both the widows were under religious obligation to perform the sradha of their husband and if one did not perform it in her life time, it was the duty of the other to perform it. Therefore alienation was valid not only to the extent of the share of the alienating widow but also to that of the widow deceased.

[P 83 C 2]

(c) Hindu Law—Alienation—Widow—Document by widow purporting to be dedication—Document found acknowledgment of dedication by husband—Document not executed till 25 years after husband's death—Dedication by husband not established—Document held not binding on reversioners.

A document executed by a widow, purporting to be a document of dedication was merely an acknowledgment that a dedication had already been made by her husband. The document was not executed till 25 years after the death of the husband. The alleged dedication by the husband was found not to have been made by him:

Held: that such a document could not be binding upon the reversioners.

[P 83 C 2; P 84 C 1]

G. P. Das—for Appellants.

Manohar Lal and A. K. Mitter—for Respondents.

Mohammad Noor, J.—The suit out of which this appeal has arisen was instituted by the appellant Keshwar Rai and his cousin Latur Rai (now dead) for a declaration that certain deeds of transfer executed by Mt. Laruan, defendant 5 a Hindu widow, be declared void and possession of the properties conveyed by those deeds be delivered to them, or, in the alternative, a declaration be made that those transfers would not be binding upon them on the death of the widow, they being the next reversioners of her husband.

There were three brothers Bhaju, Kishun and Bishun. Bhaju had a son, Latur, who was plaintiff 1 and who died during the pendency of the present appeal. Kishun also had a son, Keshwar, plaintiff 2 who is the sole appellant before us. Bishun died childless leaving two widows, Usri and Laruan (defendant 5). Usri died in 1914. Laruan executed three deeds in respect of some of the properties which are the subject-matter of the present suit. One was a deed of sale dated 26th July 1918 in respect of four annas share of tauzi 20884 of village Imadpur in favour of defendant 1. By a second deed dated 4th September 1928, she purported to dedicate the remaining twelve annas of this tauzi in favour of the idol, defendant 2 under the Shebaitship of defendant 1. By a third deed dated 5th September 1928, she transferred 17 katas of some milkana land to her sister's husband, defendant 3. These are the three deeds which the two plaintiffs sought to avoid. The plaintiff's case was that Kishun, the father of plaintiff 2, and Bishun the husband of defendant 5, were joint: therefore nothing was inherited either by Usru or Laruah and the deeds were inoperative and plaintiff 2, Keshwar son of Kishun got all the properties by survivorship and he claimed immediate possession of the properties. There was however, as I have said, an alternative prayer that in case it be found that Keshwar, the plaintiff 2 was not entitled to immediate possession, a declaration be made that the alienations by Laruan would not on her death be binding upon the plaintiffs, the reversioners of her husband.

The trial Court gave the plaintiffs a modified decree in respect of the third deed, namely, the sale of 17 kathas of malikana land in favour of defendant 3. It held that Keshwar was not joint with Bishun, and the sale of this land not being for legal necessity, would not be binding on the plaintiffs after the death of Laruan. With regard to the other two alienations, the suit was dismissed. In respect of the four annas share of Imadpur, the learned Munsif found that two annas of it was acquired by the two widows themselves under a private sale and the remaining two annas was also acquired by them in execution of a mortgage decree, the mortgage being in favour of Bishun, their husband. As it was admitted that the parties were governed by the Mithila law under which the widows took an absolute estate in the movable properties of their husband, the learned Munsif held that the money and the mortgage debt were absolutely vested in them; and therefore the properties (4 annas of the tauzi) which they acquired out of the moveable properties, namely the money, belonged to them absolutely. Therefore the deed in respect of the four annas was valid and could not be questioned by the reversioners. Regarding the dedication of the twelve annas share of the tauzi in favour of the idol, it is to be noted that according to the recital in the deed and the case stated in the written statement of defendant 2 the real dedication was by Bishun himself who was a devotee of the asthal and the mahant, namely defendant 1, was his spiritual guru and the lady simply completed the dedication by executing a deed.

The learned Munsif found that the story of the dedication of this property by the husband of Laruan was not established. He however treated the deed as an independent dedication by Laruan herself, and upheld it on the ground that it was within her competence to dedicate a small portion of her husband's estate for the benefit of his soul and the property dedicated being about one-fifth of the entire estate of the husband, the deed was valid. On appeal the decree and the findings of the learned Munsif have been upheld by the learned Subordinate Judge. The plaintiffs have preferred this second appeal. There was a question whether this appeal has abated to any extent in consequence of the death of Latur. The point has not been pressed. Moreover the surviving plaintiff, Keshwar, is now the only next reversioner to Bishun, the husband of Laruan, and is alone entitled to maintain the suit. Therefore there has been no abatement to any extent whatsoever. Coming to the appeal itself, it will be clear from what I have stated before, that it is confined to two transactions: (1) the sale of four annas of Imadpur in favour of defendant 1 and (2) the dedication of twelve annas of it in favour of defendant 2.

The learned Advocate for the appellants has attached the findings of the Courts below in respect of the first property on three grounds; first, that the mortgage debt due to Bishun was not a moveable property and therefore the 2 annas pur-

chased in execution of the mortgage decree did not absolutely belong to the widows; second, that the widows amalgamated the shares they purchased with their husband's estate; and third, that on Usri's death Laruan got only life estate and the appellant is the next heir to it as being the nephew of Usri's husband. It was contended that assuming that the entire four annas was the absolute property of the two widows, the share of Laruan was only two annas. The remaining two annas belonged to Usri and on her death it was inherited by Laruan as an heiress to Usri's stridhan and she had only a life interest in it and the alienation to the extent of two annas therefore should be held to be not binding upon the plaintiff.

Regarding the first point, the finding of the Court below is, in my opinion, correct. No doubt a mortgage is an interest in the immovable property but the mortgage debt in consideration of which the two annas of the tauzi was purchased was a moveable property. The share was simply a security for that debt. I now take up the second and third points. It is not disputed that according to Mithila law a widow takes an absolute right in the moveable properties left by her husband. As the 4 annas of the tauzi was purchased by the widows with the money which has been held to be their absolute property, it belonged to them absolutely. Now the question is whether the two widows having purchased this 4 annas share made it a part of their husband's estate. This is a question of fact, and the finding of the Courts below seems to be against it. Therefore this 4 annas of the tauzi remained absolute estate of the widows.

The next question is about the position of Laruan in respect to the 2 annas which belonged to Mt. Usri. The appellant's contention, as I have said, is that it being Usri's stridhan, Laruan got only a life estate therein as an heiress to stridhan. Mr. Manohar Lal who appeared on behalf of the respondents, on the other hand, contended that the two widows took the moveables of their husband jointly and on the death of Usri, Laruan got the whole of the 4 annas by survivorship with an absolute power of disposal as a moveable of her husband and not as stridhan, and it should be treated as other properties of the husband with only this exception that she had an absolute power over it. He argued that if there are more than one widow and one of them does not dispose of her share in the moveable, on her death the undisposed of portion goes to the surviving widow as an absolute property. He further argued that if it be held that moveables inherited by a widow are her stridhan then under the rule of Mithila law Usri's 2 annas share devolved upon the plaintiffs themselves, they being the nephews of Usri's husband but as they did not lay any claim to that share for so many years, their right became barred by limitation : Laruan having taken possession of that share without any right whatsoever, her possession was adverse to the plaintiff and this possession ripened into title after the statutory period and she got an absolute power of disposal over that share also.

The first question which arises, is whether the moveable property which a widow inherits from her husband is or is not her stridhan? Mr. Manohar Lal referred us to Vivada Chintamani and urged that the list of stridhan, as given in that book, is exhaustive and is confined to what may be called technical stridhan, and moveable property inherited from the husband does not come in the list. Now Vivada Chintamani has not given any definition of 'stridhan' but has simply enumerated them according to smriti writers. In my opinion the list given there is not exhaustive. It has been held that properties over which a Hindu lady has an absolute power of disposition comes within the generic term 'stridhan'. This was the view taken in 12 Cal. 348 (1), which was a case under the Mithila law. The learned Judges of the Calcutta High Court following the decision of the Privy Council in 5 I. A. 1 (2), seems to have laid down that the property on which a Hindu lady has a complete power of disposition is her stridhan. Therefore, there is no doubt that this four annas which was acquired by these two ladies constituted their stridhan.

The next point is who succeeded to the 2 annas of Usri on her death. Reli-

1. Bachha Jha v. Jugmon Jha, (1886) 12 Cal 348.
2. Brij Inder Bahadur Singh v. Janki Kuer, (1877)5 I A 1=3 Sar 763=1 C L R 318=3 Suth 474 (P C).

ance was placed again on Vivada Chintamani in support of the proposition that a co-widow is not an heiress to her childless co-widow. Now Vivada Chintamani, while enumerating the heirs to stridhan of a childles widow, stops at the husband in case her marriage was performed according to one of the unapproved forms, and at parents in case the marriage was in one of the unapproved forms. Who is to succeed the former in the absence of her husband has not been definitely stated. From the discussion in 12 Cal. 348 (1), and 21 Cal 344 (3). Dr. Gooroodass Banerjee in his well-known treatise on "The Hindu Law of Marriage and Stridhan" seems to have deduced the proposition that after the husband the property of a childless Hindu female will go to the groups of heirs specified in the text of Brihaspati. It was argued that as husband's nephew is mentioned in Brihaspati's text while the widow is not, therefore, the plaintiffs were preferential heirs. The question was exhaustively examined in this Court in 15 P L T, 715 (4), where the same argument was advanced that the heirs specified by Brihaspati will have preference over those not mentioned by him. After consideration of various authorities now available it was held that after the husband comes in his nearest kinsmen though not mentioned in the text. 12 Cal 348 (1), was held to be good law. The text of Brihaspati was also under consideration in 30 Bom 431 (5), where their Lordships of the Judicial Committee held that the husband's widow is an heiress to the stridhan though not mentioned by Brihaspati, she being the sapinda of her husband. That decision was not based upon any peculiar doctrine of Mayukh law but on the authority of the Mitakshara. Mithila law is the law of Mitakshara except in a few matters where it specifically differs from it. It is clear, therefore, that on the death of Usri half of the four annas share, namely, two annas of this tauzi, came to Musammat Laruan as an heiress to the stridhan. Now the question is whether she took an absolute estate in it or only a life estate. It is not necessary to discuss this point. Assuming that she took only a life estate there was legal necessity for her to sell it. There is a finding of fact by both the Courts below that out of Rs. 450 which formed the consideration of the four annas share Rs. 223 was taken in cash and Rs. 227 was set-off in satisfaction of the previous debts due from Mt. Laruan. The handnotes were produced which the learned Subordinate Judge seems to have accepted as genuine and to have held that this loan was taken in order to perform the Gaya sradh of Bishun and Mt. Usri. Therefore, the sale, at any rate to the extent of half, i. e., 2 annas was for a legal necessity and that covered the share of Usri. Mr. Das however contended that as the legal necessity was only for the sale of half, that is, two annas, the sale was valid to the extent of the share of Laruan only and not the share of Usri. I see no reason why it should be so. Both the widows were under religious obligation to perform the sradh of their husband, and if Usri did not perform it in her lifetime, it was the duty of Laruan to perform it. I think, that, on the whole, the transfer of this four annas share was valid and the decree of the Courts below is correct, though entirely upon the grounds on which they have passed it.

The next alienation to be considered is the dedication of the twelve annas of this tauzi in favour of defendant 2 the idol. Now, it is needless to consider whether, in the circumstances of the case the dedication of a fifth of the property of the husband was justified. Mr. Das contended that the finding that the dedicated property was only one-fifth of the estate is based upon no evidence. I do not wish to discuss that as, in my opinion, there is no dedication by the lady at all. The document, if correctly read, is not a document of dedication but an acknowledgment that a dedication had already been made by the husband. This story was found not to be true by both the Courts below. Bishun died in 1903. This document what is called samarpannama—did not come into existence for twenty-five years. It was executed in 1928. If Bishun had dedicated this property to the idol there is no reason why the execution of a document should have been delayed for twenty-five years and

3. Mohan Prasad Narayan Singh v. Kishun Singh (1894) 21 Cal 344.
4. Kamla Prasad v. Murli Manohar, 1934 Pat 398=152 I C 446=15 P L T 715=13 Pat 550.
5. Bai Kesser Bai v. Hansraj Morarji, (1906) 30 Bom 431=33 I A 176 (P C).

why no effort was made to take a document from the two widows jointly when Usri was alive, she having died in 1914. Therefore, in my opinion, this document is not a dedication by Mt. Laruan but, as I have said, is a confirmation of an alleged dedication by Bishun which has been found not to have been made by him. Such a document cannot be binding upon the reversioners.

The result is that I would partly allow the appeal. Over and above the declaration in respect of the 17 kathas of malikana land which the plaintiffs have got from the Courts below there will be a declaration that the document called samarpannama, dated 4th September 1928, will not be binding upon the appellant (the surviving plaintiff) after the death of Mt. Laruan. The appeal in respect of the sale dated 26th July 1918, is dismissed. The order passed by the Court below for costs will stand. The appellants will get three-fourths of their costs of this Court, respondents bearing their own costs.

Macpherson, J.—I agree.

S.R./R.K. *Order accordingly.*

A. I. R. 1936 Patna 84

WORT, J.

Naurang Lal—Petitioner.

v.

B. B. & C. I. Ry. and *another* — Opposite Parties.

Civil Revn. No. 235 of 1935, Decided on 18th October 1935, from order of Sm. C. C. Judge, Monghyr, D/- 23rd January 1935.

(a) Provincial Small Cause Courts Act (1887), S. 25—Cases cannot be argued like second appeals—High Court cannot interfere wherever question of law is wrongly decided—It will interfere only when substantial injustice is caused.

Cases under S. 25 cannot be argued as if they were second appeals. The High Court has no right to interfere with the decision of the Small Cause Court, wherever any question of law has been wrongly decided. It will interfere only where there is a substantial injustice, i. e., when a clear error of law is shown or when there is obvious perversity in the decision of a question of fact : 1928 *Bom* 504, *Foll.* [P 84 C 2]

(b) Railways Act, (1890) S. 72—Risk note—Wilful misconduct and misconduct.

There is no difference in wilful misconduct and misconduct. [P 85 C 1]

(c) Civil P. C. (1908), S. 100 — Finding of no neglect or misconduct is not one of law.

It is never a question of law when a Court has said that there is no neglect or no misconduct in fact. [P 85 C 1]

(d) Railways Act, (1890) S. 72—Misconduct —Waggons merely sealed not locked — No proof of rule that waggons should be locked —Not locking held of itself no misconduct of railway servants.

The goods waggons were merely sealed and were not locked ; it was not proved that it was the rule of the railway administration that the goods waggons should be locked :

Held : that the mere sealing and not locking of the waggons was not of itself misconduct on the part of the railway servants, 1930 *Bom* 129, *Rel. on.* [P 85 C 1,2]

M. K. Mukharji—for Petitioner.

N. C. Ghosh—for Opposite Parties.

Order.—This rule is directed against the decision of the Small Cause Court Judge in an action by the consignor against the Railway Company for loss of goods. As regards the powers of this Court under S. 25, Small Cause Courts Act, the position is not thoroughly understood. Cases are argued before this Court as if they were second appeals and that this Court has a right to interfere wherever any question of law has been wrongly decided. I propose to say with regard to this matter that I adopt the words of Sir Charles Fawcett, Ag. C. J., in 52 Bom 770 (1) where it is pointed out that the Court will only interfere where there is a substantial injustice, i. e., when a clear error of law is shown or when there is obvious perversity in the decision of a question of fact. Had S. 25 of the Act meant anything else I am quite certain the legislature would have stated explicitly that there was an appeal to this Court, whereas no such appeal does lie : it is merely the exercise of revisional powers of this Court in revising, if necessary, the judgments of Small Cause Courts. Had it been open to me to decide this question on a pure question of law, I should have found very considerable difficulties in the way of the petitioner. In my judgment the application is misconceived. The case was conducted by the parties in the Court below in a very negligent way in not getting the particulars beforehand as contemplated by the Act. I say no more about that. The Judge speaks of the matter in these words : "The loss was not due to

---

1. M. & S. M. Ry. Co., Ltd. v. Jumakhram Parbhudas Gujrathi, 1928 Bom 504 = 118 I C 241 = 52 Bom 770=30 Bom L R 1104.

any misconduct or negligence on the part of the railway staff."

The only question to be determined, although the parties seem to have been under a misapprehension with regard to it, is whether there was misconduct, and it is contended by the learned Advocate for the petitioner that as the new form of risk-note has eliminated the word 'wilful' the law has been changed. I see no difference between wilful misconduct and misconduct. The word 'wilful' seems to me to be redundant. Wilful expresses the act or the will of the person who is guilty of misconduct, but misconduct must always have that condition attached to it, otherwise the word has no meaning. As has been pointed out in a number of authorities, negligence is different from misconduct. Whether the Judge in the Court below has considered the case from the point of view of negligence or from the point of view of misconduct, it seems to me quite clear that even if it had been open to me to discuss the mere question of law I should not be able to interfere. If the learned Judge had said that the Railway Company was guilty of misconduct or its servants were guilty of misconduct, there is no doubt that the Railway Compay could have said, always assuming the question of jurisdiction in their favour, that there was no evidence of wilful misconduct or misconduct. But it is never a question of law when a Court has said that there is no neglect or no misconduct in fact. Again if the learned Judge in the Court below had said that there was no evidence of misconduct it would possibly be a question of law, but from the manner in which he has come to his finding it becomes impossible to say that any question of law arises.

He has said that there is no misconduct in fact and that ends the matter, although in considering this question I agree with the judgment of Sir Norman Kemp, Ag. C. J., in the case of 54 Bom 105 (2) where it is stated that in cases of this kind what has to be shown is the misconduct of the Railway servants. There has been no proof in this case that it was the rule of the Railway Administration that these goods waggons should be locked and it cannot be said therefore that mere sealing and not locking of the Railway waggons of itself was misconduct on the part of the railway servants. In my judgment the application fails and must be dismissed with costs.

S.R./R.K. *Application dismissed.*

2. B. B. & C. I. Ry. Co., Ltd. v. Rajnagar Spinning, Weaving and Manufacturing Co., Ltd., 1930 Bom 129 = 124 I C 229 = 54 Bom 105=31 Bom L R 1426.

A. I. R. 1936 Patna 85

AGARWALA AND VARMA, JJ.

Raghunandan Gir — Defendant 1— Petitioner.

v.

Deoraj Gir and *another* — Plaintiffs Opposite Parties.

Civil Revn. No. 117 of 1935, Decided on 21st November 1935, from order of Sub-Judge, 2nd Court, Gaya, D/- 15th January 1935.

Revision—High Court will not interfere with order permitting plaintiff to continue suit without additional court-fee.

An order permitting a suit to proceed does not injure any party. When a suit is allowed to proceed on an insufficient court-fee it is not either of the litigant parties who suffers but the revenue. It is not the object of a fiscal statute to enable litigants to be defeated on technicalities : 1925 *Pat* 703; 1929 *Mad* 191; 1929 *Mad* 396; 1929 *All* 957; 1925 *Cal* 814; 1933 *Mad* 506; 1930 *Pat* 277 and 1918 *P C* 188, *Rel. on*; 1934 *Pat* 641, *Ref.* [P 86 C 2, P 87 C 1]

Sultan Ahmad and *K. N. Varma*—for Petitioner.

T. N. Sahay and *N. K. Prasad II*—for Opposite Parties.

Agarwala, J.—This is an application to revise an interlocutory order passed by the Subordinate Judge of Gaya in the following circumstances: The plaintiff-respondent sued to obtain certain reliefs and on the plaint paid a court-fee of Rs. 15 as in a suit for a mere declaration of title. The defendant thereupon petitioned the Court to determine the question of valuation of the suit and the sufficiency of the court-fee paid. The learned Subordinate Judge proceeded to accede to this request and on a consideration of the matter decided that the court-fee paid was sufficient. Against that order the defendant has moved this Court. The matter first came before a single Judge who referred it to a Division Bench on account of the lack of uniformity in rulings of the Court in regard to interference in revision in court-fee matters. In so far as orders in favour of the plaintiff are concerned there appears to be consensus of opinion of all the Courts that such an order is not

revisable: [see 85 I C 538 (1), 114 IC 842 (2), 119 I C 35 (3), 121 I C 97 (4), 29 C W N 627 (5) and 56 Mad 744 (6)]. In the last mentioned case, the learned Chief Justice at p. 748 said :

No case has been referred to where this High Court or any other High Court has held that, where a favourable decision has been given as regards court-fee to the plaintiff, the High Court will exercise its revisional powers. I am clearly of the opinion that in such cases the High Court has no power of revision either under S. 115, Civil P. C., or under S. 107, Government of India Act.

The applicant relies on certain observations in 16 P L T 69 (7). That was a case in which an order had been passed against the plaintiff and it was the plaintiff who moved the High Court. There are observations in the judgment suggesting a distinction between cases in which the order of the Court is merely concerned with the question of valuation and cases in which the order of the Court is concerned with the category into which the plaintiff's suit falls. It was held that in the latter class of cases the order is revisable by the High Court under S. 115. Those observations however were in the nature of obiter dicta, for the plaintiff's petition was rejected on its merits. In 11 P L T 172 (8), Wort and Kulwant Sahay, JJ., refused to entertain an application to revise an order in a court-fee matter even where the order was one calling upon the plaintiff to pay a large additional court-fee, as in such a case there is another remedy open to the plaintiff by way of appeal if his plaint is rejected for non-compliance with the order. With regard to this case, the learned Chief Justice in 16 P L T 69 (7) said :

The report of that case gives no indication in itself as to the class of the decision which was given by the lower Court. One may infer however from the facts, that the learned Judges decided that revision did not lie and that the matter was really one of quantum and not of category. To my mind this case gives us no guidance in the matter. It is quite consistent with the Court having held that if it had been a case of the category under the section into which the suit fell, they might have been inclined to revise the decision.

It is clear therefore that the learned Chief Justice was under the impression that the case of 11 P L T 172 (8) had been decided on the assumption that no question as to the category into which the suit fell was in issue in that case and that the only question which arose for decision was with regard to the quantum of court-fee. Wort, J., who was one of the judges who decided the case in 11 P L T 172 (8) referred to this matter in a later case, 16 P L T 158 (9). His Lordships said :

The learned Chief Justice in the case to which I have first referred has stated that the decision reported in 11 P L T 172 (8) might be explained on the basis that it came within that class of case which was not open to revision. But as a party to that judgment I must say that the matter there in dispute was whether the Judge had rightly decided what was the nature of the action brought by the plaintiff and therefore what was the proper court-fee : in other words, what category did the case come within.

It must be therefore now taken that in the earlier case of 11 P L T 172 (8), a Division Bench of this Court refused to interfere in a case in which the question arose as to the category into which the suit fell, even where the plaintiff had been called upon to pay a large additional court-fee, and that decision is not explainable on the lines suggested by the learned Chief Justice in 16 P L T 69 (7). Our attention has been called to no case in which any High Court has interfered in revision with an order in favour of plaintiff resulting in his suit being permitted to proceed on the court-fee which he himself elected to pay. The general practice, not only in this High Court but in the other High Courts, is not to interfere with interlocutory orders unless in exceptional circumstances when such order may result in irreparable injury to one or other of the litigant parties. An order permitting a suit to proceed does not injure any party. When a suit is allowed to proceed on an insufficient court-fee it is not either of the litigant parties who suffers but the revenue. It is not the object of a fiscal statute to enable liti-

1. Kanhaya Lal v. Baldeo Lal, 1925 Pat 703= 85 I C 538.
2. Muhammad Elliyas v. Rahima Bee, 1929 Mad 191=114 I C 842=56 M L J 302.
3. Kattiya Pillai v. Ramasamy Pillai. 1929 Mad 396=119 I C 35=56 M L J 394.
4. Balkrishna v. Ramkishun, 1929 All 957=121 I C 97=1930 A L J 235.
5. G. M. Falkner v. Mirza Mahomed Syed Ali, 1925 Cal 814=86 I C 853=29 C W N 627.
6. Secy. of State v. Raghunathan, 1933 Mad 506 =144 I C 516=56 Mad 744=65 M L J 25.
7. Ram Bhusan Das v. Bachu Rai, 1934 Pat 641=152 I C 1003=14 Pat 220=16 P L T 69.
8. Sham Narain Singh v. Basudeo Prasad Singh, 1930 Pat 277=122 I C 152=11 P L T 172.
9. Kumar Ramkinkar Singh v. Jogendra Nath Singh, 1935 Pat 186=155 I C 617=16 P L T 158.

gants to be defeated on technicalities. In the case of 43 Bom 507 (10) their Lordships of the Privy Council said :

The Court-fees Act was passed not to arm a litigant with a weapon of technicality against his opponent but to secure revenue for the benefit of the State.

Where an order in regard to court-fees happens to be in favour of the plaintiff, it does not mean that it is against the defendant though it may operate to the detriment of the revenue. I see no reason for interfering with the order passed in the present case or for departing from the usual practice of this Court not to interfere in revision with interlocutory orders. The application is therefore dismissed with costs. Hearing fee two gold mohurs.

Varma, J.—I agree.

S.R./R.K. *Application dismissed.*

10. Rachappasubrao v. Shidappa Venkatrao, 1918 P C 188=50 I C 280=46 I A 24=43 Bom 507 (PC).

A. I. R. 1936 Patna 87

MACPHERSON AND MOHAMMAD NOOR, JJ.

Secy. of State—Defendant—Appellant.

v.

Kameshwar Singh Bahadur and *another*—Defendants—Respondents.

Appeal No. 169 of 1931, Decided on 24th October 1935, from original decree of Sub-Judge, Purnea, D/- 7th September 1931.

(a) Bengal Ferries Act (1 of 1885), S. 6 (b)—Private right interfered under authority of statute—Aggrieved party has no remedy if none provided—Remedy provided—Aggrieved party can get only that remedy in manner stated—Government taking plaintiff's ferry under S. 6—No arbitrary, careless or oppressive action in taking—Plaintiff held had no cause of action.

The Government took possession of the plaintiff's ferry by virtue of the power vested in them under S. 6 and in the taking of possession of the ferry the Government had not acted arbitrarily, carelessly or oppressively:

Held : that the plaintiff had no cause of action : 7 *W R* 191; 8 *I D* (*old series*) 442; 11 *I C* 453; 26 *All* 594 and *In Mayor and Councillors of East Fremantle* v. *Annois* (1902) *A C* 213, *Rel. on.* [P 91 C 1]

(b) Practice—Relief—Right taken away by statute—Aggrieved party when has remedy open.

If any private right is interfered with under the authority of any statute and no remedy is provided in the statute itself, the aggrieved party has none ; but if a remedy has been given in the statute, the aggrieved party can get that remedy only in the manner stated, provided always that those in authority who interfere with private rights do so strictly according to the mode prescribed in the statute. [P 91 C 1]

(c) Jurisdiction — Civil Courts — Statute giving right and providing mode of obtaining it—Civil Court cannot maintain suit to enforce it—Acts authorised by law—No right to compensation provided—No right exists—Right existing independently of statute—Statute affirming it providing particular remedy—Remedy is exclusive—Civil Court's jurisdiction is impliedly barred.

If a right is given to an individual by a statute and the mode of obtaining that right is provided in the statute itself, a suit to enforce the right is not maintainable in the civil Court. There is no right to receive compensation for acts done under the authority of the law unless the law itself gives such a right. If the right to receive compensation exists independently of a statute and the statute only affirms it and provides a particular form of remedy, that remedy is exclusive and the jurisdiction of civil Courts is barred by implication: *Stevens* v. *Jeacocke*, 11 *Q B* 731; *Doe dem* v. *Bridges*, 1 *B & Ad* 847 ; *Wolverhampton New Waterworks Co.* v. *Hawkesford*, 28 *L J C P* 242; *Governor and Company of British Cast Plate Manufacturers* v. *Meredith*, 4 *T R* 794; 26 *All* 594 ; 31 *Bom* 604 and 34 *Cal* 470, *Rel. on.* [P 91 C 1, 2 ; P 92 C 1]

(d) Bengal Ferries Act (1 of 1885), S. 17—Magistrate investigating income of ferry to ascertain average profit—Finding mustajir bidding not only on income of ferry but also on expectation of getting illegal tolls—Magistrate held could ignore illegal income—His order held not revisable by Civil Court.

A Magistrate while investigating the nature of the income of a ferry in order to ascertain the average net profit found that the mustajir offered bids not only on the basis of the income from the ferry but on the expectation of also realising illegal tolls during the dry season:

Held : that the Magistrate had full power to ignore such illegal income accruing through the offence of extortion and to find out what the actual income from the ferry was: [P 92 C 1]

Held further : that the Magistrate's order was not revisable by the civil Court. [P 92 C 2]

Govt. Pleader—for Appellant.

P. K. Sen, *Murari Prasad* and *Rameshwar Misra*—for Respondent 1.

Mohammad Noor, J.—This appeal is by the Secretary of State for India in Council against the decree of the Officiating Subordinate Judge of Purnea in favour of the Maharajadhiraja of Darbhanga for Rs. 9,180, and costs as compensation for loss of income of a ferry possession of which was taken by Government under S. 6 (b), Ferries Act (Act I (B. C.) of 1885). The facts are that the Magistrate of Purnea recommended to the Commissioner of Bhagalpur Division that the Dhamdaha ferry of that district, which was a private ferry of the plaintiff

should be taken possession of by Government and managed by the District Board and that the Maharajadhiraja be given compensation of Rs. 3,870, being ten times the average estimated fair profit made by him from the ferry during the previous five years. He had held after enquiry that the actual average annual income of the plaintiff, which the mustajir of the ferry paid to him, during the period in question was Rs. 928, but having found that the ferry only worked for five months in the year and for the remaining period the mustajir (lessee), who obtained settlement at auction, extorted the toll even from persons who crossed the river on foot or took their carts across it without using the boats, he took into account only the income of the five months and recommended that only ten times five-twelfths of Rs. 928 be paid to the plaintiff. The Commissioner accepted the recommendation of the Magistrate that the ferry be taken possession of and under the power delegated to him by the local Government under S. 36, Ferries Act, directed that the ferry in question be taken possession of and be declared to be a public ferry and further directed that it be managed by the District Board of Purnea. He however, held that the number of months during which the ferry worked was not five but four, and accordingly directed payment of Rs. 2,980 only being ten times four-twelths of Rs. 918.

It is to be noted that while the Magistrate took the total average annual receipt to be Rs. 928, as mentioned in his letter (Ex. A), the Commissioner's calculation is by some mistake based upon an average annual income of Rs. 918 only. When the Commissioner's award was offered to the plaintiff his Chief Manager refused to accept it and intimated that the Raj would seek its remedy in the civil Court, and the plaintiff instituted the present suit against the Secretary of State for India in Council and the Chairman of the District Board of Purnea for recovery of Rs. 13,770, being fifteen times the average income for the previous five years, the maximum compensation permissible under S. 17, Ferries Act. He took the annual income to be Rs. 918, as the Commissioner had done. The defendants contested the suit, and their main defence was that the plaintiff had no cause of action and that the civil Court had no jurisdiction to entertain the suit. They also contested the amount of the annual income as alleged by the plaintiff. The learned Subordinate Judge decreed the suit against defendant 1, the Secretary of State for India in Council, and exonerated defendant 2, the Chairman of the Purnea District Board. He has given the plaintiff a decree for ten times the average annual income as alleged by the plaintiff, namely, Rs. 918, and disallowed the remainder of the claim at fifteen times the average annual income. The Secretary of State, as I have stated, has preferred this appeal. There is a cross-objection on behalf of the plaintiff in respect of the Rs. 4,590 disallowed by the learned Subordinate Judge. The main contention of the defendant is that the plaintiff has no cause of action and that the civil Conrt has no jurisdiction to entertain the present suit. In order to decide the question of the right of the plaintiff to sue in the civil Court it will be necessary to examine the position of the Government in respect of the ferries in this province. The earliest legislation, which authorised the resumption of ferries is Regn. 19 of 1816. This Regulation provided for fixing of tolls on ferries and prescribed rules for management and collections through the collectors of land revenue. S. 9 of that Regulation provides that:

> In the event of its appearing that the profits derived from any resumed ferry may have been included in the permanent settlement of the estate to which it has heretofore been annexed, the Board or Commissioner, under whose orders the enquiry may be conducted, shall report the circumstance, with an opinion on the merits of the claim, for the consideration and orders of the Governor-General in Council; and the Courts of judicature shall not take cognizance of any claims to deductions or compensations on account of the tolls levied at any ferry or ghaut.

This Regulation was repealed by Regn. 6 of 1819, by which the management of the ferries was transferred from the Collector to the Magistrate. S. 3, Cl. (1), describes the ferries which were to be considered public ferries. They were those that were situated at or near the sudder stations of the several Magistrates or joint Magistrates, or such as might intersect the chief military routes or other much frequented roads, or such as from special considerations it might appear advisable to place it under the more immediate management of the Magistrates

and Joint Magistrates. Cl. (2) of this section ran thus :

The Government reserves to itself the power of determining, from time to time, what ferries shall under the preceding rule, be deemed public ferries and as such shall be subject to the immediate control of the Magistrates and joint Magistrates ; and no Magistrate or joint Magistrate shall without previous authority from Government, assume the management of any ferry which may not have been let in farm or held khas, or otherwise subjected to assessment by the Collectors, under the provisions of Regn. 19 of 1816.

S. 6, Cl. (2), provided that the ferries, a list of which was to be prepared, would exclusively belong to Government and no person was to ply a ferry-boat for hire at or in their immediate vicinity without the previous sanction of the Magistrate or Joint Magistrate. Provision was however made that :

Due attention be paid to all claims for compensation which might be preferred by individuals, for any loss which may be sustained by them in consequence of the extension of the authority of Government to ferries hitherto under their private management and which may not have been heretofore let in farm or held khas, or otherwise deemed subject to assessment on account of Government

and that :

Claims of that nature shall be inquired into by the Magistrates and Joint Magistrates and their opinion on the merits of each case shall be reported through the channel of the Superintendent of Police, for the consideration and orders of Government.

S. 6 of this Regulation so far as it related to Bengal was repealed by Act 1 of 1866, S. 2 of which provided :

Every ferry which has been or may be declared to be a public ferry under the provisions of Regn. 6 of 1819, shall belong exclusively to Government, and no person shall except with the sanction of the Magistrate of the District, keep a ferry-boat for the purpose of plying for hire within a distance of two miles above or below the place where such public ferry is established.

It will be observed that a definite distance was fixed within which the plying of a private ferry was prohibited. S. 4 of the Act of 1866 ran as follows :

All claims for compensation which may be preferred by any person or persons for any loss which may be sustained by them in consequence of any ferry having been declared public as aforesaid, shall be inquired into by such Magistrate, who shall award compensation to any such person or persons who may appear justly entitled thereto. Such compensation shall be calculated upon an estimate of the annual net profit actually realised by such person or persons from such ferry on an average of the five years not preceding such declaration, and shall in no case exceed the amount of 15 times of such net annual profit.

It will be noticed that before the passing of this Act, the payment of compensation was left to the discretion of Government. Regn. 19 of 1816 confined it to those cases only where the income of the ferry was taken into consideration at the making of the permanent settlement. That restriction was removed by Regn. 6 of 1819 ; but still the payment of compensation was left to the discretion of Government as was pointed out in a decision of the Calcutta High Court to which I shall presently refer. By Act 1 of 1866 the payment of compensation was placed on a firmer footing and the basis of calculation was fixed. That Act was replaced by the Ferries Act 1 (B. C.) of 1885, which is now in force. S. 6, Ferries Act, makes it lawful for the Lieutenant-Governor from time to time to

(b) take possession of a private ferry and declare it to be a public ferry,

and S. 17 practically re-enacts the corresponding section of Act 1 of 1866, and runs as follows :

Claims for compensation for any loss sustained by any person in consequence of a private ferry being taken possession of, or a new public ferry, or subsidiary ferry, being established under S. 6 or S. 11, shall be inquired into by the Magistrate of the District in which such ferry is situated, who shall, with the approval of the commissioner, award compensation to any person who may appear justly entitled thereto.

Such compensation is to be calculated upon an estimate of the annual net profit actually realised by such person from such ferry on an average of the five years preceding such declaration and shall in no case exceed the amount of 15 times such net annual profit. This is the present law as to the authority of Government to take possession of a private ferry and the right of the private individual concerned to receive compensation. Now the question is whether the compensation which is payable under the Act can be realised from Government by a civil suit, and whether the private individual concerned can question the adequacy of the compensation in a civil Court. The learned Subordinate Judge has referred to S. 9, Civil P. C., and has held that as the jurisdiction of the civil Court is not expressly barred it has jurisdiction to entertain a claim for compensation. In my opinion he is wrong. He has ignored the fact that the jurisdiction of the civil Court may also be barred by implication. A case exactly similar to the present one

was decided by a Full Bench of the Calcutta High Court in the year 1867—7 W R 191 (1). Though the decision of the High Court was after the passing of Act 1 of 1866 it is based upon Regn. 6 of 1819 under which the ferry was resumed. The suit was for compensation for the loss sustained by the plaintiff in consequence of the Government having resumed a ferry which had been till then under the private management of the plaintiff. The Full Bench held that the plaintiff had no cause of action. This decision was placed before the learned Subordinate Judge, but he did not follow it on the ground that it was under Regulation 6 of 1819 and the Regulation was not available to him for comparison with the present Act. He ought to have obtained a copy of the Regulation which, if not available in the District Court Library of Purnea, could have been obtained by him elsewhere. It is to be found in Sutherland's Regulations of the Bengal Code published in the year 1862.

The position of an individual whose private ferry is resumed by Government was exactly the same under Regulation 6 of 1819 as it is now, except that then the payment of compensation was in the discretion of the Government and no basis was prescribed for its calculation. A basis has now been fixed and payment is now compulsory. Sir Barnes Peacock, C. J., while delivering the judgment of the Full Bench in the case above cited, traced the history of the Ferries Regulations and pointed out that from the earliest times the Government reserved to themselves the right of resuming any private ferry. It was argued in that case that as S. 9, Regulation 19 of 1816 expressly barred the jurisdiction of Courts to take cognizance of any claim to deduction or compensation on account of the tolls levied at any ferry and as this provision was omitted from Regulation 6 of 1819, the civil Courts were given jurisdiction to entertain a suit for compensation. Sir Barnes Peacock observed that though the Court had cognizance of the suit it could not decree it unless the plaintiff had a cause of action. While dealing with the question whether the plaintiff of that suit had a cause of action the learned Chief Justice pointed out that if the Regulation simply authorized that a certain ferry could be declared to be a public ferry and that no person was to employ a ferry-boat for hire at or in its immediate vicinity without the previous sanction of the Magistrate or Joint Magistrate and made no provision for any compensation, the aggrieved party had no remedy whatsoever.

Then His Lordship observed that the Regulation provided that due attention would be paid to claims for compensation and held that when the legislature said that these claims should receive due attention it meant no more than that they should be enquired into in the manner provided by the Regulation and did not intend to give to the claimant any right enforceable in Court. Dr. Sen, who appeared on behalf of the respondent, has contended that if the law had been as it is now, the decision would have been otherwise. His contention has been that the ratio decidendi of the Full Bench decision that the plaintiff had no cause of action was that the right to receive compensation was not recognized in the Regulation as it only said that due attention should be paid to all claims for compensation, but inasmuch as now the payment of compensation is compulsory and the basis of the compensation has been provided in the Act, a suit to enforce it is maintainable. I am unable to accept this contention. As I have said, the position has not changed and the law now is practically the same as it was then. The only change is that the right to receive compensation is made clear and on the other hand the power of Government to take possession of a private ferry is more expressly stated. Sir Barnes Peacock, C. J., referred to an earlier decision of the Sudder Dewany Adalat: (1848) S D A 457 (2) which was the basis of the reference to the Full Bench. The suit was for recovery of possession of a ferry which was resumed by a Magistrate.

The plaintiff's suit was dismissed on the ground that the Magistrates were not amenable for their official acts to the mufassal Courts. This decision was approved, though the reasons on which it was based were not adopted, which, in my opinion, means that the opinion of the Full Bench was that the suit did not lie though not on the ground that the Magistrates were not amenable to the

1. The Collector of Pubna v. Romanath Tagore, (1867) 7 W R 191=B L R Sup Vol 630.

2. Government v. Brij Sunder Dasi, (1848) S D A 457=S I D (Old Series) 442.

jurisdiction of the mufassal Courts but on the ground that the plaintiff had no remedy in Court. The principle laid down in the Full Bench decision was accepted in 14 C L J 136 (3), at p. 143 and 26 All 594 (4). It is well-settled law that if any private right is interfered with under the authority of any statute and no remedy is provided in the statute itself, the aggrieved party has none; but if a remedy has been given in the statute, the aggrieved party can get that remedy only in the manner stated, provided always that those in authority who interfere with private rights do so strictly according to the mode prescribed in the statute. In 1902 A C 213 (5), Lord Macnaghten delivering the judgment of their Lordships of the Privy Council, observed as follows:

> The law has been settled for the last hundred years. If persons in the position of the appellants acting in the exercise of a public trust or for the public benefit do an act which they are authorised by law to do and do it in a proper manner, though the act so done works a special injury to a particular individual, the individual injured cannot maintain an action. He is without remedy unless the remedy is provided by the statute.

In the present case the Government took possession of the plaintiff's ferry by virtue of the power vested in them under S. 6 of Act I of 1885 and for this the plaintiff has no cause of action. This position is not disputed, nor is there any allegation that in taking possession of the ferry the Government has acted arbitrarily, carelessely or oppressively, so as to give the plaintiff a cause of action. The grievance of the plaintiff is that the compensation granted to him is inadequate and has been arrived at on a wrong basis. The suit therefore, is practically an appeal to the civil Court against the orders of the Magistrate and the Commissioner fixing the amount of compensation. No such appeal is provided in the Act. It is again settled-law that if a right is given to an individual by a statute and the mode of obtaining that right is provided in the statute itself, a suit to enforce the right is not maintainable in the civil Court. The learned Government Pleader has placed reliance upon a number of English decisions. Some of them were referred to by Sir Barnes Peacock in the Full Bench decision, I have just referred to. They are (1848) 11 Q B 731 (6), 1 B & Ad. 847 (7) and 28 L J C P 242 (8).

It is not necessary to examine these cases in detail as the principle which they lay down, namely, that when a right has been created by a statute the only remedy available for the infringement of that right is the one provided in the statute itself, is well settled. Dr. Sen, however contended that the right to receive compensation for the loss of income of ferry is not the creation of the statute; the right existed independently of it; the statute only recognised it and though it has provided a remedy, that remedy is not exclusive; the aggrieved party if not satisfied, may seek a remedy in the civil Court. There seems to me to be no force in this contention. First, there is no right to receive compensation for acts done under the authority of the law unless the law itself gives such a right. I have already stated that the legislature having authorized the taking of possession of ferries by Government, the private individual who was deprived of his ferry had no right against the Government unless one was given to him in the statute itself, and in this particular case the remedy provided is the payment of compensation as ascertained by the Magistrate and sanctioned by the Commissioner. In the case of (1792) 4 T R 794 (9) the plaintiff sued for relief and damages for raising the payment of a road which blocked up and obstructed the passing and repassing of carts, etc., to the plaintiff's ware-houses. The raising of the payment was done under the Paving Act. Buller, J., observed :

> The question here is whether or not this action can be maintained, and I am clearly of opinion that it cannot be, because a particular remedy is pointed out by the Act. If there had been no clause in the Act empowering the Commissioners to give satisfaction to the party aggrieved, I am no means satisfied that on the broad principle stated by the plaintiff's counsel any action could be maintained.

3. Benode Lal v. Pran Chander, (1911) 14 C L J 136=11 I C 453.
4. Sham Lal v. Bindo, (1904) 26 All 594=1 A L J 266=1904 A W N 135.
5. Mayor and Councillors of East Fremantle v. Annois, (1902) A C 213.
6. Stevens v. Jeacocke (1848) 11 Q B 731=17 L J R B 163=12 Jur 477=116 E R 647.
7. Doe dem v. Bridges (1831) 1 B & Ad 847=109 E R 1001
8. Wolverhampton New Waterworks Co. v. Hawkesford (1859) 28 L J C P 242=6 C B(NS) 336=5Jur (NS) 1104=7 W R 464=141 E R 468.
9. Governor & Co. of the British Cast Plate Manufacturers v. Merdith, (1792) 4 T R 794=100 E R 1306.

Assuming however that the right to receive compensation existed independently of the Act and the Act only affirmed it and provided a peculiar form of remedy, that remedy, in my opinion, is exclusive as the claim for compensation is to be investigated by a particular officer and on a particular basis and the jurisdiction of the civil Court is barred by necessary implication. There are a number of decisions of the Courts in India to the same effect, but I do not propose to refer to them in detail. It is sufficient to mention some of them: 26 All 594 (4) already referred to, 31 Bom 604 (10) in which it was pointed out that the jurisdiction of civil Court is excluded by implication when an authority to deal with the matter has been provided and 34 Cal 470 (11). It was observed in the last mentioned case that when statutory right and liabilities have been created and jurisdiction has been conferred upon a special Court for the investigation of matters which may possibly be in controversy, such jurisdiction is exclusive and cannot conveniently be exercised by the ordinary Court. This observation was made in connexion with a case in which the claim was in respect of lands acquired under the Land Acquisition Act. Dr. Sen, has however contended that the Magistrate and the Commissioner acted arbitrarily in reducing the actual income of the plaintiff from the ferry, for the purpose of payment of compensation, the former to 5/12ths and the latter to 4/12ths and therefore in exercising their statutory power they have gone beyond the limits of the law and for that reason his client has a remedy in the civil Court and he relies upon the above decision in his support. Now, S. 17, Ferries Act 1885, gives authority to the Magistrate to ascertain the average net profit. He had ample power to investigate the nature of the income of the plaintiff and if he found that the mustajir offered bids not only on the basis of the income from the ferry but on the expectation of also realising illegal tolls during the dry season, he had, in my opinion, full power to ignore such illegal income accruing through the offence of extortion and to find out what the actual income from the ferry was. I am not at present considering whether the Magistrate made an error of fact in coming to his conclusion. It is enough to say that his order is not revisable by the civil Court. There has been no irregularity in the proceeding. His mistake, if any, lies in his conclusions of fact. In my opinion, therefore, the plaintiff has no cause of action and the suit was not entertainable in the civil Court.

In view of this finding it is not necessary to examine how far the plaintiff's case is sustainable on the merits; but as an issue thereon has been raised, I have to decide it. The onus was obviously on the plaintiff not only to prove what he received from the mustajir but also in the circumstances to show that the actual collections from the ferry itself could warrant such a receipt. What the mustajir paid to the plaintiff is not disputed; but the question is what the profit of the ferry itself is? The mustajir was examined, but he produced no accounts to show what his income had been from the ferry. It may be admitted that the evidence in this regard adduced by the defendant in the suit is not as satisfactory as it might be. Witnesses have however been examined to prove that the river is fordable during the dry season and no boat is kept but nevertheless all who cross the river-bed are compelled to pay toll. Better evidence could perhaps have been given, but I have certainly no reason to hold that the Magistrate was not justified in holding as he has that the income of the mustajir was partly based upon the tolls which he collected illegally though whether with the knowledge of the plaintiff does not appear from the evidence. Even if it had been open to us to examine the correctness of the finding of the Magistrate, it would have been impossible on the material before us to reverse his conclusions based as they are on his own careful inquiry.

In the result, I would allow this appeal, dismiss the cross-objection and dismiss the plaintiff's suit with costs throughout. The hearing fee in this Court will be calculated on the aggregate value of the appeal and the cross-objection.

Macpherson, J. — I agree entirely that the plaintiff-respondent had no cause of action and that the appeal must

10. Bhaishankar Nanabhai v. Municipal Corporation of Bombay, (1907) 31 Bom 604=9 Bom L R 417.
11. Rameshwar Singh v. Secy. of State, (1907) 34 Cal 470=5 C L J 669=11 C W N 356.

be allowed and the suit and cross-objection dismissed with costs throughout.

I would add that in my view it is clearly established by the evidence for the defence that the legitimate income of the ferry is confined to four or five months of the year, while realization was made forcibly by the lessee of Raj Darbhanga under the shadow of the name of the Raj throughout the twelve months and he could never have otherwise paid the amount at which he had secured the ferry at auction. Had the trial Judge not been at the very beginning of his first period of appointment as officiating Subordinate Judge he also could not have failed so to hold.

S.R./R.K. *Appeal allowed.*

A. I. R. 1936 Patna 93

FAZL ALI AND LUBY, JJ.

Harlal Kamti and *others*—Appellants.

v.

Jhari Singh and *others*—Respondents.

Appeal No. 64 of 1935, Decided on 28th August 1935, from appellate order of Dist. Judge, Darbhanga, D/- 12th December 1934.

(a) Inherent power—Mortgage suit—Application for final decree beyond time—Similar previous application made in time dismissed for failure to comply with some steps concerning service of notice on judgment-debtors—Though application was beyond time Court held could restore previous application for justice—Court held had better kept previous application pending until requirements complied with—Rejection of previous application held did not amount to dismissal of mortgage suit — Once decree passed, suit cannot be dismissed unless decree reversed on appeal.

An application upon which a preliminary decree in a mortgage suit was made final was filed more than three years after the passing of the preliminary decree. The decree-holder had, however, previously applied within 3 years for preparation of the final decree but that application was dismissed for default of the decree-holders as they had omitted to take some steps with regard to service of notice on the judgment-debtors:

Held: that even if the second application was filed after the expiry of the period of limitation the Court had full power to restore the original application and make its preliminary decree final for ends of justice under S. 151, Civil P. C. [P 94 C 2]

Held also: that the Court might have done better to keep the previous application pending until the decree-holder complied with the requirements instead of rejecting it. [P 94 C 1]

Held further: that the order rejecting the previous application did not amount to dismissal of suit. After a decree had once been passsd in a suit, the suit could not be dismissed unless the decree is reversed on appeal: 1925 *All* 622; 1927 *All* 439; 1933 *Oudh* 229; 1933 *Mad* 55 and 1924 *P C* 198, *Rel. on.* [P 94 C 2]

(b) Civil P. C. (1908), S. 38—Execution of final mortgage decree—Application for final decree found time-barred—Executing Court held not entitled to investigate whether application for final decree was time-barred.

An order made without jurisdiction is not the same thing as an order made in erroneous exercise of jurisdiction. The former is null and void but the latter is only voidable. Therefore the Court executing the decree is not entitled to go behind the decree and investigate the question whether the application upon which it had been prepared is time-barred. [P 94 C 2; P 95 C 1]

In the execution of a final mortgage decree the executing Court found that the application on which the decree was made final was time barred. The Court therefore dismissed the execution case:

Held: that the mere fact that the Court passing the decree overlooked the bar of limitation or acted wrongly in not applying it would not make its order without jurisdiction: 1925 *Cal* 907, *Rel. on*; 1919 *Pat* 430 (*FB*) and 1934 *Pat* 145; *Disting.* [P 95 C 1]

(c) Res judicata — Execution — Execution case and miscellaneous cases arising therefrom—Court having jurisdiction over them ordering in one miscellaneous case that entire execution proceeding was null and void—Other miscellaneous case duly disposed of—Court held not prevented from passing final order in latter case by its order in previous case—Execution case held not disposed of by order.

A Court having jurisdiction over an execution case and the miscellaneous cases filed in connexion therewith passed an order in one of the miscellaneous cases declaring the entire execution proceedings null and void. The other miscellaneous case was duly disposed of by the Court:

Held: that the Court was not prevented by its order passed in one miscellaneous case from passing a final order in the other miscellaneous case: [P 95 C 1]

Held further: that the Court had not disposed of the execution case by its order in the previous miscellaneous case but only decided that the proceedings had been vitiated. [P 95 C 1]

(d) Res judicata — Execution—Objection—Mortgage decree—Application for final decree time-barred—Objection not raised when notices served on judgment-debtors nor when execution started—Objection filed six months after sale—Objection held could not be raised.

In a mortgage suit the application on which the decree was made final was time-barred. The judgment-debtors did not raise any objection at the time when notices were served on them in connexion with the application, nor did they raise the objection when the execution was started and notices under O. 21, R. 22 were served on them. The objection was filed by them six months after the sale in execution:

Held: that the judgment-debtors should have raised the objection earlier. [P 95 C 1]

B. N. Mitter and *B. K. Sinha*—for Appellants.

R. K. Jha—for Respondents.

Luby, J.—Harlal Kamti and others, decree-holders, appeal against the order dismissing the execution case which they brought against Jhari Lal Singh and other judgment-debtors, now respondents. The facts are as follows: The Kamti appellants got a preliminary decree on a mortgage bond on 27th January 1927. Subsequently the appellant Anchu Singh purchased a portion of the decree from them. The mortgage decree was made absolute on 25th November 1930. Execution was taken out in June 1933; and after the usual formalities the property was sold and purchased by the decree-holders on 7th November 1933. Miscellaneous cases were then filed by the judgment-debtors. On 5th June 1934, the sale was set aside for failure to have notices served under O. 21, R. 16, in respect of that portion of the decree which had been purchased by Anchu Singh. A few days later in another miscellaneous case the Munsif dismissed the execution case altogether, on the ground that the decree was time-barred and incapable of execution and in fact a nullity having been made final on an application which was filed more than three years after the passing of the preliminary decree. This order was supported on appeal by the learned District Judge of Darbhanga, who held that the decree was time-barred and that the executing Court could go behind the decree as had been done by the Munsif.

The first argument advanced in this appeal is that the decree was time-barred. The decree itself was not time-barred; but the application upon which the decree had been made final was filed more than three years after the date of the preliminary decree. And the period of limitation for such application would be three years under Art. 181, Limitation Act. It must be noticed, however that the decree-holders had applied within the three years for preparation of a final decree. Their first application was rejected for default as they had omitted to take some steps with regard to the service of notice on the judgment-debtors. It is somewhat doubtful whether the Munsif was right in rejecting the application. He might have done better to keep it pending until the decree-holders complied with his requirements. But as it was rejected, the decree-holders were quite at liberty to file another application for final decree within the three years allowed. The order rejecting the application did not amount to dismissal of the mortgage suit. After a decree has once been made in a suit, the suit cannot be dismissed unless the decree is reversed on appeal. And even if the decree-holder's second application was filed after the expiry of the period of limitation, the Court had full power to restore the original application and make its preliminary decree final for the ends of justice, under S. 151, Civil P. C. Ample authority for these propositions will be found in the following cases: 47 All 546 (1), 49 All 592 (2), 8 Luck 496 (3), 56 Mad 310 (4) and 4 Pat 61 (5). In my opinion the decree was neither time-barred nor incapable of execution.

The other question to be decided is whether the executing Court was entitled to go behind the decree as has been done by the Munsif. The learned District Judge has referred to the remarks made by a Full Bench of this Court in 4 Pat L T 240 (6). In that case it was held that an executing Court can refuse to execute a decree passed against a dead man because such a decree is a nullity. He has also referred to the case of 15 P L T 111 (7). In that case it was held that an executing Court could refuse to execute a decree of the Registrar of Co-operative Societies made against a person who was not a member of the Co-operative Society concerned, because such a decree was beyond the Registrar's jurisdiction and therefore a nullity. But the case which we are now considering is somewhat different. We must remember that an order made without jurisdiction is not the same thing as an order made in erroneous exercise of jurisdiction. The former is null and void but the latter is only voidable. This dis-

1. Jodha Singh v. Gokaran Das Pande, 1925 All 622=87 I C 225=47 All 546=23 A L J 405.
2. Chandra Sekhar v. Ameer Begam, 1927 All 439 =101 I C 676=49 All 592=25 A L J 437.
3. Puran Lal v. Komal Singh, 1933 Oudh 229= 150 I C 514=8 Luck 496=10 O W N 293.
4. Tadepalli Sriramulu v. Firm of Srirumulu, 1933 Mad 55=140 I C 324=56 Mad 310=63 M L J 719.
5. Lachmi Narain Marwari v. Balmakund Marwari, 1924 P C 198=81 I C 747=51 I A 321=4 Pat 61 (P C).
6. Jangli Lall v. Laddu Ram Marwari, 1919 Pat 430=50 I C 529=4 Pat L J 240 (F B).
7. Srimati Haridasi Ghosh v. Mothihari Town Co-operative Society, 1934 Pat 145=148 I C 730=15 P L T 111.

tinction has been drawn by a Full Bench of the Calcutta High Court in 53 Cal 166 (8). It was held in that case that an executing Court can only question such decrees as have been made without jurisdiction. In the case which we are now considering, the Munsif was seised of the case and competent to pass orders on the application for final decrees. The mere fact that he overlooked the bar of limitation or acted wrongly in not applying it would not make his order without jurisdiction. In my opinion the executing Court was not entitled to go behind this decree, which itself was not time-barred, and investigate the question whether the application upon which it had been prepared was time-barred.

It was contended for the respondents that Munsif had no jurisdiction to dispose of the Miscellaneous Case No. 175 of 1934 (with which we are now concerned) after disposing of the other Miscellaneous Case No. 299 of 1934, in which he had passed the following order on 5th June 1934 :

> That the entire execution proceedings be declared to be void and a nullity and the sale held in the same on 7th November 1933 be set aside.

This argument does not appeal to me. The Munsif had jurisdiction over the execution case and over the miscellaneous case filed in connexion therewith ; and he was not prevented by his order passed in one miscellaneous case from passing a final order in the other miscellaneous case. Moreover, he had not disposed of the execution case by his earlier order, but only decided that the proceedings had been vitiated by a material irregularity, viz., the omission to serve notices under O. 21, R. 16. Only one thing remains to be mentioned in this case ; and that is that the judgment-debtors should have raised this objection much earlier. They had their first opportunity when notices were served on them in 1930 in connexion with the second application for preparation of final decree. They had another opportunity in 1933 when the execution case was started and notices were served on them under O. 21, R. 22. But they did not take advantage of either opportunity. Their objection was not filed until six months after the sale.

In my opinion the execution was not time-barred and the decree was not incapable of execution. I would, therefore, allow the appeal and set aside the order of the District Judge dated 12th December 1934 affirming that of the Munsif dated 15th June 1934 by which they dismissed the execution case on the ground of limitation ; and I would award to the appellants their costs of these proceedings in all the Courts. The Munsif will now proceed to dispose of the execution case according to law.

Fazl Ali, J.—I agree to the order proposed. The principal question to be determined in this appeal is whether the final decree which is sought to be executed by the appellants can be regarded as a nullity on the ground that the application made by the decree-holders for making the preliminary decree final was made more than three years after the passing of the preliminary decree. In my opinion this question must be answered in the negative. It is not disputed that before the decree was made final a notice was issued to the judgment-debtors, but they did not appeal and object to the decree being made final on the ground that the application made by the decree-holders was beyond time. Even after the passing of the final decree they took no steps to question that decree or to have it set aside. In 1932 All 273 (9). Sulaiman, C. J., dealing with the question whether a decree passed in a suit which was time-barred was binding on the parties observed as follows :

> A decree passed in a suit which was time-barred is binding on the parties and the question of limitation is by implication deemed to have been decided against the defendant. . . . It must be assumed that the Court by oversight decided the question of limitation wrongly. But a wrong decision, whether express or implied on a question of limitation does not oust the jurisdiction. Limitation is a question of procedure and not one of jurisdiction : see 26 All 522 (10). The Court was seised of the case and was competent to pass orders on the application.

With this view I respectfully agree and in my opinion, therefore, the decree sought to be executed was not a nullity and the executing Court could not refuse to execute the decree on that ground.

S.R./R.K. *Appeal allowed.*

8. Gora Chand Haldar v. P. K. Roy, 1925 Cal 907=89 I C 685=53 Cal 166=42 C L J 1=29 C W N 948 (F B).

9. Gobardhan Das v. Dau Dayal 1932 All 273=138 I C 583=54 All 573 (F B).

10. Nathu Ram v. Kallian Das (1904) 26 All 522. =1904 A W N 110=1 A L J 217.

A. I. R. 1936 Patna 96

WORT, J.

Deo Narain Singh— Defendant— Appellant.

v.

Mt. Lila Kuer—Plaintiff—Respondent.

Appeals Nos. 332 and 524 of 1934, Decided on 25th November 1935, from appellate decree of Sub-Judge, 1st Court, Gaya, D/- 29th January 1934.

(a) Landlord and Tenant—Partition—Tenants cannot be brought on record or before Court to show their consent to partition between cosharer landlords—Cosharer landlord's rent suit after partition —Question whether rent apportioned— Whether tenant agreed to partition must be seen.

Excepting under the Estates Partition Act there is no procedure by which the tenants themselves can be brought on the record or can be brought before the Court to show that they have agreed to the partition which is about to take place or has taken place between the cosharer landlords. Therefore where after the partition a cosharer landlord sues a tenant for rent and the question is whether there has been an apportionment of rent it has to be seen whether the tenant has agreed to the partition: 1916 *Pat* 79, *Expl.*; 1 *Cal L R* 248, *Disting.* [P 97 C 1,2]

(b) Civil P. C., (1908), S. 100 —Question whether evidence supporting point exists is question of fact—Court's conclusion that no evidence exists or evidence is not evidence supporting point—Question is of law.

The question whether there is evidence on record in support of a particular point is a question of fact. But if the Court comes to the conclusion that there is no evidence on record or that the evidence in no circumstances could be held to be evidence in support of the point, a question of law arises. [P 97 C 1,2]

Sarju Prasad—for Appellant.

Kameshwar Dayal—for Respondent.

Judgment.—These appeals arise out of two actions for rent, one bhaoli and the other naqdi. Suit No. 11 which is equivalent of second appeal No. 524 of 1934 related to 4 bigas of bhaoli, and Suit No. 14 equivalent to second appeal No. 332 related to 2 bighas of naqdi.

A number of questions arose both as regards the area and as regards the alleged payment, but these have been disposed by the Court below against the defendant and being questions of fact cannot be disturbed in second appeal. The substantial question however is whether there had been apportionment of rent. It is clear from the judgment of the learned Judge in the Court below that parts of these holdings had fallen into the takhta of the plaintiff, and the first question which appears to have been raised was that the tenants were no parties to the agreement as between the co-sharer landlords, as the partition was effected in the civil Court and was not under the Estates Partition Act. The Judge in the Court below has however come to the conclusion that the agreement is binding upon the tenant appellant for the reason that he had in fact paid rent on previous occasions. Mr. Sarju Prasad who appears on behalf of the defendant-appellant relies upon the decision in 16 P L T 443 (1). That was a decision of this Court in which certain decrees were being executed and the point for decision was whether the decrees amounted to rent decrees or money decrees. In the course of his judgment in that case my brother Mohamad Noor made this observation :

> The civil Court partition is between landlords, and by itself it does not constitute the breaking up of the holding. The holding is a unit for which a certain rent is payable to the landlord. The rent payable is not divisible being a lump rental in respect of the entire holding. The holding can be broken up and rents apportioned with the consent of all the parties concerned, namely, all the landlords and raiyats concerned.

He then goes on to point out that :

> There is no procedure in civil Court partition suits under which the tenants can be brought on the record and the rents apportioned after splitting up the holdings.

He then observes which of course, if I may say so, is correct :

> What the civil Court partition does is that it changes the position of the cosharer landlords from holders of lands as tenants in common into landlords holding different pieces of land in severalty, but so far as their relation with a raiyat, lands of whose holding have been allotted to the different landlords is concerned, they continue to be his cosharer landlords.

I read the passages for the reason that Mr. Sarju Prasad relies on them for his argument that there was no apportionment in this case. Mohamad Noor, J., in that case referred to an earlier decision of this Court in 1 Pat L J 270 (2) and pointed out that the observation of the late Mullick, J., that there was no difference between a partition under the Estates Partition Act, and a partition made by a civil Court was in the circumstances of the case obiter, because there was evidence in that case that by payment of

1. Mt. Nepur Kuer v. Bhan Pratap, 1935 Pat 227=156 I C 881=16 P L T 443.
2. Ram Lochan Koer v. Jagernath Misser, 1916 Pat 79=37 I C 440=1 Pat L J 270.

rent the tenant had consented. The observation to which reference was made was this :

> It has been found by the learned Munsif and affirmed by the learned District Judge by implication that the second party defendants have accepted the splitting up of the whole tenancy by payment of rent according to the civil Court's apportionment."

Now if it had not been for the view which Mohamad Noor, J., took of that case, he would not have been bound to have come to the conclusion that the decision was wrong, and would have possibly referred the case he was then deciding to a Bench of Judges for disposal. His view was that the question was not whether there was an agreement as between the landlords, which was evident as he pointed out in the passage I have read that so far as between themselves they were holders in severalty but whether there was an agreement by the tenant. In the case before me there was no evidence of that whatever. Now had the view been one which Mr. Sarju Prasad presses upon me, that it was necessary to have an agreement made between the parties at a time when the parties were present, as I have already said and repeat, it would have been necessary for the learned Judge to have come to the conclusion that the decision of the late Mullick, J., could not have proceeded on the fact that there was evidence and finding to the effect that the tenant had agreed to the splitting up. It must be noticed that Mohamad Noor, J., clearly points out, as I have said, that as between the cosharer landlords they held the land in severalty. Now one of the earliest decisions on the question was the decision in 1 C L R 248 (3). There a cosharer had sued for rent. There was no evidence whatever of any agreement as between the landlords, and in those circumstances the learned Judge decided that the mere fact of payment of rent by the defendant was no evidence of such an agreement. What was missing in that case was an agreement as between the landlords. In the view which Mohamad Noor, J., took in the case cited, it is quite clear that the real question in cases of this kind is whether the tenant has agreed, and this view is supported by the contention, which is always advanced in such cases, namely, that excepting under the Estates Partition Act there is no procedure by which the tenants themselves can be brought on the record or can be brought before the Court to show that they have agreed to the partition which is about to take place or has taken place between the cosharer landlords.

In this case, according to the finding of the learned Judge in the Court below, there was evidence that the tenant had agreed and thus the agreement between the necessary parties was in my judgment complete. As to the question whether there was evidence that the tenant had agreed, it was in the circumstances of the case a question of fact. Had the learned Judge come to the conclusion that there was no evidence or that the evidence in no circumstances could have been held to be evidence of an agreement, a question of law might have arisen. On the facts as found, and in the circumstances, so far as the question of agreement by the tenant defendant is concerned, no question of law arose. The appeals therefore fail and must be dismissed with costs. Leave to appeal under the Letters Patent is refused.

S.R./R.K. *Appeals dismissed.*

3. Anoo Mundul v. Shaik Kamaloodeen (1878) 1 C L R 248.

** A. I. R. 1936 Patna 97

Full Bench

COURTNEY TERRELL, C. J., DHAVLE AND AGARWALA, JJ.

Surendra Kumar Singh—Appellant.

v.

Srichand Mahata and *others*—Respondents.

Appeal No. 10 of 1935, Decided on 17th October 1935, from appellate order of Dist. Judge, Purnea, D/- 13th September 1934.

**** Execution sale—Sale of immoveable property — Judgment-debtor having no interest in it at sale—Sale is within executing Court's jurisdiction and not void as between judgment-debtor and decree-holder or purchaser—Decree-holder purchaser not applying under O. 21, R. 91—He cannot revive proceedings on ground that sale did not satisfy decree to extent of sale price.**

A sale of immoveable property in which the judgment-debtor has no interest at the date of the sale is not a nullity in the sense of being beyond the jurisdiction of the executing Court or void as between the judgment-debtor and the decree-holder or auction-purchaser. The decree-holder, if he purchases the property, cannot successfully maintain an application for the revival of the execution proceedings on the ground that the sale has not in fact satisfied

his decree to the extent of the sale-price, unless he has the sale set aside by applying under O. 21, R. 91, Civil P. C. : 1931 *Pat* 405 ; 1924 *Pat* 273 and 1935 *P C* 139, *Disting.*; 1925 *Pat* 106; 6 *All* 269 (*P C*) ; 1927 *Mad* 394 and *Misc. Appeal No.* 285 *of* 1934, *Rel. on.*

[P 100 C 2; P 101 C 1]

Abani Bhushan Mukherjee and *Satyandranath Banerjee*—for Appellants.

B. N. Mitter and *Syed Hasan*—for Respondent.

Dhavle, J.—The appellant in this case objects to execution proceedings started afresh against him by the respondents in the following circumstances: The respondents obtained a money decree against the appellant, and in execution of it brought certain lands of the appellant's to sale in April 1931 and themselves purchased them. The sale was confirmed in June 1931 and a record was made to the effect that the decree had been fully satisfied by reason of the sale. Later on the respondents came to know that the lands had been previously sold in execution of a rent decree, so that at the time of the sale brought about by the respondents the appellant had no saleable interest in them. Upon this, in January 1933, they made an application under O. 21, R. 91 for setting the sale aside. This application was obviously barred by limitation and was accordingly dismissed. About six months afterwards the respondents made an application out of which the present appeal arises, asking for fresh execution on the ground that their decree was in fact unsatisfied. The application was resisted by the appellant on the ground that the order in execution entering satisfaction of the decree, not having been set aside by any Court, was a bar to a fresh execution and that therefore the respondents decree-holders, who had lost their remedy under O. 21, R. 91, were not entitled to maintain the application in question.

The appellants objection has been overruled by the lower Courts, relying upon certain observations in 11 Pat 250 (1); they have held that the sale in favour of the respondents was a nullity, inasmuch as the property which the Court purported to sell to them had already been sold in execution of a previous decree and therefore could not pass to the deeree-holder under the sale. As that view was in conflict with the view taken in 50 Mad 639 (2), which was followed in 53M LJ 255 (3) and in this Court in Miscellaneous Appeal No. 285 of 1934 (decided by my Lord the Cheif Justice and Verma, J.). The learned Judges before whom this appeal first came on for hearing, Fazl Ali and Luby, JJ. have made this reference to a Full Bench, formulating the point for decision as follows :

Whether a sale of immovable property in which the judgment-debtor had no saleable interest at the date of the sale is a nullity and whether the decree-holder, if he purchases the property, can without taking steps under O. 21, R. 91, or in spite of having taken steps under that provision and failed to have the sale set aside, successfully maintain an application for the revival of the execution proceedings on the ground that the decree not being satisfied is still liable to be executed.

Now, it appears at the outset that the point for decision in 11 Pat 250 (1) was whether the executing Court had properly disposed of an application for rateable distribution in ultimately dismissing it and at first ignoring it and confirming the relevant execution sale even after it had been brought to its knowledge that the judgment-debtor's property had already been sold in execution at the instance of another decree-holder. That matter is entirely different from the present case where the propriety of the order confirming the sale cannot be and is not challenged, but the decree-holder merely seeks to ignore that order as well as the order recording satisfaction of the decree on the ground that the decree has not in fact been satisfied by the sale. There cannot, of course, be any dispute that if a property has already been sold in execution of a decree, it cannot be effectively sold again in execution of another decree against the same judgment-debtor unless possibly there is a question of mortgage liens and the like. The first sale operating on the entire interest of the judgment-debtor there would be nothing left for the second sale to operate on. A second sale would therefore really convey nothing to the purchaser, and the question may arise [as happened in 11 Pat 250 (1)] whether, vis-a-vis the judgment-debtor, it ought to be confirmed. That however is not what we have to deal with in the present case ; the confirmation of the sale, as I have

1. Firm Ganga Ram-Gulraj Ram v. Muktiram Marwari, 1931 Pat 405=134 I C 616=11 Pat 250=12 P L T 639.

2. Muthukumara Swami Pillai v. Muthuswami Thevan, 1927 Mad 394=100 I C 522=50 Mad. 639=52 M L J 148.

3. Jagannadha Rao v. Rachapudi Basavayya, 1927 Mad 835=104 I C 614=53 M L J 255.

already said, is not in question. It may be indeed, it appears to be the case, that the respondents, if they are right in saying that the property had already been sold in execution of a rent-decree obtained by the landlord, have taken nothing by the sale and that as against the prior execution purchaser they will not be entitled to the property.

The sale might be a nullity in the sense that it would not operate to pass an effective title to the purchaser vis-a-vis the prior purchaser, but the mere absence of a saleable interest would not go to the jurisdiction of the Court that sells the property at the instance of the decree-holder, especially as there is no warranty of title in Court sales. But the question that arises when a decree-holder auction-purchaser applies for a fresh execution on the ground that the sale has not in fact passed any title to him and satisfied his decree is a question between him and the judgment-debtor, and not one between him and another person against whom he has obtained no title by the sale. It is open to a decree-holder, who brings the judgment-debtor's property to sale in execution and purchases it himself, to apply to the Court under O. 21, R. 91 to set aside the sale on the ground that the judgment-debtor had no saleable interest in the property; and if he so applies within the period of thirty days prescribed for such applications, and proves that the judgment-debtor had no saleable interest, the Court will, under O. 21, R. 92, sub-R. (2), make an order setting aside the sale. Such an order entitles the purchaser, under R. 93 of the same order, to an order for repayment of his purchase money, and would, when the decree-holder himself is the purchaser, lead, if it did not amount, to an order giving him leave to proceed again with the execution, in so far as the purchase money is not deposited but set off against the decretal amount. But if the sale is not set aside on this ground (or on other grounds which are open to other parties under Rr. 89 and 90 of the order), the Court has to make an order under clause (1) of R. 92 confirming the sale, whereupon the sale becomes absolute. Clause (3) of R. 92 then comes into play and debars a suit by any person against whom such order of confirmation is passed to set aside such order. The effect of this provision of the law was considered in detail by Kulwant Sahay, J., (sitting with Jwala Prasad, J., who concurred) in 6 P L T 769 (4). It was held in that case that:

> Whereas under the Code of 1882 it was optional to enforce repayment of the purchase money upon setting aside of a sale by having recourse to the procedure provided for execution of a decree for money and the auction-purchaser was not limited to that remedy which was not an exclusive remedy, but he could, if he so chose, bring a regular suit to enforce payment of the purchase money, under the present Code no such option is left to the auction-purchaser and his only remedy is by way of an application under O. 21, R. 91 of the Code.

The auction-purchaser, therefore, loses the purchase money deposited by him —and the sale stands, though ineffective against third parties—if the judgment-debtor has no saleable interest in the property and if the auction-purchaser has lost his remedy under O. 21, R. 91. The only possible exception to this is where the auction-purchaser can make out a case for equitable relief on the ground of fraud or the like; see such cases as 53 Cal 758 (5) and 1935 Cal 645 (6), but that does not arise in the present case.

On what principle then can it be held that the auction-purchaser is better off if he should also be the decree-holder and that in the latter capacity he can ignore the sale and take out fresh execution? Much reliance has been placed by the respondents on 2 Pat 829 (7) in support of the contention that as decree-holder he can do so. But that was a case where after the satisfaction of a decree by reason of an execution sale a third person had obtained a declaration of his rights to the property in a suit in which both the decree-holder and the judgment-debtor had been impleaded. Mullick, J., who delivered the judgment of the Court in the case, held that the effect of the decree in favour of the successful claimant was to set aside the sale and that no formal order to that effect was required as both the original decree-holder and his judgment-debtor were bound by the later decree. This view has been criticized in Madras in view of the finality of execution proceedings between decree-

4. Nagendra Nath Ghosh v. Sambhu Nath Pandey, 1925 Pat 106=88 I C 219=3 Pat 947 =6 P L T 769.
5. Rishikesh Laha v. Manik Molla, 1926 Cal 971 =96 I C 64=53 Cal 758.
6. Bashiruddin v. Elahi Bux, 1935 Cal 645=158 I C 585.
7. Radha Kishun Lal v. Kashi Lal, 1924 Pat 273=76 I C 927=2 Pat 829=5 P L T 345.

S. N. DAR, B. A. LL. B.,
Vakil High Court.

holder and judgment-debtor, but it is not now necessary to examine the soundness. For in the present case there is no adjudication in the presence of the decree-holder and the judgment-debtor which could be taken to have the effect of setting the sale aside. On the other hand, there is the sale which, being confirmed, binds the decree-holder, and further there is the record of satisfaction of the decree, which is binding on the decree-holder and cannot be ignored ; if it were not binding, there would (as their Lordships of the Judicial Committee said in 11 I A 37 (8), be no end to litigation.

The decree-holder auction-purchaser would seem in such circumstances to have a smaller claim to consideration than a third party auction-purchaser ; for while both of them purchase at their own risk, it is the decree-holder himself that brings the property to sale and he ought to see that it is still the property of his judgment-debtor, if he makes a mistake, to discover it within the period of limitation prescribed for applications for setting sales aside. That in circumstances essentially similar to those of the present case an application for further execution is unsustainable, was held in 50 Mad 639 (2), the reasoning in which was accepted in this Court in Misc. Appeal No. 285 of 1934, the case referred to by Fazl Ali and Luby, JJ. As a matter of fact, 50 Mad 639 (2) was perhaps in one respect rather stronger in favour of the decree-holder auction-purchaser than the present case, for the property put up to sale in that case did not belong to the judgment-debtor at all; and the learned Judges held that even so, the sale was not void as between the decree-holder and the judgment-debtor and that the want of title did not entitle the decree-holder to ignore it.

The learned Advocate for the respondent has pressed us to hold that the sale in the present case was a nullity—was absolutely void—but in support of this contention he has relied on cases which only deal with the relations between an earlier and a later purchaser, and not with those between the later purchaser and the judgment-debtor himself. It is therefore unnecessary to refer to them in detail. The latest of the cases cited was 16 P L T 589 (9). But in this case their Lordships of the Judicial Committee merely pointed out that a sale for arrears of land cess in 1914 of a property which purported to be the property of a man to whom it did not belong at that time was a nullity against an auction-purchaser of 1908 who was no party to the proceedings leading to the sale in question, and that Art. 12, Lim. Act, was therefore no bar to the suit of the successor of the purchaser of 1908 against the cess purchaser of 1914. The sale in favour of the respondents before us may, as I have already said, have no effect whatsoever against the landlord if the latter had brought the property to sale in execution of his rent decree before the sale obtained by the respondent. But that has nothing to do with the satisfaction of the decree that has already been entered on the record and that must bar further execution unless it is set aside, as it cannot be set aside without the sale itself being set aside as between the judgment-debtor and the decree-holders auction-purchasers. The observations from 11 Pat 250 (1), on which the lower Courts have acted, were made in a case in which, as the learned Judges found, the second sale ought not to have been confirmed on the materials then before the Court. It is therefore unnecessary to examine them in detail on the present occasion; they could not have been meant to apply to cases like the present where the propriety of the order confirming the sale is not in question. In my opinion the lower Courts were in error in concluding on the basis of those observations that the respondents were entitled to ignore the sale because long after the confirmation it is discovered to have brought them nothing in fact. I would answer the question propounded by the referring Judges as follows:

(a) A sale of immoveable property in which the judgment-debtor has no interest at the date of the sale is not a nullity in the sense of being beyond the jurisdiction of the executing Court or void as between the judgment-debtor and the decree-holder or auction-purchaser, and (b) the decree-holder, if he purchases the property, cannot successfully maintain an application for the revival of

8. Ram Kirpal v. Rup Kuari, (1884) 6 All 269=11 I A 37 (P C).

9. Kedar Nath Goenka v. Munshi Ram Narain Lal, 1935 P C 139=157 I C 485=14 Pat 611=16 P L T 589 (P C).

the execution proceedings on the ground that the sale has not in fact satisfied his decree to the extent of the sale-price, unless he has the sale set aside by applying under O. 21, R. 91. I would accordingly allow the appeal, reverse the order of the lower Courts and dismiss the application for execution with costs in all Courts.

Courtney Terrell, C. J.—I agree.

Agarwala, J.—I agree.

S.R./R.K. *Appeal allowed.*

A. I. R. 1936 Patna 101

ROWLAND, J.

Seth Ghadsiram—Petitioner.

v.

Vice-Chairman, Sambalpur Municipality—Opposite Party.

Criminal Revn. No. 594 of 1935, Decided on 20th November 1935, from decision of Sess. Judge, Manbhum-Sambalpur, D/- 20th August 1935.

(a) Bihar and Orissa Municipal Act (7 of 1922), S. 180 (2)—Platforms whether new or old cannot be retained without license.

Sub-Section (2), S. 180, contains nothing to distinguish between the cases of new platforms and old platforms. The intention is that while old platforms will be allowed to be retained, their owners must take out licenses. [P 101 C 2]

(b) Bihar and Orissa Municipal Act (7 of 1922), S. 82 (2) — Resolution by Commissioners is sufficient authority to compel platform owners to take licenses.

There is nothing in the Act requiring any other authority than a resolution of the Commissioners at a metting to impose the obligation on the owners of platforms to take out a license. [P 102 C 1]

G. P. Das—for Petitioner.

P. Misra—for Opposite Party.

Order. — The petitioner has been convicted under S. 180, Cl. (5), Bihar and Orissa Municipal Act, and sentenced to pay a fine of Rs. 30 and costs Rs. 3-12 for keeping a platform extending over the Municipal drain in front of his house in Sambalpur Municipality without taking out a license for keeping the platform. It is not disputed that the petitioner has kept this platform and that he has not taken out a license. His substantial defence in the Courts below was that the platform had been in existence since 70 years ago, long before the Municipal Act came into force in Sambalpur, and therefore he should not be prosecuted. This contention would have been available to the petitioner and might have been good defence had he been prosecuted for an alleged contravention of S. 180, Sub-S. (1), Municipal Act. That sub-section forbids to erect, re-erect or extend a platform, but the offence alleged against the accused is contravention of Sub-S. (2), S. 180 which requires the owners of every platform (except a platform used for giving such access to the house as the Commissioners may consider necessary) to take out a license for keeping the platform if the Commissioners at a meeting so direct. This sub-section contains nothing to distinguish between the cases of new platforms and old platforms and the intention appears to be that while old platforms will be allowed to be retained their owners must take out licenses. The second defence taken was that the proceedings were bad for want of sanction by the Chairman of the Municipality. This contention was negatived by the Courts below on the facts, it being held that the complaint had been made with the consent and approval of the Chairman.

It was further contended (and this is the point which has been pressed in this Court that the Commissioners had no power to levy a fee without the sanction of the Local Government. It is conceded that no orders of the Local Government have been obtained sanctioning or approving the scale fixed by the Municipal Commissioners at a meeting dated 7th July 1934, and it is said in reply that no approval of the Local Government was necessary for fixing license fees under S. 180. The argument for the petitioner is based on S. 82 of the Act. Sub-S. (1) of this section empowers the Commissioners at a meeting after notice and with the sanction of the Local Government to impose certain taxes and fees. Sub-S. (2) empowers the Commissioners at a meeting to charge a fee in respect of licenses not provided for by Sub-S. (1) "in accordance with a scale of fees to be approved by the Local Government." The argument is that this section controls the provisions of S. 180 that the provisions of S. 82 which is the opening section of Ch. 4, the chapter dealing generally with Municipal taxation, are intended to be of general application and that they regulate the procedure to be followed by the Commissioners both in imposing taxes and in fixing a scale of fees for licenses. If so, a resolution of the Commissioners under Sub-S. (4) fixing the scale of fees

for licenses to keep a platform extending over a public road or drain would not become effective until the approval of the Local Government has been obtained in puruance of S. 82, Cl. (2), and without such approval there would be no obligation under S. 180, Cl. (4) to pay the fee ; and non-payment of the license fee would be no offence by reason of contravention of S. 180, Sub- S. (4). But the petitioner has been convicted of contravening Sub-S. (2) and not Sub-S. (4) of S. 180, and I can find nothing in the Act requiring any other authority than a resolution of the Commissioners at a meeting to impose the obligation on the owners of platforms to take out a license.

I have no doubt that the Commissioners had power by their own resolution to make it obligatory on the owner of a platform to take out a license, and that by keeping a platform without a license there was a contravention of Sub-S. (2) of S. 180. It may be that the resolution charging fees for such licenses could not be effective until it had been approved by the Local Government ; and if the owner of a platform were to apply for a license and claim to have it issued to him free of any fees until the scale had been approved by the Local Government, and so brought into force in the manner provided for by S. 82 of the Act the question might arise whether the Commissioners could lawfully refuse it. But the petitioner made no such application and so it is not necessary to determine whether he had the right to have a license issued to him without paying the fee. It is enough to say that he was not entitled to keep a platform without making an application for a license in that behalf. That being so the conviction of the petitioner is correct because he has contravened Sub-S. (2) of S. 180.

The rule is discharged.

S.R./R.K. *Rule discharged.*

A. I. R. 1936 Patna 102

VARMA, J.

Jhakar Sahu—Appellant.

v.

Raj Kumar Tewari—Respondent.

Appeal No. 837 of 1934, Decided on 6th December 1935, from appellate decree of Dist. Judge, Shahabad, D/- 30th January 1934.

Civil P. C. (1908), S. 102—Suit for recovery of money value of bhaoli produce of mahua trees is suit for money and not suit for rent—No second appeal lies from such suit.

A suit for recovery of money value of bhaoli produce of some mahua trees standing on a plot of land, is not a suit for rent but is a suit for money, and not being outside the jurisdiction of the Court of Small Causes, no second appeal lies from it under S. 102 : 1927 *Rang* 94 and 1914 *Mad* 362, *Foll.* [P 102 C 2]

Harians Kumar—for Appellant.

Hareshwar Prasad Sinha—for Respondent.

Judgment.—I am afraid this second appeal must fail on the preliminary ground that no second appeal lies in a case of this nature. The suit was for recovery of money value of bhaoli produce of some mahua trees standing on plots Nos. 72 and 194 in khata No. 15 in the village Kashidih, district Shahabad. The trial Court gave a modified decree evidently under the impression that it was a rent suit. The respondent went in appeal before the District Judge who dismissed the suit of the plaintiffs on grounds which I need not go into and with which I need not express an agreement. The plaintiffs have come in second appeal before this Court. The preliminary objection that has been taken is that under S. 102, Civil P. C., it was a suit for money and it cannot be said to be a suit for rent, therefore no second appeal lies. My attention has been drawn to the case, 4 Rang 503 (1), which was a case where compensation was claimed for the lease of palm trees and it was held that as trees do not come within the definition of immovable property, therefore it could not be held that that was a suit for rent and was not outside the jurisdiction of the Small Cause Court. It relied upon an earlier decision of the Madras High Court in 38 Mad 883 (2), where a similar view was expressed. In this view of the matter I would dismiss the appeal with costs. Leave for appeal is rejected.

R.M./R.K. *Appeal dismissed.*

1. Maung Kywe v, Maung Kala, 1927 Rang 94=99 I C 996=4 Rang 503.
2. Natesa Gramani v. Thangavelu Gramani, 1914 Mad 362=23 I C 102=38 Mad 883.

A. I. R. 1936 Patna 103

ROWLAND, J.

Ali Khalifa and *others*—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 610 of 1935, Decided on 20th November 1935, from order of Deputy Magistrate Araria, D/- 17th September 1935.

Penal Code (1860), S. 366 — Accused charged under S. 366—Age of woman 18 or more — Woman appearing to have gone willingly with accused — No evidence that she had been forced to go by deceitful means—Woman herself not examined—Commitment held liable to be set aside.

The accused were charged and committed to Sessions under S. 366, for having kidnapped a woman in order that she might be forced or seduced to have illicit intercourse. It appeared that the age of the woman was 18 years or more and that she went with the accused willingly and had not been by force compelled to go with them, nor was there any evidence that she was forced by any deceitful means, and the woman herself was not examined :

Held : that there was no evidence that the woman had been kidnapped or abducted and the commitment of the accused under S. 366 was liable to be set aside. [P 103 C 2; P 104 C 1]

Yasin Yunus—for Petitioners.

W. H. Akbari for *Assistant Government Advocate*—for the Crown.

Order.—The petitioners have been committed to the Court of the Sessions Judge of Purnea on charges being framed against petitioners Nos. 1 to 4 under S. 366 and against petitioner No. 5 under S. 366, read with S. 109, I. P. C. This is an application to quash the commitment. The charge is to the effect that on 31st December 1934, at Jalalgarh the first four petitioners kidnapped a woman named Jaso or Jasia in order that she might be forced or seduced to illicit intercourse. It appears that the age of the woman is 18 years or more. It is not alleged that she has been kidnapped from British India and therefore having regard to S. 359, I. P. C., the kidnapping charge must be a kidnapping from lawful guardianship. But kidnapping from lawful guardianship means the taking of a minor under fourteen years, if a male, or under sixteen years, if a female, or a person of unsound mind. It has not yet been suggested that Mt. Jaso is of unsound mind and the evidence as to her age has proved that she is not a minor, and therefore she has not been kidnapped at all. Under S 366, I. P. C., it is an offence either to kidnap or to abduct a woman with certain criminal intent. Therefore I ought to see whether there is material on which a charge could properly have been framed under the same section for abduction instead of kidnapping. Abduction is defined in S. 362 and the offence is committed by forcibly compelling or by deceitful means inducing any person to go from any place. There is some evidence as to the departure of Jaso from the house of Shebali, the complainant. She was seen by witnesses going with the first four petitioners. She and they told the witnesses that she was going to the house of Motijan, petitioner No. 5, in response to an invitation. It is apparent on the face of the evidence that she was going willingly and had not been by force compelled to go. There is no evidence whatever that she had been induced to go by any deceitful means. If such had been the fact, the essential witness to establish it was Jaso herself. She has not been examined. On 3rd January 1935, the same day on which the complainant's petition of complaint in this case was presented, another petition was presented purporting to be by Jaso herself and stating that she had voluntarily left her brother Gafoor who like herself had been staying at Shebali's house. The Magistrate issued search warrant for the production of Jaso who surrendered on 27th February 1935, and was released on bail. The Magistrate did not take any statement from her on that occasion. This is deplorable. She was entrusted to the custody of one Hahib who stood bail for her appearance. On 19th May 1935, a case was instituted against Shebali and others on the allegation that they, on 19th May 1935, had forcibly seized and removed her while she was on a railway journey. The result of that case does not appear in these proceedings, but it is admitted that after that date she was in the custody of Shebali. Summons had been issued for her appearance in Court on 1st June 1935, as a witness in the present enquiry, but she did not appear and the Magistrate passed order for her production on 15th June 1935, when, instead of producing her, Shebali made an excuse. The prosecution on that date put in a petition praying the Court to dispose of the case on the materials on the record on the ground that Jaso's evidence was not desired and was not necessary. It is apparent that Shebali has been deliber-

ately keeping back the evidence of Jaso. There is thus no evidence whatever that Jaso was either kidnapped or abducted. The circumstances are such that a remand for taking Jaso's evidence would not be justified. The commitment must be set aside. The rule is made absolute. Let the petitioners be discharged from their bail.

R.M./R.K. *Rule made absolute.*

A. I. R. 1936 Patna 104

MOHAMMAD NOOR AND SAUNDERS, JJ.

Jokhiram Sagarmal and *others*—Appellants.

v.

Chaman Choudhry and *others*—Respondents.

Appeals Nos. 323 and 324 of 1934, Decided on 3rd December 1935.

(a) Execution—Law—Applicability—Court passing decree governed by special law of limitation—Sending decree for execution to Court where that law not applicable—Execution is governed by special law. (*Obiter.*)

Obiter.—Where the Court which passed a decree is governed by a special law of limitation and it sends a decree for execution to another Court where that law of limitation does not apply, the execution proceedings are nevertheless governed by the special law of limitation. Therefore, where a decree is barred by time according to the law, when it was transferred to the executing Court, the bar cannot be removed on the ground that the decree is not barred according to the law of limitation in force in the executing Court. [P 105 C 1]

(b) Civil P. C. (1908), S. 100—Law point not dependent on question of fact can be raised.

A point of law not dependent on any question of fact can be raised in second appeal though not raised before. [P 105 C 2]

(c) Santhal Parganas Civil Justice Regulation (1893), S. 27—Rules under—Santhal Parganas Manual, Judicial Rule, R. 35—R. 35 is inconsistent with Art. 182, Limitation Act—Hence it is ultra vires.

S. 27 of Civil Justice Regulation of 1893 specifically prescribes that the rules framed thereunder must be consistent with that regulation and with all other enactments for the time being in force in the santal parganas. One year's limitation for execution of decree prescribed by R. 35 is obviously inconsistent with Art. 182 of Limitation Act which relates to the execution of decrees and, therefore R. 35 to that extent is ultra vires and has got no binding effect upon Courts. [P 106 C 1]

(d) Santhal Parganas Civil Justice Regulation (1893), S. 27—Rules under—Santal Parganas Manual, Judicial Rules, R. 36—'Proceeding' need not be execution proceeding—Execution may be continuation of transfer proceeding and as such an exception to R. 36 as being pending proceeding.

'Proceeding' in R. 36 need not be execution proceeding. A proceeding to have a decree transferred may be said to be a proceeding and therefore the execution of the decree may be in continuation of such a proceeding and as such may be an exception to R. 36 as being a pending proceeding. [P 106 C 2]

S. N. Bose—for Appellant.

Anand Prasad—for Respondents.

Mohammad Noor, J.—These two appeals arise out of two proceedings for execution of decrees started in the Court of the Munsif of Banka. The decree-holders are different in the two cases, but the judgment-debtors are common. The facts are similar and the question involved in both of them is exactly the same, namely, whether the application for execution in each case was barred by limitation. The decrees were passed in suits of below Rs. 1,000 in value by a Deputy Collector of Deoghar, an officer appointed by the local Government under S. 2 of Act 37 of 1855. The Courts of these officers are not regular civil Courts. They are governed by procedures of their own prescribed by the Local Government under their powers of control and direction. They are commonly known as "Santal Courts." Under the Schedule to Regulation 3 of 1872 some provisions of the Civil Procedure Code relating to the transfer of decrees are applicable to suits tried by these officers. The whole of the Code however is applicable to suits of over Rs. 1,000 in value which are tried by Courts established under the Bengal, Agra and Assam Civil Courts Act (12 of 1887). The two decrees in question were transferred by the Court which passed them to the Munsif of Banka for execution. Objections were taken by the judgment-debtors that the executions were barred under the special rules of limitation applicable to these decrees and being barred in the Santal Parganas could not on transfer be executed outside. The objection has prevailed before both the lower Courts, and the decree-holders have preferred these miscellaneous appeals. Now the rules relied upon by the judgment-debtors are Rr. 35 and 36 of the Judicial Rules to be found at p. 103, etc. of the Santal Parganas Manual. They run thus :

35. Execution of a decree shall be taken out within a year; and if the decree is not satisfied, execution may again be taken out at any time so long as it remains in force; provided that, if there is a return of no effects to three successive orders of attachment, the decree shall become void unless the Court executing it is satis-

fied that the judgment-debtor is fraudulently concealing property within its jurisdiction. If more than a year has elapsed since the date of the last application for execution, no action shall be taken until the judgment-debtor has been served with a notice calling on him to show cause against it.

36. A decree shall ordinarily become void, except as regards pending proceedings, at the end of three years from the date of the decree, or where an appeal has been filed, from the date of the appellate decree.

Proviso (b) to this rule runs thus :

Where a decree permits payments by instalments or after a period of grace, the limitation of three years will commence from the date of the first default or from the conclusion of the period of grace allowed under the decree.

In one case (M. A. 323 of 1934) the decree which was passed on 16th September 1929 was an instalment one. The first fourteen instalments were paid up, but only a portion of the fifteenth instalment, which was due on 14th January 1930, was paid and thus there was a default on that date and thereafter. The application for transfer of the decree from Deoghar to Banka was made on 17th January 1932, and order for transfer was passed on 20th December 1932. The application for execution was made on 15th November 1933. In the other case, M. A. 324 of 1934, also the decree was passed on 26th November 1929, and was payable in instalments. A default was made in the payment of the instalment due on 28th August 1931. Application for transfer was made on 11th February 1933, order for transfer was passed on 16th February 1933 and the application for execution was passed at Banka on 15th November 1933.

The judgment-debtors contended that executions not having been taken out within one year of default they were barred under R. 35. The contention of the decree-holders, on the other hand, has been that the law of limitation being the law of procedure the special rules of limitation prescribed for the "Santal Courts" of the Santal Parganas are not applicable when the decrees are being executed at Banka, and that the present execution applications are governed by Art. 182, Lim. Act. The legality of the rules had also been questioned before us. I doubt whether the first contention is sound, especially when the decrees when transferred had already become barred by limitation under the rules. A Court to which a decree is sent for execution executes it on behalf of the Court which passed it. The latter Court does not lose its connection with decree. The executing Court has, after the completion of the execution, to send to the Court which passed the decree a certificate as to how the decree was executed, and if it fails to execute it, the reason of such failure (S. 41, Civil P. C.). Once such certificate is sent, the executing Court's jurisdiction to execute the decree ends and the Court which passed it may deal with it as it thinks fit. In both these cases, if one year's rule of limitation is applicable, the execution had become barred long before the decree-holders applied for transfer of the decrees to Banka, and it may be argued that the order of transfer was itself illegal. The case will perhaps be different if a decree be transferred before the expiration of the special period of limitation. Some decisions were cited to show that the law of limitation applicable for the execution of the decrees is the law applicable to the Court where execution is taken. As however, in my opinion, the appeals must succeed on the second ground, it is not necessary to examine those cases. Mr. S. N. Bose on behalf of the appellants has contended that the Santal Parganas Judicial Rules 35 and 36 are ultra vires and that the Banka Court was not entitled to recognize these rules and to hold the executions to be barred by limitation. This point does not seem to have been taken before the Courts below, but being a point of law and not being dependent upon any question of fact we have allowed it to be taken in the second appeals. Now, Sch. 1, Regn. 3 of 1872 specifies the enactments which shall be deemed to be in force in the Santal Parganas. I have said that a very few sections of the Civil Procedure Code are in force in respect of suits of value not exceeding Rs. 1,000 though the whole of it is in force in respect of suits of higher value. The Limitation Act, however, is in force in its entirety, as is clear from the schedule and it governs suits and proceedings before the officers appointed by the Local Government. The Santal Parganas Judicial Rules purport to have been framed under S. 1, Cl. (2), Act 37 of 1855 and S. 27, of the Santal Parganas Justice Regulation of 1893 (Act 5 of 1893). S. 1, Cl. (2) of the Act of 1855 is to the effect that

> the said districts shall be placed under the superintendence and jurisdiction of an officer or officers to be appointed in that behalf by the

Lieut.-Governor of Bengal, and such officer or officers shall be subject to the directions and control of the said Lieut.-Governor.

These judicial rules have been framed in exercise of the powers of direction and control given to the Local Government. But S. 27, Civil Justice Regulation of 1893, specifically prescribes that that direction must be consistent with that Regulation and with all other enactments for the time being in force in the Santal Parganas. The section runs thus :

Any directions which the Lieut.-Governor of Bengal may issue under S. 1, Cl. 2, Act 37 of 1855 must be consistent with this Regulation and with all other enactments for the time being in force in the Santal Parganas.

One year's limitation for execution of decrees is obviously inconsistent with Art. 182, Lim. Act, which relates to the execution of decrees and therefore in my opinion R. 35 to that extent is ultra vires and has got no binding effect upon Courts. Therefore Art. 182, Lim. Act, applies in these cases and therefore the execution in Misc. Appeal No. 324 of 1934, which was filed after one year of the default but within three years of it, is not barred by limitation. In Misc. Appeal No. 323 of 1934 the application for execution was filed more than three years after the date of the default when according to R. 36 referred to above the decree had become void. This rule does not contravene any provision of the Limitation Act. The life of a decree is not governed by the Limitation Act. There is a corresponding provision in the Civil Procedure Code (S. 48) which provides that no order for execution of a decree shall be passed after twelve years of the date of the decree or the date of default if the payment under the decree is to be made on a subsequent date. This provision of the Civil Procedure Code does not apply in the Santal Parganas to suits of Rs. 1,000 in value or less. Therefore, it may be said that R. 36 is not inconsistent with any law in force in the Santal Parganas. It is however doubtful whether it was competent for the Local Government to frame such a rule. Strictly speaking, prescribing a life for a decree appertains to substantive law and not the law of procedure. S. 48, Civil P. C., bars execution, but does not make the decree void.

In other words, the right subsists, but the remedy is barred. There is a good deal of difference between the two. Apart from this, S. 1, Cl. (2), of Act 37 of 1855 gives power to the Local Government to give direction to the officers and to control them. It is doubtful whether declaring a decree to be void comes within the term 'direction and control.' However it is not necessary for the purposes of this case to discuss this question in detail. The decree in this case was transferred before the expiry of three years from the date of default. It had not become void when it was transferred to Banka. It was then in full force and thereafter the execution in the Banka Court will be governed by the law which is applicable to that Court. Furthermore, R. 36 which makes a decree void after three years makes an exception in favour of a pending proceeding. It is not clear what the word "proceeding" means. It need not be execution proceedings. A proceeding to have a decree transferred may be said to be a proceeding and therefore the execution of the decree may be in continuation of such a proceeding. At any rate, the decree had not even according to the rule, if the rule is legal, become void when it came for execution to Banka. In my opinion the execution is therefore valid. I would therefore allow the two appeals, set aside the orders of the Court below and direct that the executions shall proceed. In the circumstances of the case the parties will bear their own costs throughout.

Saunders, J.—I agree.

S.R./R.K. *Appeals allowed.*

A. I. R. 1936 Patna 106

WORT AND ROWLAND, JJ.

Parmeshwar Dayal Singh and *others*—Appellants.

v.

Brindaban Chandra Sarkar and *others*—Respondents.

Privy Council Appeal No. 31 of 1935, Decided on 12th December 1935.

Civil P. C., (1908), S. 111—Decision of single Judge—Leave to appeal to Division Bench refused—Appeal to Privy Council is prohibited by S. 111.

The prohibition in S. 111 is unconditional. Where therefore the decision sought to be appealed from is a decision of a Single Judge of the High Court, leave to appeal from it to Division Bench having been rejected, an appeal to His Majesty in Council is prohibited by S. 111.

[P 107 C 1]

Dasu Sinha—for Appellants.

S. Bose, Raj Kishore Pd. and *Muhammad Hasanjan*—for Respondents.

Order.—This is an application by the plaintiff to appeal to His Majesty in Council from a decision of a Judge of this Court sitting singly. Mr. B. C. Sinha, appearing on behalf of the plaintiff-applicants, advanced certain arguments relating to the merits of the appeal—assuming for the moment that the applicants had a right to make such an application for leave. But in our judgment those questions cannot possibly arise in this case for this reason. The decision of this Court was pronounced by Varma, J. An application was made by the defeated party, being the plaintiffs, for leave to appeal to a Division Bench of this Court. That application was rejected. It remains therefore that the decision is a decision of a Single Judge of this Court; and, in our opinion, there can be no doubt whatever that S. 111, Civil P. C., prohibits an appeal to His Majesty in those circumstances. S. 111 provides:

Notwithstanding anything contained in S. 109 (and S. 109 is a general section giving right to appeal to His Majesty) no appeal shall lie to His Majest in Council

(a) from a decree or order of one Judge of a High Court established under the Indian High Courts Act, 1861, etc.

That prohibition is unconditional. The application for leave to appeal to His Majest in Council is rejected with costs: hearing fee one gold mohur.

R.M./R.K. *Application rejected.*

A. I. R. 1936 Patna 107

WORT, J.

Lal Narain Singh and *others*—Petitioners.

v.

Ugeshwardhari Singh and *another*—Opposite Parties.

Civil Revn. No. 322 of 1935, Decided on 27th November 1935, from order of Judge, Patna, D/- 27th March 1935.

Civil P. C. (1908), O. 1, R. 10—Transposition of defendant as plaintiff should always be adopted if necessary for complete adjudication and to avoid multiplicity of proceedings.

Order 1, R. 10 is in the widest possible language and transposition of a defendant to the side of the plaintiff should be adopted in all cases where it is necessary for the complete adjudication upon the question involved in the suit and to avoid multiplicity of proceedings: 1932 *Pat* 346, *Ref.* [P 107 C 2]

Chaudhury Mathura Prasad — for Petitioners.

S. N. Roy and *G. P. Singh*—for Opposite Parties.

Order.—When this rule came on for hearing on the first occasion I understood that the petitioners were agreeable to the transposition of defendant 2 to the side of the plaintiffs. It is now contended that in the circumstances such transposition should not be made and reference is made to decisions one of which has been dissented from by this Court, but there is a decision of the Madras High Court on this subject. O. 1, R. 10, is in the widest possible language and their Lordships of the Privy Council have pointed out that this transposition should be adopted in all cases where it is necessary for a complete adjudication upon the questions involved in the suit and to avoid multiplicity of proceedings. Now what the position would have been if defendant 2 had not been a party to the action it is unnecessary to contemplate. It is sought in this case to differentiate the decision of this Court in 11 Pat 616 (1) from the facts of the present case. The only difference in that case, where the transposition was allowed, was that defendant 4 there was styled a benamidar. Now the Negotiable Instruments Act does not recognize benami transactions. It allows a person to recover on a bill only if he is the person in whose favour the bill is executed or the person in whose favour an endorsement is made. Now the proper person in this case to have sued would have been defendant 2, and the argument that defendant 2's interest has been assigned by the partition to the plaintiff, is for the purpose of this case entirely irrelevant, for the reasons which I have stated in connexion with my reference to the Negotiable Instruments Act. In order to do justice between the parties and as defendant 2 is a party to the action, he will be transposed to the category of the plaintiffs. With that variation the order of the learned Judge in the Court below will be confirmed. The application is dismissed with costs. Hearing-fee is assessed at two gold mohurs.

R.M./R.K. *Application dismissed.*

1. Surajman Prasad Misra v. Sadanand Misra, 1932 Pat 346=140 I C 572=11 Pat 616.

A. I. R. 1936 Patna 108

ROWLAND, J.

Abdus Salam—Petitioner.

v.

Emperor—Opposite party.

Criminal Revn. No. 560 of 1935, Decided on 6th November 1935, from order of Sess. Judge, Monghyr, D/- 6th August 1935.

Criminal Trial — Presumption—Presumption is that if facts bear out explanation compatible with innocence, he is innocent, unless explanation is proved to be false—Circumstances being such that only one inference can follow, he should be convicted—Accused found to be corruptly giving access to others for copying records—Keys of record room in custody of accused found with another person—Explanation given by him as to possession of key by the stranger found to be false—Accused held guilty under S. 409, Penal Code.

In a criminal prosecution, the accused being entitled to the presumption of innocence, the presumption will be that if the facts will bear an explanation compatible with his innocence, that view should be adopted unless it is proved to be false, but if the circumstances are such that only one inference can follow in the mind of any reasonable man in such a case, there can be a conviction. [P 108 C 2]

A was suspected of malpractices in a Court office. *J* was deputed as a spy and a raid was made on the office. It was found that *J* had got possession of a record of which he was making a copy. He alleged to have obtained the record by making payment to an outsider *M* in whose possession a marked rupee was found. *A* was absent from the office, but the keys of the almirah, which ought to have been in the custody of *A* were found with *M*. It was found that *A* gave a false explanation for not having the keys in his own possession :

Held : that *A* was rightly convicted under S. 409, although it could not be established by positive and direct evidence that the keys were made over by *A* to *M*. There was no room to doubt that the keys were in possession of *M* with the connivance and complicity of *A* for the purpose of giving access corruptly to the records. [P 108 C 2 ; P 109 C 1]

Held further : that the mere fact that *A* did not himself misappropriate, use or dispose of any record in violation of his trust made no difference. His action was covered by the second part of the definition in S. 406. The record was used when it was in the hands of *J* and was being copied : 1917 *Pat* 625, *Disting.*

[P 109 C 1]

Yasin Yunus and *Janak Kishore*—for Petitioner.

K. K. Banerjee—for the Crown.

Order. — The petitioner Abdus Salam has been convicted under S. 409, Penal Code, and his conviction upheld on appeal by the Sessions Judge in the following circumstances : The petitioner was Money Suit Moharrir in the Court of the Second Munsif at Monghyr. There was suspicion of serious malpractices in the Court-offices of Monghyr, and on 2nd May 1935 an attempt was made to expose them by catching an offender in the act. For this purpose Janki Prasad was deputed as spy and a raid was made at 3-45 p. m., by the police officers accompanied by Mr. Madan, the District Judge, with the result that it was found that Janki had got possession of a record from which he was making a copy. He is said to have obtained it by making payment to an outsider Mathura Prasad in whose possession a marked rupee was found. Another outsider Parmeshwari was also present in the office—so was the Sheristadar,—but the present petitioner was absent. The keys of the Money Suit almirah which ought to have been in the custody of the petitioner were found with Mathura Prasad. It is perfectly clear on the evidence that access to a Court-record was corruptly given to Janki Prasad. It is fairly clear that the person who directly gave him access to the record was Mathura Prasad, and Mathura Prasad was able to do this because he had the keys which it was the duty of the petitioner to keep in his own possession for the safe custody of the records entrusted to him. The explanation offered by the petitioner was that on that day he had to leave office at 11-30 because he had been asked by the Munsif to send off a money-order. He did so leaving the keys on the table in front of the Sheristadar.

The Courts below have not accepted this explanation. The Magistrate said "until the contrary is proved, the natural presumption is that Salam gave the keys to Mathura." This is not quite a correct statement of the presumption to be drawn in a criminal prosecution. The accused being entitled to the presumption of innocence, the presumption will be that if the facts will bear an explanation compatible with his innocence, that view should be adopted unless it is proved to be false, but if the circumstances are such that only one inference can follow in the mind of any reasonable man in such a case, there can be a conviction. The accused gave an explanation of his reason for leaving the keys on the table of the Sheristadar which the Magistrate has found to be entirely false. The explana-

tion is that the bunch contained also the key of the outer door of the room in which the Sheristadar and others were working. In fact the Munsif's standing orders were that the key of the outer door was to be in the custody of another clerk named Ahsan. Of course if the accused had left the keys through negligence or forgetfulness he would not be criminally liable. But he has not pleaded negligence or forgetfulness. It is his own case that the key was intentionally left behind, though he does not admit it was done with a corrupt purpose. The inference is almost irresistible that the accused gave a false explanation of not having the keys in his own possession because no true explanation consistent with his innocence was available to him. I am of opinion that although it cannot be established by positive and direct evidence that the keys were made over by the petitioner to Mathura Prasad, there is no room to doubt that the keys were in Mathura Prasad's possession with the connivance and complicity of the accused for the purpose for which they were used, that is to say, for giving access corruptly to records.

It is contended that the accused did not himself misappropriate or use or dispose of any record in violation of his trust and therefore should not be convicted of criminal breach of trust and reference is made to 2 Pat L W 188 (1). That was a case in which no question of dishonesty, that is to say, of corrupt use for the purpose of making profit arose at all. The dishonesty appears to be clearly established in the present case. As for the record not having been used by the petitioner himself, this point is answered by the second part of the definition in S. 406 which makes it an offence wilfully to suffer any other person to use or dispose of the trust property. There is no doubt that the record was being used when it was in the hands of Janki Prasad and being copied. I am of opinion therefore that the conviction of the petitioner under S. 409, I. P. C., was correct and there is no reason for interference in revision. The rule is discharged.

R.M./R.K. *Rule discharged.*

1. Dhanpat Singh v. Emperor, 1917 Pat 625=42 I C 598=18 Cr L J 932=2 Pat L W 188.

A. I. R. 1936 Patna 109

ROWLAND, J.

Baldeo Singh and *another*—Petitioners.

v.

Mt. Dheno Goalin—Opposite Party.

Criminal Revn. No. 627 of 1935, Decided on 4th December 1935, from order of Deputy Magistrate with appellate powers, Gaya, D/- 7th August 1935.

(a) Revision—Competency—Application to Patna High Court presented after expiry of 60 days from date of order—It will not be entertained unless case is of special importance.

According to the practice of the Patna High Court, applications for revision are not entertained unless presented within sixty days of the order applied against. An application presented after the period prescribed cannot be entertained unless the case is of special importance and there is particular reason to depart from the usual practice. [P 109 C 2]

(b) Criminal P. C. (1898), S. 421—It is illegal for Magistrate to dismiss appeal summarily and also to modify order appealed from.

It is illegal for a Magistrate at the same time to dismiss an appeal summarily and to modify the order appealed from: 1935 *P C* 89, *Foll.* [P 109 C 2]

Ramchandra Prasad—for Petitioners.

Dhyan Chandra—for Opposite Party.

Order.—The two petitioners were convicted under S. 352, I. P. C. of assault on Mt. Dheno Goalin and each of them was sentenced to pay a fine of Rs. 25 each. They appealed and the Magistrate having first class powers passed an order dismissing the appeal summarily, but at the same time altering the conviction of Baldeo Singh from S. 352 to S. 352 read with S. 114 of the Code. The appellate order is dated 7th August 1935, and this application in revision was presented on 8th November 1935. In accordance with the practice of this Court applications in revision are not usually entertained unless presented within sixty days of the order appealed against. In the facts of this case there is nothing of special importance and no particular reason for departing from the usual practice. But it is necessary to point out to the Magistrate that it is illegal at the same time to dismiss an appeal summarily and to modify the order appealed from. This has been pointed out in 62 Cal 983 (1). In the present case the Magistrate might well have let the order of the lower Court

1. Dahu Raut v. Emperor, 1935 P C 89=1935 Cr C 551=155 I C 386=36 Cr L J 838=62 I A 129=62 Cal 983 (P C).

stand because when any person, who is absent would be liable to be punished as an abettor, is present when the act or offence is committed, he is to be deemed under S. 114, I. P. C., to have committed the act or offence. That is to say there was not in fact any error on the part of the first Court in convicting under S. 352. With these observations the rule is discharged.

R.M./R.K. *Rule discharged.*

A. I. R. 1936 Patna 110

AGARWALA AND VARMA, JJ.

Dular Chand Ram and *others*—Petitioners—Appellants.

v.

(Kumar) Kamakhya Narain Singh—Opposite Party—Respondent.

Appeal No. 286 of 1934 and Civil Revn. No. 200 of 1935, Decided on 11th November 1935, from order of Deputy Commissioner, Sub-Judge, Hazaribagh, D/- 3rd April 1935.

Execution—Mortgage decree—Original attaching creditor of mortgaged property who was impleaded as party dying—No steps taken to bring his legal representatives on record—Legal representatives sought to be impleaded as judgment-debtors in execution proceedings—They are entitled to be discharged.

Where in a suit on a mortgage, a person impleaded as a party, by reason of his having attached the mortgaged property in execution of a money decree dies and no steps are taken to bring his legal representatives on record, but it is sought to implead them as judgment-debtors in the execution proceedings, they are entitled to be discharged from the array of the judgment-debtors in the execution proceedings of the mortgage decree: 1934 *All* 1027, *Foll.*

[P 110 C 2]

Janak Kishore and *Rajeshwar Prasad*—for Appellants.

S. M. Mullick and *Govt. Pleader*—for Respondent.

Agarwala, J.—On 4th February 1929 the plaintiffs instituted a suit to enforce a mortgage against the mortgagors and a large number of persons interested in the equity of redemption. One of such persons was Hiraman Ram. The mortgaged property was, on the day of the institution of the suit, under attachment in execution of a money decree obtained by Hiraman and the appellants who belonged to a joint family. A preliminary decree in the mortgage-suit was passed in March 1931, and a final decree in September of the same year. In the meanwhile however, on 21st December 1929, the property covered by the mortgage had been put up for sale in execution of the appellants' money decree and purchased by the appellants. Two days after this purchase, Hiraman had died.

No steps were taken to bring on the record of the mortgage-suit his representatives; but in March 1932, in execution of the final decree passed on the mortgage-suit, notice was served on the heirs of Hiraman. No appearance was made on their behalf and the execution of the decree proceeded. A sale was eventually held in execution of the decree, but that sale was set aside on the objection of the mortgagor. The decree-holder again applied for execution and on this application the appellants objected to being impleaded in the execution proceedings. Their objection has been overruled by the Court below. The facts thus stated bring the case clearly within the decision of the Division Bench of the Allahabad High Court in 1934 All 1027 (1). The facts in the present case are even stronger than in that case, where an attempt was made to implead in the execution proceedings of a mortgage-decree, a person who had attached the mortgaged property in execution of a money decree prior to the institution of the mortgage-suit. In the case out of which the present appeal has arisen, it is not even the original attaching creditor whom it is sought to implead in the execution proceedings of the mortgage-decree but persons alleged to be his representatives. In the case before the Allahabad High Court it was held that the attaching creditor was entitled to be discharged from the proceedings in execution of the mortgage-decree, and this case being on all fours with it we propose to pass a similar order directing the appellants to be discharged from array of judgment-debtors in the proceedings in execution of the mortgage-decree. The appeal succeeds and the appellants are entitled to their costs. Civil Revision No. 200 is not pressed and is dismissed without costs.

Varma, J.—I agree.

R.M./R.K. *Appeal allowed.*

---

1. Hoshiar Singh v. Gobardhan Das, 1934 All 1027=153 I C 158=1934 A L J 1085.

A. I. R. 1936 Patna 111

ROWLAND, J.

Ras Behari Mandal and *others*—Defendants—Appellants.

v.

Raja Jagadish Chandra Deo Dhaubal Deb—Plaintiff and *another*—Defendant—Respondents.

Appeal No. 1236 of 1932, Decided on 25th November 1935, from appellate decree of Dist. Judge, Manbhum, D/- 31st March 1932.

Lease—Construction — Rights of lessee—Ordinary agricultural tenancy—Lessor retains all rights in mines and quarries—Lessee is however entitled to collect and remove lime-stone found on surface.

In case of lease of land the ordinary rule is that the lessor retains all rights in mines and quarries. This includes open quarries as well as those which involve mining operations and tunnelling beneath the surface. A lessee is not however disentitled to use the surface and to take what he finds on the surface. [P 111 C 1]

In a case of a lease, the terms of which are those of an ordinary agricultural tenancy, the lessee obtains the surface rights and is entitled to collect and remove ghooting-stone found on the surface, although he is not entitled to dig and quarry for it: 1 *C L J* 526 and 1916 *Pat* 69, *Rel. on*; *Barnard-Argue-Roth-Stearns Oil & Gas Co., Ltd.* v. *Farquharson*, (1912) *A C* 864 and *Great Western Railway Co.* v. *Carpalla United China Clay Co., Ltd.*, 1910 *A C* 83, *Disting.* [P 111 C 2]

S. M. Mullick and *S. C. Mazumdar*—for Appellants.

P. K. Sen and *G. C. Mukherjee*—for Respondents.

Judgment.—The appellants are mukarrari tenants in village Tamakpal under the Raja of Dhalbhum, the tenancy having been created by a lease in the year 1885. The terms of the lease are those of an ordinary agricultural tenancy. The suit was brought in 1930 by the landlord for a permanent injunction to restrain the defendants from collecting or digging and removing ghooting-stone (lime-stone) within the lease-hold property. The Munsif held that by the lease, mines and quarries did not pass but that the lessee obtained the surface rights. Therefore although the defendants were not entitled to dig or quarry for lime-stone, they did not exceed their rights by collecting and removing stones found on the surface.

The District Judge on appeal by the plaintiff held that ghootings not being animal or vegetable must be mineral and therefore must be taken to be excluded from the grant. In support of this decision he cites (1912) A C 864 (1), a case which does not support the view of the learned District Judge because the popular division of substances into animal, vegetable or mineral is in this case referred to only to be dismissed as irrelevant. The decisions relied on by the Munsif in 1 C L J 526 (2), and in 1 Pat L J 275 (3), are more in point. The ordinary rule is that the lessor retains all rights in mines and quarries. This has been held to include open quarries as well as those which involve mining operations and tunnelling beneath the surface. But no case has been cited to me in which the tenant has been held disentitled to use the surface and to take what he finds on the surface. The reasoning of the District Judge is really extraordinary when he says that the ghooting-stones which are found on the surface are not surface because they come to the top after rain, having previously been below the surface. He misses the point that the ghooting-stones were on the surface at the time when they were taken. If that is so, the plaintiff cannot rely on their previous history to say that because they were once below the surface they must be for ever underground minerals. Reference was made to (1910) A C 83 (4), where a grant reserving minerals was held to exclude a deposit of China clay although it was found near the surface. The case was decided on the terms of the particular grant. But a point in its decision was that excavation which was destructive of the surface was the necessary method of working it. There is no question of excavation in the collection and removal of the ghooting-stones lying on the surface within the defendants' tenure. I am of opinion therefore that the decision of the Munsif was correct and should be restored and the decision of the District Judge was erroneous and must be set aside. The Munsif's order for costs of the hearing before him is restored and the plaintiff will bear the costs of the

---

1. Barnard-Argue-Roth-Stearns Oil & Gas Co., Ltd. v. Farquharson, (1912) A C 864=28 T L R 590=57 S J 10=107 L T 332.
2. Gandoo Mahata v. Nilmonee Singh Deo Bahadur, (1905) 1 C L J 526.
3. Nawagarh Coal Co., Ltd. v. Behari Lal, 1916 Pat 69=37 I C 450=1 Pat L J 275.
4. Great Western Railway Co. v. Carpalla United China Clay Co., Ltd., (1910) A C 83=79 L J Ch 117=74 J P 57=54 S J 151=101 L T 785.

hearing before the District Judge and in this Court.

Leave refused.

R.M./R.K. *Appeal allowed.*

A. I. R. 1936 Patna 112

COURTNEY TERREL, C. J. AND
MOHAMMAD NOOR, J.

Tejmal Marwari—Appellant.

v.

(Firm) Jokiram Surajmal and *others*—Respondents.

Appeal No. 286 of 1933, Decided on 25th November 1935, from original decree of Dist. Judge, Manbhum-Sambalpur, D/- 2nd September 1933.

Provincial Insolvency Act (1920), Ss. 28, Cl. (7), 37 and 51—Some of the creditors of insolvent bringing to sale property of insolvent before order of adjudication but during pendency of insolvency proceedings and realising money from it—They must share proceeds with other creditors—They are liable under S. 28 read with S. 51 to make over proceeds to Receiver, although he is subsequently appointed, when he calls upon them to do so—S. 37 does not apply to such case.

An order of adjudication under Cl. (7), S. 28 relates back to the date when the petition for insolvency is admitted by the Court. The effect of Cl. (2) and Cl. (7), S. 28 is that the properties of the insolvent, wherever they may have been and whoever may have been in their possession, automatically vest in the Court. It is immaterial whether there was at that time any Receiver appointed by the Court or not. The vesting of the property of the insolvent in the Court is not dependent upon there being a Receiver. [P 113 C 1]

What S. 51 means is that if a creditor has proceeded to execute a decree he will not be entitled as against the Receiver to the benefit of the execution except so far as he may have been able to realize the assets before the admission of the petition for insolvency. If he has derived any benefit from that execution when the application for insolvency was pending, he cannot keep that benefit to himself as against the Receiver. [P 113 C 2]

Where therefore some of the creditors of the insolvent bring to sale an unliquidated sale due to the insolvent before the order of adjudication and the debt is sold by the Court not knowing the pendency of the insolvency proceedings, the sale, although it would protect a bona fide purchaser, will have absolutely no effect upon the rights of the creditors inter se, which would be governed by S. 51 and the creditor realizing money from the sale of the property must share it along with other creditors, and under S. 28 read with S. 51, he must make over the benefit he has derived from the execution to the Receiver when the Receiver calls upon him to do so. S. 37 does not apply to such a case as it refers to the vesting of the property of the insolvent after an order of annulment has been made. [P 113 C 2; P 114 C 1]

S. M. Mullick and *S. C. Mazumdar*—for Appellant.

N. N. Roy—for Respondents.

Mohammad Noor, J.—The facts of the case, so far as they are relevant to this appeal, are these: On 24th February 1926, one Chouthmal Bhagirath applied that one Gurdat Singh be adjudged an insolvent. An ad interim Receiver was appointed by the Court during the pendency of the insolvency proceeding, but later on the application was refused on 20th February 1927. Chouthmal Bhagirath preferred an appeal to this Court, and on 25th May 1927 an ad interim receiver was again appointed. Ultimately, this Court on 8th November 1927, adjudged Gurdat Singh to be an insolvent. In between these two dates, namely the refusal of the application by the District Judge on 20th February 1927, and the order of adjudication by this Court on 8th November 1927 the respondents, who were creditors Nos. 2 and 3, brought to sale certain unliquidated debt due to the insolvent from the Bengal Nagpur Railway Company and realised Rs. 5,750 as its sale proceeds. Later on, the order of adjudication was annulled. Thereafter the appellant, who is one of the creditors, applied to the District Judge for an order that the amount of Rs. 5,750 which was taken by the creditors Nos. 2 and 3 towards the satisfaction of their decrees during the pendency of the insolvency proceedings be realised from them and be rateably distributed among all the creditors of the insolvent. The learned District Judge being of opinion that after the order of annulment of adjudication there was no insolvency proceeding before him, refused this application. The appellant came up in appeal (Miscellaneous Appeal No. 217 of 1930). This Court held that the insolvency proceeding had not come to an end by the annulment of adjudication and that it was open to the Court to continue to administer the estate of the insolvent for the benefit of his creditors. The effective part of the order was that the learned District Judge was directed to proceed with the application of the appellant and dispose of it according to law. It was further ordered that the learned District Judge should take steps to realise the assets of Gurdat Singh vested in the Receiver, wherever they may be found, and which may be lawfully realisable and to

take such legal steps for their realisation as the parties may ask him to take. When the case went back to the learned District Judge, the appellant asked him for calling upon the respondents, the creditors Nos. 2 and 3, to refund the amount of Rs. 5,750 for the purpose of rateable distribution. The learned District Judge again refused this request and hence this appeal.

In my opinion the learned District Judge's order cannot be upheld. His reason for refusing the prayer of the appellant seems to be that creditors Nos. 2 and 3 brought the insolvent's property to sale and appropriated its sale proceeds towards the satisfaction of their decrees at a time when there was no Receiver of the insolvent's estate and that the debt due from the Bengal Nagpur Railway Company, which was sold, was never vested in any Receiver and therefore the sale proceeds of that property could not be rateably distributed. In my opinion, the learned District Judge has misconstrued S. 51 which has been referred to by him and obviously ignored S. 28, Insolvency Act. S. 28, Cl. (2) says:

> On the making of an order of adjudication the whole of the property of the insolvent shall vest in the Court or in a Receiver as hereinafter provided, and shall become divisible among the creditors, and thereafter, except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall, during the pendency of the insolvency proceedings, have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceeding, except with the leave of the Court on such terms as the Court may impose.

Clause (7) of this section provides:

> An order of adjudication shall relate back to and take effect from, the date of the presentation of the petition on which it is made.

It is clear that the order of adjudication passed by this Court in November 1927 related back to the date when the application for insolvency was admitted by the learned District Judge, and the effect of the two clauses of S. 28 is that the properties of the insolvent, wherever they may have been and whoever may have been in possession of them, automatically vested in the Court. It is immaterial whether there was at that time any Receiver appointed by the Court or not. The vesting of the property of the insolvent in the Court is not dependent upon there being a Receiver. One of the properties, however, namely, the unliquidated debt due from the Bengal Nagpur Railway, had been sold before the order of adjudication, but the sale proceed thereof was in possession of a creditor who got it during the pendency of the proceeding. The Court sold the debt not knowing of the pendency of the insolvency proceeding. S. 52, Insolvency Act, provides that when execution is issued against any property of a debtor and the executing Court is informed that an insolvency petition against the debtor has been admitted, the Court on application shall direct the property to be made over to the Receiver if it is in possession of the Court. It is obvious that the Court would not have proceeded to sell the debt had it been informed that an insolvency application against the judgment-debtor was pending. The effect of such sale can only be to protect a bona fide purchaser, but it will have absolutely no effect upon the rights of the creditors inter se, which are governed by S. 51. This section has been referred to by the learned District Judge, and, in my opinion, as I have said he has misconstrued it. Cl. 1 of it says:

> Where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the receiver except in respect of assets realized in the course of the execution by sale or otherwise before the date of the admission of the petition.

The learned District Judge seems to have been of the view that as the sale proceed was never vested in the Receiver the respondents were not liable to refund it. This is not so. What the section means is that if a creditor has proceeded to execute a decree he will not be entitled as against the Receiver to the benefit of the execution except so far as he may have been able to realise the assets before the admission of the petition for insolvency. If he has derived any benefit from that execution when the application for insolvency was pending, he cannot keep that benefit to himself as against the Receiver. In this case during the pendency of the insolvency proceeding, one of the creditors brought a property of the insolvent to sale and realised a certain amount of money from the sale of that property. The simple proposition of law is whether he can retain the whole amount, or he must share it along with the other creditors. S. 28, read with S. 51, makes it perfectly clear that when the Receiver appointed calls upon

him to make over the benefit he has derived from the execution he must do so. The learned Advocate, who has appeared on behalf of the respondents, has referred us to S. 37, Insolvency Act, which refers to the situation which may arise after the annulment of the order of adjudication. In my opinion that section has got no application. It refers to the vesting of the property of the insolvent after an order of annulment has been made; but in this case there is no question of vesting of any property when the order of annulment was made. The property of the insolvent was a debt due from the B. N. Ry. Co. The debt had been sold long before, and what was there was the sale proceed of that property which was in possession of one of the creditors. That creditor under the express terms of S. 51 cannot retain it as against the receiver whenever that Receiver may have been appointed.

I would allow this appeal and direct that the learned District Judge should proceed to realise the amount of Rs. 5,750, from the respondents, the creditors Nos. 2 and 3, and distribute it rateably among the creditors. In making rateable distribution, the debt due to these two creditors from the insolvent should be fixed, ignoring the realisation of this Rs. 5,750, that is to say, this amount should be treated as an unrealized debt. It will be open to the learned District Judge to call upon the respondents to refund only the amount which may be in excess of the amount to which they themselves may be entitled out of Rs. 5,750, under rateable distribution. The respondents will pay the costs of the appellant in both the Courts.

Courtney-Terrell, C. J.—I agree.

R.M./R.K. *Appeal allowed.*

A. I. R. 1936 Patna 114

MACPHERSON AND DHAVLE, JJ.

Mt. Laikunnissa and *others*—Appellants.

v.

Durga Dass Mukharji and *others*—Respondents.

Appeal No. 864 of 1932, Decided on 23rd December 1935, from appellate decree of Sub-Judge, Purnea, D/- 26th April 1932.

Bengal Court of Wards Act (9 of 1879), S. 55—Prohibition laid down in S. 55 does not extend to litigation already in progress when Court of Wards assumes charge of estate.

Section 55, Court of Wards Act, simply prohibits initiation of litigation on behalf of a ward by the Manager except with the authorisation of a Court of Wards. The prohibition does not extend to a litigation which is already in progress when the Court of Wards assumes charge of the estate of the wards. The Act sufficiently provides for such a case in S. 51 under which the Manager is to be named as next friend or guardian for the suit and to represent the ward. [P 115 C 1]

Where therefore a suit is instituted by the plaintiffs before their estate is taken over by the Court of Wards, the mere fact that the estate is taken over by the Court of Wards during the pendency of suit does not take away the jurisdiction of the Court to try the suit by reason of the suit having been instituted without the permission of the Court of Wards: 1920 *Cal* 197, *Ref.* [P 114 C 2, P 115 C 1]

Saiyid Hasan and *Muhammad Hassan Jan*—for Appellants.

Govt. Pleader and *P. Jha*—for Respondents.

Macpherson, J.—The proprietors of the Maldwar estate sued the appellants as defendants first party for ejectment from an area of 146 bighas odd in Tetiar. The learned Munsif decreed the suit and the appellants' appeal was dismissed. In second appeal they raise the point that the Court below had no jurisdiction to proceed with the suit by reason of S. 55, Court of Wards Act, 1879, which ordains that

> No suit shall be brought on behalf of any ward by a Manager, unless the same be authorised by some order of the Court (of Wards),

it being alleged that there was no such authorisation by any order of the Court of Wards, which under S. 5 is the Board of Revenue, or of the Commissioner or the Collector to whom its powers in this regard have been delegated under S. 15 of the Act. (In the suit which was valued at Rs. 55 only authorisation may under such delegation come from the Collector). The point was not taken until the stage of argument in the lower appellate Court, and there is therefore nothing on the record to show that under "some order" (a vague expression which might include an implied authorisation) the Collector did not authorise the action taken by the Manager. The position is that the suit was instituted by the plaintiffs before they became wards of Court; the written statement of the defendants was filed after the Court of Wards took charge of the plaintiffs' estate and inter alia it claimed that the suit could not

proceed unless the Court of Wards became plaintiff; the Manager thereupon made an application to the Court upon whose direction the plaint was altered to show the wards as plaintiffs through (bazarie) the Manager of the Court of Wards and in this state of the record the parties proceeded to trial, no issue as to jurisdiction being raised or tried.

Several decisions of the Calcutta High Court have been cited on behalf of the appellants in which it was held that S. 55 was a bar to suits (using that term in a wide sense) not covered by the provisos to that enactment which were instituted by the Manager without authorisation by some order of the Court of Wards. But in the more recent decisions such as 23 C W N 876 (1) it is at least implied that it is not a question of the jurisdiction of the Court in which the suit has been instituted, but the section merely seeks to control the Manager, and that there is nothing in the section which prevents the defendants from waiving. That decision related to the first proviso to S. 55 under which the Manager may authorise a plaint to be filed in order to save limitation, the suit however not to be afterwards proceeded with without the sanction of the Court of Wards. But there is a distinction between the decisions cited and the present case. We are not referred to any decision relating to a case where the Manager took over the carriage of litigation which was pending when the plaintiffs became wards. To my mind S. 55 does not contemplate such a case. In terms it simply prohibits initiation of litigation on behalf of a ward by the Manager except with the authorisation of the Court of Wards. There is no indication that the prohibition is to extend to litigation of the wards which is already in progress when the Court of Wards assumes charge of the estate of the ward. And apart from the serious practical difficulties which would arise from the interpretation suggested both in the Courts and in the management of the estate, it would appear that the Act sufficiently provides for such a case in S. 51 under which the Manager is to be named, as in the present instance, as next friend or guardian for the suit and to represent the ward.

Further in the present instance the appellants accepted the intervention of the Manager as sufficient compliance with their objection to the maintainability of the suit and raised no issue on the point in their grounds of appeal to the District Judge so that the Courts would be warranted in refusing to allow the point to be raised. But apart from this consideration, it is a complete answer to the plea that S. 55 does not contemplate anything but the initiation of the particular litigation and has no reference to pending litigation in respect of which the Court already possesses jurisdiction. I would dismiss this appeal with costs.

Dhavle, J.—I agree.

R.M./R.K. *Appeal dismissed.*

1. Joy Churn Dutta v. Sarjubala Debi, 1926 Cal 197=55 I C 261=23 C W N 876.

---

* A. I. R. 1936 Patna 115

AGARWALA AND VARMA, JJ.

Nilkantha Narayan Tewari—Plaintiff.

v.

Debendra Nath Ray—Defendant.

Appeal No. 322 of 1932, Decided on 4th December 1935.

***Provincial Insolvency Act (1920), Ss. 28 and 59—Power of Hindu father to sell joint family property including son's interest thereon does not vest in receiver—Receiver is not empowered to sell such property.**

The Provincial Insolvency Act does not empower a receiver to sell anything more than the property of the insolvent which vests in the receiver by reason of the insolvency. [P 118 C 1]

The power of a Hindu father to sell the joint family property, including the interest of the son is not " property of the insolvent " which by reason of S. 28 of the Act vests in the receiver and which by reason of S. 59 he is empowered to sell for distributing among creditors. [P 116 C 2]

The receiver is not, therefore, empowered to sell the joint family property including the interest of the son which does not vest in him by reason of the adjudication : 1925 *P C* 18, *Foll.*; 1926 *Pat* 438, *held impliedly overruled by* 1925 *P C* 18 ; 1932 *Pat* 231 and 1934 *Pat* 514, *Explained* and *Disting. Case law discussed.* [P 118 C 2]

A. B. Mukharji and *U. N. Banarji*—for Appellant.

S. M. Mullick, B. C. De, L. N. Chaudhury, K. K. Banarji and *K. N. Varma*—for Respondents.

Agarwala, J.—This appeal arises out of a suit brought by the appellant, a Hindu son, to recover the whole of, or his interest in, the ancestral property, which was sold to the defendants by a receiver appointed in the insolvency of the plaintiff's father. The appeal there-

fore raises the question, which has often been agitated in the Courts in this country, regarding the effect on the interest of a Hindu son when his father is adjudicated an insolvent. S. 28 (2), Provincial Insolvency Act (1920), is as follows :

> On the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a receiver as hereinafter provided, and shall become divisible among the creditors. . . . . .

The procedure for dividing the property of the insolvent among his creditors is provided by S. 59 of the Act which, in so far as is material, is in these terms :

> Subject to the provisions of this Act, the receiver shall, with all convenient speed, realise the property of the debtor and distribute dividends among the creditors entitled thereto, and for that purpose may (a) sell all or any part of the property of the insolvent.

It is quite clear from a perusal of these two sections that what vests in the receiver on an order of adjudication is the "property of the insolvent" and what the receiver is authorised by S. 59 to sell for the purpose of providing dividends for the creditors is the whole or any part of the "property of the insolvent." The question that falls for determination in the present case, therefore, is whether the undoubted right which the father would have had to sell the whole of the ancestral property, including his son's interest therein, in satisfactfon of his own debt, provided that the debt was neither for an illegal or immoral purpose, is " property of the insolvent " within the meaning of the statute. By S. 2 (1) (d) of the Act, it is provided that "property" includes

> Any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit.

It is contended that the right of a Hindu father to sell the ancestral property, including his son's share, in satisfaction of his own legal debts, is property which vests in the Receiver within the meaning of this section and S. 28. That contention was expressly negatived by the Privy Council in 6 Lah 1 (1). At p. 22 of the report, in considering the definition of the word "property" in the Presidency-towns Insolvency Act, which is precisely the same as in S. 2 (1) (d), Provincial Insolvency Act, their Lordships said : "S. 2 seems to contemplate an absolute and unconditional power of disposal." The power of a Hindu father to sell the joint family property and apply the profits for the payment of his debt was not, in the opinion of their Lordships, such an absolute and unconditional power as is contemplated by S. 2. It follows therefore that the power of a Hindu father to sell the joint family property, including the interest of his son, is not "property of the insolvent" which, by reason of S. 28 of the Act, vests in the receiver, and which, by S. 59, he is empowered to sell for distributing among the creditors. Since the decision of the Privy Council in the case already referred to; there have been many cases in the High Courts in India in which precisely the same question has been discussed and decided. Those cases are: 49 Mad 849 (2), 50 Mad 135 (3), 6 Lah 493 (4), 13 Lah 464 (5), 53 All 239 (6), 55 Bom 110 (7), 9 Luck 304 (8), 128 I C 404 (9) and 1934 Nag 271 (10). In all these cases it was held that a receiver appointed in the insolvency of a Hindu father is entitled to sell the ancestral property, including the interest of the insolvent's son, for the satisfaction of the insolvent's debts.

There can be no doubt that a Hindu father has the power to sell the entire joint property in satisfaction of his own debt and that such sale is binding on his son provided that the debt, for the satisfaction of which the property was sold, was not contracted for an illegal or immoral purpose. It is also clear that where, in execution of a decree against a Hindu father, joint family property, including the interest of his son is sold, the latter is not able to challenge the sale except on the ground that the debt was not

1. Sat Narain v. Behari Lal, 1925 P C 18=84 I C 883=52 I A 22=6 Lah 1 (P C).

2. T. S. Balavenkata Seetharama Chettiar v. Official Receiver, Tanjore, 1926 Mad 994=97 I C 825=49 Mad 849=51 M L J 269 (F B).
3. Basava Sankaran v. Garapati Anjaneyulu, 1927 Mad 1=99 I C 8=50 Mad 135 (F B).
4. Khem Chand v. Narain Das, 1926 Lah 41=89 I C 1022=6 Lah 493=26 P L R 848.
5. Gori Shankar v. Official Receivor, Delhi, 1932 Lah 151=135 I C 217=13 Lah 464=33 P L R 314.
6. Anand Prakash v. Narain Das Dori Lal, 1931 All 162=135 I C 119=53 All 239 (F B).
7. Haridas Himatlal v. Lallubhai Mulchand, 1931 Bom 50=129 I C 153=55 Bom 110.
8. Sidheshwar Nath v. Deokali Din, 1934 Oudh 1=147 I C 642=9 Luck 304 (F B).
9. Bajirao v. Daulatrao, 1930 Nag 215=128 I C 404.
10. Hiralal Champa Lal v. Fatehchand Parmanand, 1934 Nag 271=152 I C 1026.

one which was binding on him, that is to say, that it was either illegal or immoral. The question however is whether, under the Insolvency Act the receiver of the insolvent has the power which a Hindu father has. Many of the cases referred to above appear to indicate an assumption that because the father may alienate his son's interest in satisfaction of his own debts, a receiver appointed on the adjudication as an insolvent of the father stands in the place of the father with respect to the power which the latter may exercise over the interest of his sons in the joint family property. I find nothing however in the Provincial Insolvency Act to justify this assumption. The powers conferred on the receiver are defined by the statute and in so far as it is material to the present question the only power conferred on the receiver is to sell the "property of the insolvent," that is to say, the property of the insolvent which vested in the receiver by reason of the order of adjudication. The decision of the Privy Council in 6 Lah 1 (1) has made it quite clear, and indeed it was conceded by the learned advocate for the respondents that this is so, that the property of the son does not vest in the receiver on the adjudication as an insolvent of his father. The case before the Privy Council arose in this way.

A Hindu son applied to pre-empt a certain property on the ground of contiguity. His suit was resisted on the ground that his father had been declared an insolvent and that therefore the property by reason of which he claimed to pre-empt had vested in the receiver, and that consequently the son had no right in the property which would entitle him to pre-empt. Their Lordships negatived this in unmistakable language and indeed characterised as "startling" the proposition that the insolvency of one member of a Hindu family should of itself and immediately take from the other male members of the family their interests in the joint property and from the female members their right to maintenance and transfer the whole estate to an assignee of the insolvent for the benefit of his creditors.

The case went to the Privy Council from a decision of a Full Bench of the Lahore High Court, presided over by Sir Shadi Lal, C. J. In the course of his judgment the learned Chief Justice said:

> The result of the above survey of the judicial decisions is decidedly in favour of the contention urged on behalf of the Official Assignee, but I must say that if the matter were res integra, I should find considerable difficulty in subscribing to the doctrine that the son's interest in the joint family property should, in the event of the father's insolvency, be regarded as the latter's property which vests in the Official Receiver. Upon general principles of the Hindu law governing the rights of the father and his son in the coparcenary property I should be inclined to hold that an order of adjudication against the father has only the effect of replacing the father by the Official Receiver, and that the order does not by itself vest in the latter the interest of the son in the property. As the son's share is in certain cases liable for the debts of the father, the Official Receiver may be able to enforce that liability provided that he takes appropriate proceedings for the purpose and satisfies the conditions which alone render the son's interest liable for the father's debts.

Pausing here for one moment it may be noticed that the learned Chief Justice does not express any decided opinion that in such circumstances the receiver would be able to enforce the ordinary liability of a Hindu son for the legal debts of his father. His Lordship merely says that the receiver may be able to do so provided that he takes appropriate proceedings. Although the opinion of the learned Chief Justice was contrary to the claim of the receiver to be able to deal with the son's share in the same way as the father could have dealt with it, his Lordship referred to the authorities which in his opinion precluded him from enforcing that view. With reference to those authorities their Lordships of the Privy Council said at p. 11:

> Their Lordships are of opinion that the question to be decided in this appeal must be decided on the wording of the Presidency Towns Insolvency Act, 1909, and on that Act alone. Cases which have arisen under S. 266, Civil P. C., 1882, or under S. 60, Civil P. C., 1908, depended on different considerations, and decisions in cases under those sections are likely to mislead a Court which has to construe the Presidency Towns Insolvency Act, 1909.

On a construction of the provisions of that Act their Lordships held that the right of a Hindu father to sell the interest of his son in the joint family property in satisfaction of his own debts is not a right which vests in the receiver appointed on the adjudication of the father as an insolvent. At p. 23 their Lordships went on to observe however that:

> It may be that under the provisions of S. 52, or in some other way, that property may in a proper case be made available for payment of the father's just debts; but it is quite a different

thing to say that by virtue of his insolvency alone it vests in the assignee, and no such provision should be read into the Act.

We have, therefore, to decide the question which arises in the present appeal entirely on the provisions of the Provincial Insolvency Act and, as has already been indicated, that statute does not empower a receiver to sell anything more than the property of the insolvent which vests in the receiver by reason of the adjudication. That, the Privy Council held, does not include the right of a Hindu father to sell the interest of his sons in the joint family property. In this Court a contrary view was taken in the case of 5 Pat 476 (11). But that being a decision prior to the decision of the Privy Council in 6 Lah 1 (1), we do not consider that we are now bound by that decision. The matter has since been agitated in 11 Pat 399 (12) but that case was eventually decided on other grounds and the present question was expressly left open. Their Lordships said at p. 408 of the report:

> The decisions of this Court may possibly have gone a little too far, and it is perhaps not essential in the present case to say whether the fathers' power to dispose of their sons' shares for their own just and proper debts has vested in the Receiver.

The matter also came before a Division Bench of this Court, of which I was a member, in 15 P L T 502 (13). The real question that arose for decision in that case was whether a receiver had power to convey a portion of the joint family property to one particular creditor and the point really decided was that the power of the receiver to sell the property of the insolvent is confined to a sale for the purpose of providing dividends for the general body of creditors and that the powers conferred on him by the statute did not include the power to convey a particular property to any particular creditor to the exclusion of the general body of creditors. In the judgment of the case, however, reference was made to the decision of the Privy Council in the following terms:

> The question whether the property which vests in the receiver on the insolvency of a member of a joint Mitakshara family includes the interests of other members of the family has been set at rest by the decision of the Privy Council in 6 Lah 1 (1) Their Lordships of the Judicial Committee there held that it is only the insolvent's share in the joint family property which vests in the receiver, and pointed out that in cases where the sons of the insolvent are liable for the debt of their father, the receiver, by adopting the appropriate procedure, may bring the shares of the sons to sale.

Although this observation, in view of the real point for decision in that case, may be regarded as obiter dictum, it is the only expression of opinion in this Court that we have been able to find since the decision of the Privy Council. It was however contended by learned advocate for the respondents that if the receiver cannot, by virtue of the powers conferred on him by S. 59, sell the interest of the son of the insolvent, there is no procedure under the Act by which the undoubted liability of the son for his father's just debts can be enforced. For the appellant however it was contended that the proper procedure in such a case is for the receiver to request the Court to issue notice on the sons, and after hearing the sons, in exercise of its powers under S. 4, to decide all questions arising in insolvency proceedings to declare the sons' liability. Whether that is the only procedure provided by the Act or whether it is the only method by which the receiver can enforce the liability of Hindu sons for their father's debts is not the question with which we are concerned in the present case, for no notice was issued to the son, who was then a minor. If there is a lacuna in the Act in this respect it is for the legislature to provide the appropriate remedy. So far as we are concerned, we have to consider the language of the Act itself, as pointed out by the Privy Council, and in our view a proper construction of the Act precludes the receiver from selling property which did not vest in him by reason of the adjudication. In the result this appeal must be allowed in part. It appears, in respect of three of the properties in dispute, namely, Harchanda, Hassatu and 13 annas of Bartua, that they were not ancestral properties in which the plaintiff acquired any interest by his birth, and with respect to these properties the suit will be dismissed. With respect to the remaining property the suit will be decreed in terms of prayer (iii) of the plaint. Each party will bear his own costs throughout.

Varma, J.—I agree.

R.M./R.K. *Order accordingly.*

---

11. Chairman, District Board, Monghyr v. Sheodutt, 1926 Pat 438=98 I C 364=5 Pat 476.
12. Bhola Prasad v. Ram Kumar, 1932 Pat 231 =139 I C 13=11 Pat 399=14 P L T 63.
13. Mahabir Prasad v. Shivanandan Sahay, 1934 Pat 514=152 I C 277=15 P L T 502.

* A. I. R. 1936 Patna 119

WORT, J.

Nasiruddin Haider—Petitioner.

v.

Hakim Muhammad Tahir and *others*—Opposite Parties.

Appeal No. 35 of 1935, Decided on 17th October 1935, from appellate order of Munsif, Chapra, D/- 1st June 1934.

(a) Appeal—Order allowing deposit and setting aside execution sale—Second appeal does not lie.

A second appeal does not lie from an order of the Court allowing a deposit and setting aside a sale in execution under O. 21, R. 92, Civil P. C. [P 120 C 1]

(b) Res judicata—Application for rule rejected—Court can grant rule on subsequent occasion.

An application for a rule and its rejection does not make the matter res judicata and does not prevent a Court on a subsequent occasion, if the occasion arises, from granting a rule in the interests of justice. [P 120 C 1]

(c) Appeal—Wrong decision on jurisdiction does not give right of appeal.

A wrong decision, even though it relates to jurisdiction, would not give a right of appeal where otherwise no appeal lay: 1930 *Pat* 280, *Foll.* [P 120 C 1]

*** (d) Execution sale — Application under O. 21, R. 89, Civil P. C.—Circumstances showing applicant's readiness to deposit sum —Court can entertain application.**

Where an application under O. 21, R. 89, Civil P. C., for setting aside the sale is made and the circumstances of the case show that the applicant is ready to deposit the sum required, the Court can entertain the application always provided that the applicant has an interest by virtue of title. But the application and the deposit have both to be made within 30 days. [P 120 C 2]

*** (e) Civil P. C. (1908), O. 21, R. 89—Decree for specific performance of contract for sale, against tenant of property sold under another execution—Application by holder of former decree for setting aside execution sale—Specific performance decree not executed by applicant when deposit for application made—Applicant held had no title when making deposit.**

A person, who had obtained a decree for specific performance of a contract of sale against one of the tenants of the property sold in execution of another decree, made an application to set aside the sale under O. 21, R. 89, Civil P. C. The applicant had not executed his decree for specific performance when he made the deposit required under O. 21, R. 89:

Held: that until the time the applicant did not execute his decree for specific performance he could have no title in the sale of property. [P 121 C 2]

*** (f) Revision—Judge assuming jurisdiction and proceeding to decide question of law—High Court cannot interfere though decision wrong—Judge deciding question of law or fact for determining jurisdiction question, before assuming jurisdiction—High Court can revise decision.**

If a Judge assumes jurisdiction of the matter and proceeds to decide a question of law, however erroneous this decision may be, the High Court cannot interfere in revision. But if before assuming jurisdiction he determines a question of law or fact to determine the question of jurisdiction, a wrong decision in a case of this kind is certainly revisable by the High Court: 1917 *P C* 71, *Rel. on.* [P 121 C 2]

K. P. Jayaswal and *Syed Ali Khan*—for Petitioner.

B. N. Mitter and *Rai Tribhuban Nath Sahay*—for Opposite Parties.

Judgment.—In this appeal the respondent was the person who in the execution sale of a holding made an application to be allowed to deposit the auction money and prayed that the sale be set aside. What actually was done was that he took out a chalan, did not in fact deposit the money, but applied to the executing Court to be allowed to deposit the money. The question which was decided by the Court before which that application came was whether the respondent had an interest in the property within the meaning of O. 21, R. 89, Civil P. C., and the learned Judge came to the conclusion that the respondent had no interest of that nature. The only interest, to use the expression in a neutral sense, that the respondent had was that he got a contract for sale, from one of the tenants, of this property who eventually obtained a decree for specific performance; but at the time that he had applied to make the deposit, no conveyance had been executed in his favour.

Having failed before the executing Court he appealed to the District Judge where the decision of the first Court was reversed on the point that he had an interest which would entitle him to deposit the money under O. 21, R. 89, Civil P. C. A third person who was the purchaser in the auction sale is the appellant before me and he appeals against the order of the District Judge allowing the respondent to deposit the money and setting aside the execution sale. The first point taken by way of preliminary objection is that no appeal lies. The relevant provisions of the Code with regard to that matter are contained in O. 43, R. 1 so far as regards the appeal to the District Judge. It is clear that so far as that matter is concerned there was an appeal. But I think it is equally

clear, and Mr. Jayaswal appearing on behalf of the appellant does not seriously contend that the argument that there is no appeal to this Court is erroneous. But I am asked to deal with the matter under my revisional jurisdiction. The answer to that by the respondent is that an application was made before one of the learned Judges of this Court to revise the order of the District Judge, the application for a rule being rejected on the ground that there was a second appeal, and therefore no application can now be made after the decision on the former occasion. That argument in my judgment is not well-founded for the simple reason that an application for a rule and its rejection does not make the matter res judicata and does not prevent a Court on a subsequent occasion, if the occasion arises, from granting a rule in the interests of justice. Therefore, so far as the preliminary point is concerned, it partly succeeds and partly fails. I said a moment ago that there was no serious contest by Mr. Jayaswal that no second appeal lay. There is some authority however for the proposition that in the event of a District Judge entertaining an appeal without jurisdiction a second appeal would lie to this Court.

Reference is made to the decision in 9 Pat 685 (1) as an authority for the proposition. Fazal Ali, J., deciding the case, has stated that there are authorities which establish that proposition. But I must confess that the authorities upon which the learned Judge relies certainly do not meet the point with which I have to deal : in other words, that although by statute no appeal lay the circumstances surrounding the case will in any way affect the statute. I have very little hesitation in coming to the conclusion in this case that no appeal lay both on the grounds stated in the decision referred to and on the ground which Mr. Jayaswal advances before me. I cannot for a moment think that a wrong decision, even though it relates to jurisdiction, would give a right of appeal where otherwise no appeal lay. But in this case, even assuming that proposition to be well-founded, that is to say, there is a second appeal to this Court, it would in this case depend upon a number of facts and the construction of O. 21, R. 89 which, to say the least of it, is a highly technical one. What happened was that the person seeking to deposit the money took out a chalan for the amount to be deposited, and, without actually depositing it in Court, applied to the Judge to allow him to make the deposit, and in his petition claimed to have the sale set aside. Now the learned Judge refused the application and I think it will be taking a very technical view of the Civil Procedure Code and indeed straining the language of the statute to suggest that he had not done what was required of him, that is to say, the applicant, and that the effect of the order of the Judge was not an order refusing to set aside the sale. To put it more precisely Mr. Jayaswal contends that what was necessary was the actual deposit of the money and then an application, and that no application was competent until the deposit had been made. I have considered the matter very carefully both in the light of the language used by the order and the decision of this Court relating to a deposit, which so far as its amount is concerned was short by a small sum of money, and I have come to the conclusion that the contention is not well-founded.

The rule is slightly ambiguous. The words used may apply to have the sale set aside on his deposit in Court etc. It may be read as meaning that on his depositing the sum in Court he may have the sale set aside on an application, or at the moment he could apply to the Court to have the sale set aside on his depositing, that is to say, when he does deposit a sum of money. That is to say both the application and the deposit have to be made, quite clearly from the order itself and from the authorities within thirty days. To put it in other words, it is competent for the Court to decide the matter on its ascertaining whether the application is a bona fide one. If the circumstances show that the applicant is ready to deposit the sum, the Court can entertain the application always provided of course that he has an interest by virtue of title. In my judgment, so far as the jurisdiction of the District Judge to entertain the appeal is concerned, the objection is not well-founded; and I have already decided that the objection of the respondent as to the revisional jurisdiction is not well-founded. This leaves me

1. Ramratan Prasad v. Banarsi Lal, 1930 Pat 280=122 I C 589=9 Pat 685=11 P L T 156.

in the position to deal with the matter under my revisional powers.

Now the substance of the matter that is left is the question of whether the person (i. e. the respondent) desiring to deposit the money is a person who has interest by virtue of his title acquired before the sale. So far as the dates are concerned there is no doubt that he is a person who comes within the meaning of the rule, but the question of whether he has a title and interest by virtue of a title (to use the words of the order) is quite another matter. Mr. Jayaswal and Mr. Mitter both argue for and against the existence of a title and also as to whether this matter strictly comes within S. 115, Civil P. C. I propose to deal in the first instance with the question of title. Mr. Das, the District Judge, seems to think that because a decree was obtained in the Court below for specific performance, the applicant was in a better position from the point of view of his title than he was before the decree. To use the words of the District Judge he was on surer ground. He got something little bit better than a contract ; the Court had pronounced on it, and it was indefeasible. No one therefore could question it and the effect of the decree was to have his contract specifically performed : There was an order of the Court to perform the contract specifically. But quite apart from the proposition of law, if as a fact he could have his decree executed and it was necessary to have his decree executed if the judgment-debtor did not comply with the order of the Court, how can it be said that he had any title because the conveyance was what would give him his title. But if it was necessary to obtain his conveyance by execution or otherwise, it quite clearly shows that he had up to that moment no title, although he had the solemn pronouncement resulting from the judgment or decree. But on a surer ground, on the question of fundamental principles of law, the matter is quite clear, as it has been pointed out, that under the English law a person holding a contract has an equity or equitable title but not a title in law. But that principle is not applicable in this country. The Transfer of Property Act is quite clear on the point. The contract does not give any interest in the land, and the only question to be asked is, what is the effect of a judgment ? A judgment does not give title; it gives a right of execution to specific performance of that contract, the judgment having pronounced upon all the possible issues which arise not as to the title but as to the validity of the contract itself. On first principles therefore it is quite clear in my judgment that the applicant before the Court below had no title at the time that he had to deposit the money and, if the case depended upon that, there could be only one conclusion to be arrived at in this application before me.

The point, however, arises as to whether this is a question which goes to the jurisdiction of the Court. It is contended that as the applicant had no interest, the District Judge had no right to decide in his favour, in other words, he had no jurisdiction to do so. Now if it does go to the jurisdiction of the Court, there is no doubt as to the result. But the matter, I think, is concluded by a statement of Lord Atkinson in the well known case of 22 C W N 50 (2) who, in delivering the opinion of their Lordships of the Privy Council, referring to S. 115, said this :

> The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved,

Now those words have been referred to in numerous cases and I think there is no doubt as to their meaning, nor, in my judgment, do I think there can be any doubt about the meaning of S. 115, C. P. Code. If a Judge assumes jurisdiction of the matter and proceeds to decide a question of law, however erroneous the decision may be, this Court cannot interfere. But if before assuming jurisdiction he determines a question of law or fact to determine the question of jurisdiction, a wrong decision in a case of this kind is certainly revisable by this Court. But the District Judge (erroneously as I have held), deciding this question of whether the applicant had interest, was not deciding a question relating to his jurisdiction at all, but he was deciding whether the particular applicant had a locus standi, and that most certainly a Judge had jurisdiction to determine, although he might have decided it erroneously which, in my judgment he has. It leaves this Court

2. Bala Krishna Udayar v. Vasudeva Aiyar, 1917 P C 71=40 I C 650=44 I A 261=40 Mad 793=22 C W N 50 (PC).

quite helpless so far as an interference with that order is concerned. Quite apart from those views, the justice of the case demands that this Court should not interfere even had the view as to jurisdiction been otherwise. The rule must therefore be discharged.

On second consideration I cannot give leave to appeal on the first point as to jurisdiction, and on the merits as the case has been treated as a revision, there can be no question of appeal under Letters Patent.

S.R./R.K. *Rule discharged.*

A. I. R. 1936 Patna 122

ROWLAND, J.

Thakur Prasad and *another* — Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 136 of 1935, Decided on 7th August 1935, from judgment of Sub-Judge, Monghyr, D/- 31st May 1935.

Criminal P. C. (1898), S. 476-B—Right of appeal—Appeal to Court immediately superior — Amendment of 1923 has made no change—District Judge is appellate Court to Sub-Judge.

The Court of the Sub-Judge is a Court from whose orders appeals ordinarily lie to two Courts, that of the District Judge and the High Court. The appellate Court of inferior jurisdiction, namely the District Judge's Court, is to be the Court to which the Court of Subordinate Judge must be deemed to be subordinate, within the meaning of S. 195, sub-s. (3). The appeal, therefore, under S. 476-B lies to the District Judge. That was held to be the position under the Code as it stood before the amendments made in 1923; and the amendments introduced in that year have not changed the law in this respect : 17 *All* 51 ; 1927 *Mad* 683, *Cri. Appeal No.* 331 *of* 1934, *approved.* [P 122 C 2]

Manohar Lal and *N. C. Roy*—for Appellants.

Assistant Govt. Advocate — for the Crown.

Judgment.—A preliminary objection is raised that the appeal from the Subordinate Judge's order does not lie to the High Court but to the District Judge. The order under S. 476, Criminal P. C., directing the presentation of a complaint against the appellant was passed in a proceeding arising out of a suit valued at over Rs. 5,000. S. 476-B gives the person complained against a right to "appeal to the Court to which such former Court is subordinate within the meaning of S. 195, sub-s. (3)." S. 195, sub-s. (3) enacts that :

> A Court should be deemed to be subordinate to the Court to which appeals ordinarily lie from the appealable decrees or sentences of such former Court.

Appeals from the decrees or orders of Subordinate Judges are provided for by S. 21, Bengal, Agra and Assam Civil Courts Act, Act 12 of 1887:

> An appeal shall lie (a) to the District Judge where the value of the original suit did not exceed Rs. 5,000, and (b) to the High Court in any other case.

The appellant has presented his appeal to this Court on the ground that the original suit was valued at over Rs. 5,000 and an appeal from the decree in it or from any order passed in proceedings arising out of it would ordinarily lie to this Court ; but the case is covered by proviso (a) to S. 195, sub-s. (3) :

> Where appeals lie to more than one Court the appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate.

The words of the Code are perfectly clear. The Court of the Subordinate Judge is a Court from whose orders appeals ordinarily lie to two Courts, that of the District Judge and the High Court. The appellate Court of inferior jurisdiction, namely the District Judge's Court is to be the Court to which the Court of the Subordinate Judge must be deemed to be subordinate, within the meaning of S. 195, sub-s. (3). The appeal therefore in this case lay to the District Judge. That was held to be the position under the Code as it stood before the amendments made in 1923; and the amendments introduced in that year have not changed the law in this respect. The decision in 17 All 51 (1) was followed as being still good law in 99 I C 957 (2) decided by two Judges of the Madras High Court. The same view is taken in an unreported case of this Court in Cri. Appl. No. 331 of 1934 (3) decided by Macpherson, J. In the result the appeal is dismissed.

B.D./R.K. *Appeal dismissed.*

---

1. Ganga Dei v. Sher Singh, (1895) **17 All 51.**
2. Palaniappa Chetti v. Chettiappa Chetti, **1927** Mad 683=99 I C 957.
3. Lalita Chaudhuri v. Emperor, **Cri. Appeal** No. 331 of 1934.

* A. I. R. 1936 Patna 123

MOHAMMAD NOOR AND SAUNDERS, JJ.

Gobardhan Mukharji — Petitioner — Appellant.

v.

Saligram Marwari and *others*—Objectors—Respondents.

Civil Appeal No. 190 and Civil Revn. No. 439 of 1934, Decided on 2nd September 1935, from order of Sub-Judge, Mangum, D/- 14th February 1934.

(a) Civil P. C. (1908), O. 22, R. 3—R. 3 does not apply to assignee of deceased—Person's application for substitution of his name in deceased plaintiff's place—Claim based on transfer during plaintiff's lifetime—Applicant held not entitled to substitution.

Order 22, R. 3 does not apply to a man who has not come in as a legal representative of a deceased party but as an assignee from him.

[P 124 C 1]

A person made an application to get his name substituted in the place of a deceased sole plaintiff on the basis of a right which had accrued to him not on the death of the plaintiff but on a transfer made to him during the plaintiff's lifetime :

Held : that the applicant could not come in as a man entitled to have his name substituted in consequence of the death of the plaintiff.

[P 124 C 1]

***(b) Civil P. C. (1908), S. 146—S. 146 authorises person claiming under another to apply for what other could—Appellant claiming substitution in deceased plaintiff's place under plaintiff's living daughter—Appellant held could apply for substitution of daughter's name but not for his own.**

Section 146 authorises a person claiming under another person to make an application which the other person could have made

[P 125 C 1]

The appellant claimed to be entitled to have his name substituted in place of the deceased plaintiff claiming under the daughter of the plaintiff who was alive :

Held : that the appellant could make an application which the daughter was entitled to make namely for substitution of her name but he could not apply for substitution of his own name.

[P 125 C 1]

***(c) Civil P. C. (1908), O. 22, R. 10 — 'Party' refers to party on record—Legal representative of deceased party not coming forward—Transferring interest to another—Transferee cannot continue suit.**

The word 'party' in R. 10 refers to a party who is already on record. It will be defeating the object of the law if the legal representative of the deceased party instead of coming forward and himself taking up the responsibility of the suit transfers his interest to another man and that man is permitted to continue the suit : 1922 *P C* 304, *Disting.*; 1925 *Mad* 1166, *Rel. on.*

[P 125 C 1]

G. C. Mukharjee for *S. S. Majumdar* —for Appellant.

R. S. Chattarji—for Respondents.

Mohammad Noor, J. — This appeal and the revision application are directed against an order of the Subordinate Judge of Manbhum refusing to substitute the name of the appellant in place of a deceased sole plaintiff of a suit named Matangini, who had instituted the suit for certain property against the present respondents. She died during the pendency of the suit. The date of her death is stated to be 15th November 1933. On 2nd December 1933, the present appellant Gobardhan Mukherjee filed an application to the effect that he had acquired a 99 years' lease of the disputed property from the deceased plaintiff and wanted that he should be substituted in her place. On 8th January 1934 the learned Subordinate Judge passed an order which, in my opinion, was an order rejecting the application. The order ran thus:

Now Matangini has died and an application has been made for substitution by Gobardhan Mukerjee as being ijaradar of Matangini. Matangini had limited interest according to the plaint. Therefore the ijaradar cannot be substituted in her place after her death.

By a second petition filed on that date (8th January 1934), Gobardhan Mukherjee made a fresh prayer for substitution of his name on the basis of a document which he claimed to have obtained from one Priyasakhi said to be the daughter of the deceased Matangini. He also asked that Priyasakhi should be made a pro forma defendant. By his order, dated 14th February 1934, the learned Subordinate Judge rejected this application and Gobardhan Mukherjee has come up in appeal. Being doubtful about his right to appeal, he has also filed a revision application. The learned advocate for the appellant has contended that his client was entitled to have his name brought on the record as plaintiff either under O. 22, R. 3, read with S. 146, Civil P. C., or under O. 22, R. 10, either as representative of the original plaintiff now dead or as representative of her daughter Priyasakhi. I shall deal with the two applications of the appellant before the lower Court separately. The first application of the appellant was for substitution of his name as an assignee from the original plaintiff and not as her legal representative within the meaning of the

Code. O. 22, R. 3 deals with substitution after the death of a party. This rule, in my opinion, does not apply to a man who does not come in as a legal representative of a deceased party, but as an assignee from him. It is accidental in this particular case that the first application of the appellant was filed after the death of the original plaintiff. But the right which the appellant claimed did not accrue to him on the death of the plaintiff but on a transfer made to him by her in her lifetime. Therefore it is obvious that he cannot come in as a man entitled to have his name substituted in consequence of the death of the original plaintiff. The term "legal representative" in defined in S. 2 (11), Civil P. C., thus:

> Legal 'representative' means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.

It cannot for a moment be argued that the appellant having obtained lease from Matangini has become her legal representative. He does not even represent the whole of the disputed property, much less he represents the estate of Matangini. The alleged 99 years' lease relied upon by the appellant reserves an annual rent of Rs. 189, and therefore assuming this lease to be a genuine transaction, interest in the disputed property to that extent was left in Matangini.

I now come to the question whether the appellant could have his name substituted for that of Matangini under O. 22, R. 10, on the basis of this lease. Now there is a difference between R. 3 and R. 10. In case there is a death of a party to a suit, the Court on a proper application is bound to substitute the legal representative of the deceased party under R. 3, while R. 10 refers to cases of assignment, creation or devolution of an interest during the pendency of a suit other than on death, etc. In this case the Courts have a discretion to give leave for the suit to be continued by or against the person to or upon whom such interest has come or devolved. It may be that the appellant came under this rule, but the learned Subordinate Judge by his order dated 8th January, has rejected his first application on the ground that Matangini had claimed only a life interest in the property in suit. That order in my opinion has become final. No appeal was preferred against it within the time allowed by law. The present appeal is against an order rejecting the second application based upon an assignment from Priyasakhi and is described by the appellant as having been passed on 14th February 1934, and confirmed on 17th February 1934. The first order cannot therefore be interfered with. I however regret this result. It would have been much better for the administration of justice if the claim of the appellant to have acquired a lease from Matangini could have been investigated. The circumstances under which the lease came into existence are very suspicious. Matangini died on 15th November 1934. This document is dated 14th November, i. e., a day before her alleged death, but was registered by her Mukhtar Am, Upendra Nath Banerji on 15th November, the day Matangini is said to have died. The time of the death is not known and it cannot be said whether it was registered before or after her death. The defendants alleged that this document was bogus and fictitious. Matangini sued in forma pauperis and the defendants' suggestion was that this Mukhtar Am got up this document in order to continue the suit in that form. Priyasakhi, the heiress of Matangini, could not have done so, as she has properties of her own. This suggestion is to some extent supported by the fact that Priyasakhi did not come forward to apply for substitution of her name in spite of the fact that if the lease is genuine, her mother had reserved to herself an interest of Rs. 189 a year in the disputed property and the appellant is admittedly a beggar by profession. However the matter has ended and nothing further need be done.

I now proceed to consider the appellant's second application dated 8th January 1934, based upon an assignment from Priyasakhi. The learned advocate appearing on his behalf has attempted to bring this application also under O. 22, R. 3. It is clear from what I have said above that R. 3 applies to substitution in case a party dies. Priyasakhi is not dead. Nor can the appellant be a legal representative of Priyasakhi even if she were dead. The learned advocate however tried to apply S. 146, Civil P. C., and argued that whatever could have been

done by Priyasakhi can be done by her assignee, the appellant. Conceding that S. 146 of the Code has any application to this case, the utmost which can be said is that the appellant is entitled to make an application but the only application which he can make is for substitution of the name of Priyasakhi in place of Matangini. S. 146 authorizes a person claiming under another person to make an application which the other person could have made. The appellant can make an application which Priyasakhi could have made, namely for substitution of her name. I fail to understand how he can apply for substitution of his own name.

Now comes the question as to whether the appellant can get leave to continue the suit under O. 22, R. 10. The learned Subordinate Judge relying upon certain observations of the Privy Council in 1 Pat 581 (1) and on the decision in 1925 Mad 1166 (2) has held that that rule applies to cases in which there has been an assignment by a party who is already on the record. The observations of the Privy Council do not apply very much to the facts of the present case, but the Madras decision which is of a Single Judge, is exactly in point, and if I may say so, I entirely agree with the view taken there and in my opinion the learned Subordinate Judge has rightly rejected the application. R. 10 empowers the Court to give leave to a person who has taken an assignment from a party to continue the suit. The "party" there obviously refers to a party already on the record. Now in this particular case there has been no substitution of the legal representative of the deceased plaintiff Matangini. Her daughter Priyasakhi seems, as I have said, to be unwilling to come up and prosecute the suit for reasons of her own. It will be defeating the object of the law if the legal representative of a deceased party, instead of coming forward and himself taking up the responsibility of the suit transfers his interest to another man and that man be permitted to continue the suit. This disadvantage will be obvious if we refer to the facts of this particular case. The appellant is admittedly a beggar by profession. Priyasakhi is unwilling to come forward, and if the appellant be allowed to prosecute the suit, the defendants will be deprived of their costs. Assuming however that it was open to the learned Subordinate Judge to allow the appellant to prosecute the suit, the circumstances of this case were such in which the discretion ought not to have been exercised.

I see no ground for interference. The appeal is dismissed with costs and the civil revision petition is rejected. No separate costs will be taxed for the revision application.

Saunders, J.—I agree.

S.R./R.K. *Order accordingly.*

1. Manindra Chandra Nandi v. Ram Lal Bhagat, 1922 P C 304=68 I C 973=1 Pat 581=49 I A 220 (P C).
2. Kutti Amma v. Tarvad Karunavan, 1925 Mad 1166=87 I C 402.

A. I. R. 1936 Patna 125

AGARWALA AND VARMA, JJ.

Rameshwar Prasad Narain Singh—Petitioner.

v.

Kunj Behari Mahto—Opposite Party.

Civil Revn. Nos. 340 and 408 of 1935, Decided on 21st November 1935, from order of Munsif, Third Court, Gaya, D/- 25th March 1935.

Bengal Tenancy Act (8 of 1885), S. 70—Order under S. 70 is not decree.

An order of a Collector passed under S. 70, Ben. Ten. Act, is not a decree as it is an order in a proceeding which does not start with a plaint but with an application on which court-fees are not payable as for a plaint. [P 125 C 2]

U. N. Banarji—for Petitioner.

Raj Kishore Prasad — for Opposite Party.

Agarwala, J.—The only question for decision in these applications is whether an order of a Collector passed under S. 70, Ben. Ten. Act, is a rent decree. It is conceded that if such an order is a rent decree, O. 21, R. 58, Civil P. C., does not apply and therefore the present applications must fail. I have no doubt that if the order is a decree at all, it is a rent decree, but I am not satisfied that an order under S. 70 is a decree. As I understand it, a decree is an order passed in a suit and a suit is a proceeding which starts with a plaint on which court-fees have been paid in the manner provided in the Court-fees Act. An order under S. 70 is an order in a proceeding which does not start with a plaint but with an application on which court-fees are not payable as for a plaint. Furthermore, the fact that sub-s. 5 of S. 70 directs

that such an order shall be enforceable as a decree indicates that the order has not proprio vigore the force of a decree. For these reasons I would hold that an order under S. 70 is not a decree and dismiss both these applications with costs. Hearing fee one gold mohur in each.

Varma, J.—I agree.

R.M./R.K. *Application dismissed.*

A. I. R. 1936 Patna 126

WORT, J.

Rameshwar Prasad Singh and *another* —Petitioners—Appellants.

v.

Basdeo Singh and *others* — Opposite Parties.

Appeal No. 112 and Civil Revn. No. 391 of 1935, Decided on 12th November 1935, from order of Dist. Judge, Patna, D/- 7th March 1935.

Civil P. C. (1908), S. 47—Undivided share of judgment-debtor attached — Judgment-debtor dying during pendency of attachment —Execution case dismissed for want of prosecution — Order of dismissal set aside—Attachment held to have revived—Nephews of judgment-debtor in possession of property held to be representatives within meaning of S. 47.

The undivided interest of a judgment-debtor was attached in execution of a decree and the judgment-debtor died during the pendency of the execution proceedings. The execution case was dismissed for want of prosecution but the order of dismissal was subsequently set aside and the execution Court held that the revival of the execution did not result in the revival of the attachment which had taken place in the execution. The District Judge on appeal by the decree-holder came to a contrary conclusion. The nephews of the judgment-debtor who were survivors of the family appealed against the order of the District Judge:

Held : that the effect of setting aside the order of dismissal for want of prosecution resulted in the revival of the attachment and as the nephews were in possession of the property, which by reason of that attachment reviving was not their property, they were intermeddling with the estate and were therefore representatives within the meaning of S. 47. An appeal therefore lay from the order of the executing Court to the District Judge and also to the High Court : 16 *C W N* 332 *Disting.*

[P 127 C 2; P 128 C 1]

L. N. Singh—for Appellants.

Baldeo Sahay and *C. P. Sinha*—for Opposite Parties.

Judgment.—The appeal and the application arise out of the order of Mr. Shearer, the District Judge, made by him on 7th March of this year against the order of the Munsif in certain execution proceedings. It would appear from the order of the Munsif that the matter came before him for decision from what stage should certain execution proceedings, which had been revived by an order of review vacating the previous order dismissing the execution for want of prosecution, be taken. Shortly stated the effect of the order of the Munsif was that the revival of the execution case did not result in the revival of the attachment which had taken place in the execution. The learned District Judge, however, has come to a contrary conclusion on the footing that the Judge who dismissed the original application in execution for want of prosecution, had made an order which was a nullity and which, therefore, had no effect. The statement of the learned Judge in the Court below was that the order was a nullity as there was in fact no default. The executing Court had made an order on 18th September 1929, on being informed by the relatives of one Gopi Singh, the judgment-debtor, that Gopi was dead and the decree-holder should take steps by a certain date to be fixed by him then. The effect of the order of the District Judge, as I have indicated, was that as no steps could possibly be taken, it was unnecessary to join the nephews of Gopi Singh as judgment-debtors and, therefore, the order dismissing the execution case for want of prosecution was, as I have already stated, a nullity.

Two points arise before me: first, whether an appeal lay to the District Judge, and secondly the merits of the case. The case has got into a tangle of litigation having gone on since 10th December 1927, and this is the third time the matter has been before this Court in one form or another. The short facts, which it is necessary to state for the purpose of deciding this appeal, are these. In execution case No. 181 of 1929 the undivided interest of Gopi Singh was attached in execution on 3rd July. In May 1929 Gopi Singh died. A large number of applications, including an application to certify satisfaction, were before the Court, and in the course of litigation two other execution proceedings were taken out; with the mass of details relating to these executions it is quite unnecessary to deal. I have already stated that in September 1929 the first execution case, which is the one with which we have to deal, was dismissed for want of prosecution. That

case eventually came up before this Court, and in 1931 by a judgment to which I was a party, it was held that the result of the dismissal of the execution for want of prosecution was that the attachment ceased. In the same month as the order of this Court was made, the decree-holder made an application to the executing Court for review of its order dismissing the case for want of prosecution. In the result the learned Judge allowed the petition restoring execution case No. 181 of 1929. Now the matter in another form with regard to another part of another execution case, came up before this Court and was dealt with by my learned brother Macpherson on 7th April 1934. With the greater part of the order made on that occasion we are not concerned. The learned Judge in the course of his order stated that it was open to the petitioner to proceed with the restoration of the execution case No. 181 of 1929 from the position at which it stood when the order of satisfaction on 16th December was passed, etc. It was in pursuance of that order of this Court that the application was made to the Munsif. An appeal was preferred to Mr. Shearer, the District Judge, from the order of the Munsif in that case and it is the District Judge's order which is under appeal before me. An application in revision has also been filed against that order.

The first question that arises is by way of preliminary objection. The appellants are Rameshwar and Ramnandan, the nephews of Gopi Singh, and it is contended by the learned Advocate on their behalf that they are not judgment-debtors within the meaning of S. 47, Civil P. C., and therefore the matter decided by the Munsif was not a matter between the decree-holder and the judgment-debtor or parties to the suit. Consequently as they did not come under S. 47 of the Code, no appeal lay to the District Judge and his order therefore is without jurisdiction. Mr. Baldeo Sahay on behalf of the decree-holder contends, however, that the appellants are the representatives of Gopi Singh within the meaning of the Code and refers me to sub-s. (11), S. 2 which provides :

> Legal representative means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased;

It is contended in this case that the appellants are intermeddling with the estate of the deceased and therefore are representatives within the meaning of S. 47 of the Code. Consequently appeal lay to the District Judge and to this Court. Now it is admitted by both parties that on attachment and in the event of Gopi Singh the judgment-debtor dying during that attachment, the property is prevented (if I may use the expression) from being taken by the nephews by survivorship. To put it in plain language, the property remains the property of the deceased judgment-debtor Gopi Singh. It is contended therefore that in the circumstances of this case the nephews were intermeddling with the estate. Now that depends to some extent upon the view of the argument which is presented to me by the learned advocate for the appellants.

It is contended in this case that when the attachment ceased, as it undoubtedly did when the order was made by the Munsif dismissing the execution case for want of prosecution, the nephews then took the property by survivorship, and the argument proceeds to this extent that any subsequent order setting aside the order of dismissal will not result in the attachment reviving. During the course of this part of the case the decision of the Calcutta High Court in 16 C W N 332 (1) was relied upon. That was a case however where on 13th November of one year an execution case was dismissed for default. On 12th of the next month the judgment-debtor transferred the properties to a third person ; then in the following month a review order was obtained by which the order for dismissal was set aside. The learned Judges of the High Court decided that the reversal of the judicial order did not affect the rights of bona fide purchasers who had acquired a title on the assumption that the original order was valid in law. But that is not this case. In my judgment quite clearly, on this limited part of the case, the effect of the order setting aside the order of dismissal for want of prosecution resulted in the revival of the attachment. The nephews who are the survivors of the family are in possession. Their possession of pro-

1. Patringa Koer v. Madhava Nand Ram, (1911) 16 C W N 332=12 I C 65.

perty which by reason of the attachment reviving was not their property and therefore in my judgment they are intermeddling with the estate and therefore are representatives within the meaning of S. 47, Civil P. C. I therefore overrule the objection and hold that there was an appeal to the District Judge and an appeal lies to this Court.

The observation just made incidentally decides the only question as regards the merits of the case, whether the result of the order setting aside the dismissal for want of prosecution is the revival of the attachment which I think quite clearly is the result. The learned Judge in the Court below has decided the case on other grounds which I must say do not appeal to me. But for the reasons which I have stated I come to the conclusion that the order of the Court below is correct although its reasoning may not, as I have said, be so. The result therefore is that the appeal is dismissed with costs. The civil revision application also is dismissed. Leave to appeal under the Letters Patent is refused.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1936 Patna 128

VARMA, J.

Raghubir Mahto and *others* — Plaintiffs —Petitioners.

v.

Ganeshdutt Ojha and *others* — Defendants—Opposite Parties.

Civil Review No. 7 of 1935, Decided on 2nd October 1935, from appellate decree No. 635 of 1932, D/- 5th November 1934.

Civil P. C. (1908), O. 41, R. 21 — Appeal decided ex parte against respondent—His application for re-hearing supported by affidavit—Affidavit alleging that applicant approached friend familiar with Court work who introduced him to another — Latter person frequent visitor to High Court — Applicant handing him over some money and necessary papers—Allegations held not proper ground for re-hearing appeal.

An appeal was heard ex parte against the respondent and he made an application under O. 41, R. 21, Civil P. C., praying that the appeal be re-heard. The application was made on the basis of certain allegations made in the affidavit field by the applicant which alleged that the applicant approached one of his friends who was familiar with Court work to look after his case. The friend in turn introduced the applicant to another person who was known to be a frequent visitor to the High Court and handed over to him some money with necessary papers. The latter person took no steps in the matter; **Held**: that the allegations were not proper ground for re-hearing of the appeal. [P 128 C 2]

S. N. Banerjee—for Petitioners.

H. P. Sinha and *P. Jha*—for Opposite Parties.

Order.—This is an application filed under O. 41, R. 21, Civil P. C., praying that Second Appeal No. 635 of 1932, which was dismissed by me on 5th November 1934, be re-heard. The applicant happened to be the respondent in that appeal and no one appeared on his behalf at the time of the hearing. The petition is filed on the basis of certain allegations made in the affidavit. The affidavit shows that the petitioner approached one of his friends in Bettiah who is familiar with the High Court work to look after his case. That gentleman introduced him to one Ramgati Singh who is known in that locality to be a frequent visitor to Patna and the petitioner entrusted him with some money and the necessary papers. But it appears that Ramgati Singh took no steps in the matter. The learned Advocate appearing on behalf of the petitioner urges that he could not contest the appeal on account of the laches of Ramgati Singh and he lost his case for no fault of his own. He has referred me to two cases: one reported in 2 C W N 414 (1), and the other in 14 I C 823 (2), but a mere glance at those cases will show that the Court was dealing with laches on the part of pleader's clerks, whereas in this case Ramgati Singh does not occupy any such recognised position. A case reported in 39 All 388 (3), bears strong resemblance to the case in hand. The agent of a litigant engaged a counsel but near about the time of the hearing he took away the papers with the result that Counsel was unable to appear and the appeal was decreed ex parte. Their Lordships of the Allahabad High Court held that that was not a ground for re-hearing of the appeal under the provisions of O. 41, R. 21. Agreeing with that principle, I would dismiss this application with costs. Hearing fee one gold mohur.

S.R./R.K. *Application dismissed.*

---

1. Kailash Chunder Das v. Ram Nath, (1898) 2 C W N 414.
2. Rukminimoyi Dassi v. Poran Chunder Bhera, (1910) 39 Cal 341=14 I C 823.
3. Baji Lal v. Nawal Singh, 1917 All 216=39 I C 636=39 All 388=15 A L J 413.

A. I. R. 1936 Patna 129

WORT AND ROWLAND, JJ.

Sudhakar Misra and *another*—Plaintiffs—Appellants.

v.

Nilkantha Das and *others*—Defendants Respondents.

Appeal No. 1256 of 1931, Decided on 18th December 1935, from appellate decree of Dist. Judge, Manbhum-Sambalpur, D/- 7th March 1931.

(a) Evidence Act (1872), S. 66, Proviso 2—Objection by party that secondary evidence is inadmissible — Original in possession of party objecting but not producing it—S. 66, Proviso 2, applies—Notice to produce original is not necessary.

Where a party alleges that no facts are adduced by the opposite party nor any facts proved which would justify the Court in admitting as secondary evidence a copy of an original document and it is found that the original document is in possession or control of the party taking the objection and it fails to produce it, Proviso 2, S. 66 applies and notice to the party to produce the original is not necessary as by the nature of the case the party must be held to be knowing that it would be required to produce it.

[P 130 C 1, 2]

(b) Second Appeal—Finding of fact—Documents not documents of title — Decision of Court with regard to such documents not question of law—Erroneous decision by Court as to import of such documents is not error of record but is merely decision on question of fact.

Where none of the documents filed in a case is a document of title, nor is there any question or any decision of the Court with regard to the documents which is a decision on a question of law, an erroneous decision by the Court as to the import of such document is not error of record but is merely an erroneous decision by the Court on a question of fact and is binding on the Court in second appeal : 1918 *P C* 92, *Rel. on.* [P 130 C 2]

(c) Limitation Act (1908), Art. 120 — Suit for declaration of title and that settlement record is erroneous and fraudulent is governed by Art. 120—Mere payment of ad valorem fees makes no difference.

A suit for a declaration of the plaintiffs' title and that the settlement record is erroneous and fraudulent, without any claim for possession is governed by Art. 120, Limitation Act, and the time runs from the final publication of the Record of Rights. The mere fact that the plaintiff pays an ad valorem court-fee makes no difference. [P 131 C 1]

Sultan Ahmed and *P. Misra*—for Appellants.

Sivanarayan Bose—for Respondents.

Wort, J.—This appeal has been argued elaborately ; but the points in dispute fall into a small compass and I propose to deal with them as briefly as possible. It was the plaintiffs' action in which they claimed a declaration that the settlement record was erroneous and fraudulent. The entry in the record appears to have been that one Anant Misra and seven others were entitled to the mauza to the extent of two annas each. The plaintiffs claimed that Anant was entitled to the 16-annas interest and that the defendants were not co-sharers. In order to establish this the plaintiffs alleged that they were his legal heirs and the nearest agnates, and with regard to this claim issue 10 was settled by the Judge of the trial Court. So far as this question is concerned, both the trial and the appellate Courts have come to a conclusion in favour of the plaintiffs, and, as it is a decision on a question of fact, no point arises in this Court. The trial Court decided that Anant, and therefore the plaintiffs, were entitled to the 16 annas interest in the property, but that there was a charge in favour of the defendants to the extent of Rs. 5 each. The appellate Court modified this decision coming to the conclusion that the plaintiffs were entitled to two annas and that the seven defendants were also entitled to two annas each. This second appeal has been preferred against the decision of the learned District Judge.

Two questions arise: one as regards the admissibility of certain evidence and also the alleged error of the record, and the other is the question of limitation. Amongst the documents which the defendants relied upon was Ex. F-1. This purports to be a copy of the confirmatory sanad of the year 1841, and in passing, I should like to say that the entry in the Record of Rights was founded on the original sanad. It is a matter of some comment and perhaps of some importance to state that this sanad which was in the possession of the plaintiffs, was not produced by them. The contention of Sir Sultan Ahmed is that Ex. F-1 was not admissible in evidence, and that it being admitted in evidence, the Judge of the appellate Court has been wrongly influenced by the document in discounting the evidence adduced by the plaintiffs. As already stated, Ex. F-1 was a copy of a sanad purporting to be of the year 1841. Of the original sanad of which it was a copy there is no evidence. It appears from the record of the case that this

document, amongst others, was objected to by the plaintiffs.

The nature of the objection is not stated, nor do we find any reference to the particular matter raised and argued by Sir Sultan Ahmed on behalf of the plaintiffs in this regard. It is contended that it is not even secondary evidence ; that is to say, (I assume) that it is not a copy of the original sanad. All I need say with regard to that matter is that there is no foundation for that argument. Ex. F-1 purports to be a copy of the original sanad, and it would appear to have been admitted on that basis, although the learned Judge in the Court below is in some error in stating it to be a certified copy. The point taken is this that no evidence was adduced by the defendants, nor were the facts proved, which would justify the Court in admitting it as secondary evidence of the original sanad. The objection, as I have already stated, appears to have been merely formal and this point was not discussed by either of the Courts ; the trial Court, I might say, in coming to the conclusion, incidentally said that the document was not a genuine one. Mr. Bose contends however that the point cannot be taken in appeal before this Court as there was no objection, on the ground now stated, before the trial Court. If the record of the case gives no indication of what took place, I must say that I am in agreement with the argument of Mr. Bose that the objection was not taken in the form in which it is now presented. The objection in the first instance may have been merely formal, and if the plaintiffs intended to rely upon the objection, they certainly should have developed it, which, as I have already stated, was not done.

Assuming however that the objection was taken, one of the questions which would arise is whether it comes within the proviso to S. 66, Evidence Act. One of the contentions on behalf of the appellants was that in order to entitle the Judge to admit the document as secondary evidence, notice would have to be given to the other side to produce the original. I have already stated that although the record of rights was founded upon the original sanad, and although it is quite clear that the document was in the possession or under the control of the plaintiffs, they failed to produce it. I should have very little hesitation in coming to the conclusion that, had the question been raised in the form in which it is now raised, the learned Judge in the Court below would have come to the conclusion that Sub-Cl. (2) of the proviso to S. 66, Evidence Act, applied; that is to say by the nature of the case the adverse party (who were the plaintiffs in this case) knew that they would be required to produce it. That in itself is sufficient, in my opinion, to answer the point. As I stated, the contention with regard to this document was that the Judge had been influenced in his consideration of the evidence that the plaintiffs adduced as regards their title. In my judgment, the reason which I have just stated is a sufficient answer to the argument advanced by Sir Sultan Ahmed on this point.

The other argument connected with this question is that in certain instances the Judge in the Court below has been guilty of errors of record. We have been referred to a number of documents, and it has been contended that the learned Judge has been in error in deciding what was their import. It is not contended that any of these documents was a document of title ; it is not contended that any question or any decision of the learned Judge with regard to these documents was a decision on a question of law ; and that being so, in my opinion quite clearly it is erroneous to describe an error (assuming there be an error in the Judge of the Court below) as an error of record. It is an erroneous decision on a question of fact and nothing more. Lord Buckmaster, in delivering the opinion of their Lordships of the Judicial Committee in 45 I A 183 (1), in reversing the decision of a Court of fact with regard to certain conclusions upon oral and documentary evidence, makes this statement :

> Their functions (referring to the High Court) were completely circumscribed by the provisions of the statute passed for the express purpose of securing some measure of finality in cases where the balance of evidence, verbal and documentary, arose for decision.

That, in my judgment, is this case, and we are bound by the decision of the Court below on questions of fact. There only remains the question of limitation. The claim in the plaint is, what I stated it to be at the commencement of my ob-

1. Nafar Chandra Pal v. Shukur Sheikh, 1918 P C 92=51 I C 760=45 I A 183=46 Cal 189 (P C).

servation, a prayer for a declaration of the plaintiffs' title, and that the settlement record is erroneous and fraudulent. In answer to a question from the Bench as to the existence of a claim for possession, Sir Sultan Ahmed referred us to paras. 14, 15 and 16 of the plaint. It is now abundantly clear that paras. 14, 15 and 16 of the plaint refer to properties not now the subject-matter of the action, a prayer for relief concerning which was withdrawn under an order dated 20th November 1929. It leaves us therefore in this position: that the plaintiffs' prayer was merely for a declaration. Now it is not disputed by Mr. Misra, although he has faintly argued that it is otherwise, that he was entitled to bring his action immediately after the final publication of the Record of Rights in 1909, and that the period of limitation ran from that date. The learned Judge in the trial Court, it would appear, had decided the point in favour of the plaintiffs on the ground that they had no knowledge of the entry in the Record of Rights. So far as that finding is concerned, it has been set aside by the appellate Court, the learned District Judge coming to the conclusion that the plaintiffs were aware of the Record of Rights, and therefore were aware of the existence of what has been described as a "cloud upon their title." That being so, and there being no dispute (and there can be no dispute) that Art. 120, Limitation Act, applies, the action is quite clearly barred by limitation. The fact that the plaintiffs paid an ad valorem court-fee can in no way affect the decision that this was a claim for a mere declaration and not a claim for possession; and indeed the plaintiffs alleged that they were in fact in possession. Mr. Misra's contention that it was open to the plaintiffs to bring their action within a period of six years from the death of Kshetramoni, the widow, is true only in a case where the action was for possession.

In my judgment, for the reasons I have stated, it seems to me that the action is barred by limitation, the decision of the learned District Judge is right and must be confirmed, and the appeal must fail and be dismissed with costs.

Rowland, J.—The attempt on the part of the appellants to escape from the finality of the findings of fact of the lower appellate Court suffers from the initial disadvantage of having to ignore the earlier part of the District Judge's judgment in which after pointing out that by statute the presumption is in favour of the correctness of the Record of Rights and that the onus lies heavily on the plaintiffs to displace that presumption, he discusses the evidence adduced by the plaintiffs and concludes:

> Thus I have considered all the important documents that the plaintiffs rely on and none of them appears to me to be inconsistent with the correctness of the entry in the Record of Rights.

Thereafter the District Judge proceeded to consider the evidence adduced on behalf of the defendants. It is contended that his treatment of Ex. F-1 is not justified both as regards its admissibility and as regards the significance to be attached to it. It is further said that he has not correctly interpreted Ex. D and that he has misread Ex. L. It seems to me that I need hardly dilate on this line of argument when from the outset it was doomed to failure in view of the finding that the plaintiffs had failed to discharge the onus of showing that the Record of Rights was incorrect. On the second point, that of limitation, the Munsif came to the conclusion that the suit was not time-barred after considering two decisions of this Court and without noticing that in both those dicisions the suit was framed so as to claim an adjudication coupled with consequential relief. In such a suit the plaintiff, it has been held, is not bound to include a prayer for correction of the Record of Rights, and if he does not include such a prayer, his suit for possession will not be defeated for that reason. Nor will it come under any different Article of limitation other than the ordinary limitation applying to suits for recovery of possession merely by reason that in order to succeed the plaintiffs require a finding that an entry in the Record of Rights is incorrect. But the present suit is differently framed. There is no consequential relief prayed for at all. The prayer is for a declaration and one of the declarations expressly asked for is that the settlement record is erroneous and fraudulent. Such a suit, I am clearly of opinion, is barred by the six years rule of limitation, commencing from the final publication of the record. I therefore entirely agree that the appeal should be dismissed.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1936 Patna 132

WORT, J.

Ramsundar Sahu— Plaintiff — Petitioner.

v.

Sakhi Sahoo—Defendant — Opposite Party.

Civil Revn. No. 325 of 1935, Decided on 16th November 1935, from order of Small Cause Court Judge, Sasaram, D/- 4th May 1935.

Provincial Small Cause Courts Act (1887), S. 25—High Court would ordinarily not call for record in every case in which possible error of law has been made— Lower Court committing all possible mistakes—Whole case a mis-trial—Case is liable to be sent back for retrial.

No doubt S. 25 gives discretion to the High Court, but in every case in which a possible error of law has been made the High Court would no tcall for the record and pass an order thereon. [P 132 C 1]

Where however the lower Court commits every possible mistake which is possible in the circumstances to commit and the whole case has been a mis-trial, the High Court, although it would not ordinarily interfere, would send back the case for re-trial. [P 132 C 1]

D. N. Varma—for Petitioner.

Harinandan Singh — for Opposite Party.

Order.—This rule is directed against the judgment of the Small Cause Court Judge in an action on a promissory note. I was much impressed with the argument addressed to me by the learned advocate appearing on behalf of the defendant to the effect that although perhaps S. 25, Small Cause Courts Act, is wider in its application than S. 115, Civil P. C., in this case no question of jurisdiction arose, and at the most the Judge has committed an error of law. I have construed the section referred to on more than one occasion in my judgments, but there is considerable difficulty in its application. It is note-worthy that the section gives discretion in the High Court, but I apprehend that in every case in which a possible error of law has been made, the High Court would not call for the record and pass an order thereon. But I do not think there is really very much doubt about this case, because not only has the Judge in the Court below committed every possible error which was possible in the circumstances to commit, but the case must be described as a mis-trial. The Judge appears to have confused the plaintiff with the mortgagor. At least he has not clearly defined in his mind the difference between the mortgagor and the plaintiff; the mortgagor in this case appears to have been called as the plaintiff's witness.

Now the short facts which presented themselves in this case were these. The plaintiff who did not appear in the witness-box claimed to have a promissory note in his favour for Rs. 165. It would appear that this debt is supposed to have been incurred by the defendant for the purpose of paying to the mortgagor (who was called as a witness) certain rents, which he was to collect and pay over to the mortgagor in advance. Whether the amount was Rs. 165 or any other sum is for the purposes of this point immaterial. The only question that the Judge had to try was whether there had been a promissory note executed by the defendant for Rs. 165 and whether there was a consideration for that note. The Court below in the first instance makes the profound mistake in placing the onus upon the plaintiff to prove the passing of consideration. This is indicated in two passages made in the course of its judgment. Now it would appear, with what justification I am not prepared to say, that the defendant admitted the execution of the promissory note. The words used by the Judge are these: "The execution of the hand-note is practically not denied on behalf of the defence." Now the first matter the Judge had to make up his mind about was whether the execution of the hand-note had been admitted or not. The law knows nothing about the word 'practically.' If the defendant admitted the execution he did admit it; if he did not, he did not admit it: and, if he did not admit the execution of the hand-note it was necessary for the plaintiff to prove it. Now once assuming for the moment that the admission was made, the onus was entirely on the defendant to prove that no consideration had passed. The Judge allowed himself to get into a state of utter confusion by mixing up the rehan bond with the promissory note. It may be to some extent the plaintiff's own fault to call the mortgagor in order to establish the account on what has been described as 'the hisab;' but it is quite clear that the rehan bond and the promissory note had no direct relation one with the other. The mere fact that by some arrangement

between the mortgagor and the mortgagee the mortgagee was to pay a sum of money on account of rents to the mortgagor, has nothing to do with the matter. The only question for the Judge in the Court below to try was whether as I have already said, the hand-note was executed and whether there was consideration; and it must be observed in this connection that the mere fact that the plaintiff obtained a hand-note for a sum in excess of the money actually lent or borrowed does not show that there was no consideration: in other words, the mere fact (or assuming it to be so) that Rs. 46 odd only was borrowed while the hand-note was for Rs. 165 does not entitle the Judge in law to find that the defendant was liable for Rs. 46 only. Had this been a case of endorsement by some person connected with the original acceptor, the position in law would have been entirely different.

Now there is a second aspect of the case. The defendant appears to have contended in his written statement that the hand-note was obtained by fraud or something of that kind. The manner in which the Judge deals with it is by saying:

> The hand-note cannot be said to be for a consideration exceeding Rs. 46-2-3 admitted to be due. It seems, under the threat of withholding the rehan deed, hand-note was executed for Rs. 165.

If there was evidence of that, the Judge of course was entitled to come to that conclusion; but from the record of the case it does not appear that there is an iota of evidence to support the contention that the hand-note was executed by reason of any threat, and indeed the plaintiff, who obtained the promissory note, as I have already pointed out, had nothing to do with the rehan bond. But these matters are matters for the Judge in the Court below. In those circumstances, although I hesitate to interfere with any of these cases, it cannot be said for one moment that this case has been properly tried. In the circumstances, the case must go back for re-trial on the evidence already before the Court. The Judge will determine first whether the hand-note was executed by the defendant. If the defendant has executed the hand-note, then the onus is on him to show that there was no consideration for the hand-note. The Court will not be satisfied that there was no consideration merely because Rs. 46 odd only was borrowed as against the hand-note of Rs. 165. I do not propose to suggest to the parties points which arise in the case. All I can say as regards the balance between Rs. 165 and Rs. 46 odd, if those facts are found, is that the Judge can only deprive the plaintiff of that balance on considerations which do not appear to have been mentioned by either party. The case will be remanded to be heard and determined according to law. The costs of this petition two gold mohurs will abide the result of the hearing in the Court below.

R.M./R.K. *Case remanded.*

A. I. R. 1936 Patna 133

WORT, J.

Munshi Mahton and *others*—Defendants—Appellants.

v.

Jugeswari Prasad Singh and *others*—Plaintiffs and *others* Pro forma Defendants—Respondents.

Appeal No. 243 of 1933, Decided on 4th December 1935, from appellate decree of Sub-Judge, 3rd Court, Patna, D/-15th August 1932.

Estoppel—*C* taking oral lease of land from *A* and erecting house thereon—*B* purchasing house after obtaining from *A* order permitting him to do so—Suit by *A* for ejecting *B*—*A* held not estopped to eject *B*—Permission by *A* held to be similar to license to sublet in cases of covenant not to assign or sublet.

C took an oral lease of certain land belonging to *A* and erected a house thereon. *B* purchased the said house from *C* and at the time of the purchase an order from *A* permitting him to purchase the house from *C*. *A* subsequently brought a suit to eject *B*, having served him with notice to quit :

Held : that *A* was not in any way estopped from saying that he was entitled to eject *B* on one month's notice. The actions of *B* and *C* were referable to the verbal contract whatever that may have been. The order given by *A* was merely a permission to purchase interest of *C* and was not dissimilar to license to sublet where there is covenant not to sublet or assign: 1925 *P C* 146, *Disting.* [P 134 C 1 ; P 135 C 1]

A. B. Mukharji and *U. N. Banarji*—for Appellants.

G. P. Singh—for Respondents.

Judgment.—This is a very hard case for the appellants and from whatever point of view I look at it, I find it impossible to accept the argument of Mr. Mukharji appearing on behalf of the defendants-appellants. The plaintiffs are the

landlords who brought an action to eject the defendants having served them with a notice to quit. A previous action had been brought in which the landlords had treated the defendants as tenants-at-will, but the Courts had rightly held that the defendants were not tenants-at-will and that a notice to quit was necessary. Hence this action out of which this appeal arises. Now the defendants purchased the house which they now occupy from the defendants-second party. It would appear that the defendants-second party took an oral lease of this land about four years ago and erected this house thereon. The purchase was made by the first party-defendants from the second party in 1922 and about the time of the purchase the defendants got from the plaintiffs an order which reads as follows :

> Order for the purchase of Dih land (land for residential use) to Shiboy Mahton and others of village Barh, pargana Ghayaspore, etc. etc., by Jugeshwari Prasad Singh, the malik and karta of the family, resident of village Gonawan. As prayed for, permission is given to you to purchase a residential house from Sham Lal Modi, son of Sanichar Modi. You do purchase the said residential house quite willingly with my permission and pay Rs. 25 as salami for recognizing you and registering your name. Hence an order in writing is given for future reference. Dated 3rd Jaith 1329 Fs.

Now Mr. Mukharji does not contend, and it is impossible to contend, that under that document he got a lease in perpetuity or a lease for any period for that matter. It was merely a permission to purchase the interest of defendants-second party. It is not dissimilar to a license to sublet in cases where there is a covenant not to assign or sublet. Even had the defendants been minded to bring an action for specific performance against the plaintiffs, I very much doubt whether they could have succeeded as there is no contract which might be described as a lease of the land for any period, much less a lease in perpetuity. But Mr. Mukharji contends that in the events which have happened the plaintiffs are estopped now from ejecting the defendants or, to put it in other words, they are estopped from saying that the defendants are not entitled to remain as tenants of this house in perpetuity. Reliance was placed on the decision in 52 I A 178 (1). Mr. Ameer Ali who delivered the opinion of their Lordships of the Judicial Committee of the Privy Council applied the principle of *Ramsden* v. *Dyson* (2) and there held that the defendants were entitled to a permanent lease having regard to a representation made by the plaintiff dated 31st December 1903. Now whatever may be said about the application of the principle laid down in 52 I A 178 (1), it seems to me to be a case which is very clearly different from the one which is before me. There had been a lease dated 22nd June 1894 in that case, and the manager of the defendant apparently being uncertain as to what was the nature of that lease, wrote to the plaintiffs, and the plaintiffs had made a representation which their Lordships of the Privy Council described as an estoppel :

> Referring to your conversation of this morning with Mr. Forbes and myself, I write at your request to say that the lease executed by Mr. C. Acatos, dated 22nd June 1894, is a permanent lease and gives you the right to erect buildings, but it does not entitle you to hold at fixed rate.

Reference was made to that authority in the well-known decision of 58 I A 91 (3) at p. 102 where Lord Russell states :

> Reference is made by the learned Judge to the case of 52 I A 178 (1) before this Board, but that decision was based upon an estoppel grounded upon a statement of fact.

Now as I look at the matter, at the very highest the appellants' case can be put in this way: that by the order dated 3rd Jath 1329 Fs, the appellants were allowed to purchase all the interest which the defendants-second party had. From one point of view the case in my judgment could not be stated to be as favourable to the appellants as that ; but assuming that they had the authority from the landlords to purchase the interest of defendants second party, what had the defendants second party? Apparently they had gone on the land and erected the building on this oral lease. Now it would be impossible for me to say that they had a lease in perpetuity, as S. 107, T. P. Act, would have been in their way, and for myself I cannot distinguish the position of defendants second party and therefore of course defendants first party, if their rights were co-extensive, with the position of Ariff had gone into possession on

1. Forbes v. Ralli, 1925 P C 146=87 I C 318=52 I A 178=4 Pat 707 (P C).

2. (1866) 1 H L 129=14 W R 926=12 Jur N S 506.

3. Ariff v. Jadunath Mazumdar, 1931 P C 79=131 I C 762=58 I A 91=58 Cal 1235 (P C).

an oral agreement under which the proprietor had agreed to give him a lease in perpetuity. Ariff alleged that on that representation he put up the buildings and was put to great expense, and it was contended in that case that the proprietor was estopped. Lord Russel in dealing with the case made this statement :

In truth this case, when the true facts are appreciated, is simple enough. The acts of the respondent are all referable to a verbal contract which was enforceable against the appellant at the time when the respondent's expenditure was incurred and for long afterwards. Unfortunately for the respondent, he allowed his right to enforce his contract to become barred, with the result that he can only resist the appellant's claim to possession by seeking to establish a title, the acquisition of which is forbidden by the statute. The statute disables him from contesting the appellant's right to possession.

Assuming in favour of the appellants that the rights of defendants first party and those of defendants second party are the same, I cannot help saying that the actions of the defendants are referable to the verbal contract whatever that may have been. Again assuming that defendants first party had purchased the rights of defendants second party, they might have had a right to specific performance, but it cannot be said that the plaintiffs are estopped in any way now from saying in their action that they are entitled to eject the defendants on one month's notice. As I have said, it is a hard case for the defendants, but that can in no way influence my view on the question of law which arises. The appeal in my judgment fails and must be dismissed with costs, but the appellants may have leave to appeal under the Letters Patent.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1936 Patna 135

FAZL ALI, J.

Jagdeo Prasad and *another*—Defendants—Appellants.

v.

Bhagwan Hajam—Plaintiff—Respondent.

Appeal No. 392 of 1933, Decided on 20th December 1935, from appellate decree of Sub-Judge, Third Court, Gaya, D/- 10th January 1933.

Decree—Setting aside—Fraud—Suit to set aside ex parte decree—Court coming to finding as to non-service of summons or notice in previous suit—Court can go into merits of suit to determine as to whether there was motive for wilful or fraudulent suppression of summons or notice to prevent defendant from placing his case before Court.

No doubt, decree passed by a competent Court cannot be set aside by a suit, simply on the ground that it is based on a false claim or on the mere ground that there was no service of summons or notice, but after the Court comes to a finding as to the non-service of summons or notice, it is open to it to go into the merits of the previous suit with the object of determining as to whether there was a motive for wilful or fraudulent suppression of the notice or summons in order to obtain a decree based on a false claim. [P 136 C 1]

Where, therefore, the mere non-service of summons is not by itself sufficient to prove fraud, it is permissible for the Court to go into the merits of the original claim and if the claim is found to be false, to draw such inference as to fraud as the circumstances may warrant : 1927 *Pat* 183, *Rel. on.* [P 136 C 1]

Sarjoo Prasad—for Appellants.

Rajkishore Prasad—for Respondent.

Judgment.—This appeal arises out of a suit brought by the respondent to set aside an ex parte decree which had been obtained by the appellants against the respondent for a sum of Rs. 50 in the Court of the Small Cause Court Judge at Calcutta on 20th May 1928. The Munsif who tried the suit dismissed it on the ground that the plaintiff had failed to prove that the decree had been fraudulently obtained. On appeal, however, the decision of the Munsif was reversed by the learned Subordinate Judge who heard the appeal. It may be stated here that in this particular case no summons had been either issued or served upon the plaintiff, in the Small Cause Court suit ; but it appears that a registered cover was issued by the Court, and the evidence adduced in the case was that this cover was tendered to the plaintiff by one Deep Narain Chaube, the postal peon, but the plaintiff refused to accept it. The learned Subordinate Judge investigated the question whether this registered cover had been tendered at all to the plaintiff and accepting the evidence adduced on behalf of the plaintiff that the postal peon was a person not wholly unconnected with the defendants, he came to the following conclusion :

There is no satisfactory evidence to show that the summons of the Small Cause Court suit was served on the plaintiff and that he had knowledge of the suit. It is unsafe to fix liability on the plaintiff simply on the uncorroborated statement of the postal peon.

Having come to this conclusion the learned Subordinate Judge proceeded to consider whether the Small Cause Court

suit brought by the defendants against the plaintiff was based on true allegations or not or, in other words, whether the defendants' claim was true or false. The learned Subordinate Judge, after examining the evidence before him, virtually came to the conclusion that the claim was not true. Having come to these findings, he expressed the view that the decree had been fraudulently obtained by the defendant against the plaintiff, and he accordingly allowed the appeal and decreed the plaintiff's suit. Now in this second appeal, which has been preferred on behalf of the defendants, it is contended that the learned Subordinate Judge not having found in clear terms that there was any suppression of summons or notice in this case, was not competent to set aside the decree merely on the ground that the appellants' claim in the Small Cause Court suit was false. It is true that a decree passed by a competent Court cannot be set aside by a suit simply on the ground that it was based on a false claim or on the mere ground that there was no service of summons or notice.

But, as was pointed out by a Division Bench of this Court in 8 P L T 193 (1), after the Court comes to a finding as to the non-service of summons or notice, it is open to it to go into the merits of the previous suit with the object of determining as to whether there was a motive for wilful or fraudulent suppression of the notice or summons in order to obtain a decree based on a false claim by preventing the defendant from placing his case before the Court. Now there may be cases in which, without going into the merits of the claim, it may be possible to find on the evidence that the summons or notice was fraudulently suppressed with the object of preventing the defendant from placing his case before the Court. There may however be cases in which mere non-service of the summons may not be sufficient by itself to prove fraud, and in such cases it has been held that it is permissible for the Court to go into the merits of the original claim, and, if the claim is found to be false, to draw such inference as to fraud as the circumstances may warrant. It appears to me that the learned Subordinate Judge has virtually acted upon this rule in the present case because the learned Subordinate Judge ultimately came to the conclusion that the decree had been fraudulently obtained by the defendants against the plaintiff. It is true that the learned Subordinate Judge has not come to the positive finding that the summons was deliberately suppressed but has only negatively found that there was no satisfactory evidence to show that the summons of the Small Cause Court suit had been served on the plaintiff and that he had knowledge of the suit. But reading his judgment as a whole, it appears to me that he must have examined the merits of the case merely to find out whether the non-service was accidental or deliberate.

In these circumstances, it appears to me that the appeal must fail and it is accordingly dismissed. Parties will bear their own costs in this Court.

R.M./R.K. *Appeal dismissed.*

1. Ramchandra Prasad v. Firm Parbhulal Ram Ratan, 1927 Pat 183=101 I C 780=6 Pat 458 =8 P L T 193.

A. I. R. 1936 Patna 136

WORT AND ROWLAND, JJ.

Mt. Bibi Zainab and *others*—Defendants—Appellants.

v.

Muhammad Ayub—Plaintiff and *others* Defendants—Respondents.

Appeal No. 542 of 1932, Decided on 13th December 1935, from decision of Dist. Judge, Shahabad, D/- 6th February 1932.

(a) Evidence Act (1872), S. 66, Prov. 2—Document produced from custody of person asserting title — Fact is important in considering question of benami—Judge is not however bound to conclude that title is made out.

The fact that the documents of title are produced from the custody of certain person, is of importance in considering a question of benami, but the Judge in considering such a question, is not bound to come to the conclusion that, in the event of a document being produced from the custody of the person asserting that title, his case is made out. [P 138 C 1]

(b) Adverse Possession—Cosharer—Ouster—Knowledge on part of person ousted is essential — Non-receipt of rent is not proof of ouster—Burden of proof is on person setting up adverse title.

Exclusion or ouster involves not merely the act of the person ousting but the state of mind of the person ousted. Knowledge on the part of the latter is therefore essential. [P 139 C 2]

The mere fact of non-receipt of rents is not conclusive proof of ouster by co-sharer who is in possession. [P 139 C 1]

The onus of proving ouster is upon persons who set up adverse title: 1930 *Cal* 466; 1919 *P C* 44 and *Culley* v. *Taylerson*, 11 *Ad & El* 1008, *Rel. on.* [P 139 C 2]

(c) Second Appeal — Question of law — Lower Court stating law correctly and coming to particular conclusion—It decides point as question of law.

Where the lower Court Judge states the law correctly and does not misdirect himself and comes to a particular conclusion, he decides the point as a question of law and not as a question of fact. [P 139 C 2]

(d) Adverse Possession—Proof of—Possession referable to lawful title will not be deemed to be derived from usurpation.

Where possession can be referred to a lawful title, it will not in the absence of very cogent reasons be deemed to be derived from usurpation. [P 140 C 2]

Mahabir Prasad and *Harinandan Singh*—for Appellants.

Manohar Lal, *Yasin Yunus* and *J. N. Sahay*—for Respondents.

Wort, J.—This appeal is by the defendants in an action brought by the plaintiff for possession of two parcels of land upon one of which stood a house which was admittedly in possession of the defendants. It is quite unnecessary to set out in detail the actual facts. It is sufficient to say that the plaintiff claimed title through a purchase from Mt. Masiman and Mt. Safiban who were daughters of one Khedan Mian by his first wife. Some question arose in the Court below as to whether they were in fact sisters, as the facts I have stated would indicate, or whether they were cousins as was the later case of the plaintiff before the learned District Judge. The learned District Judge however has come to the conclusion that they were cousins, but, in the events which have happened and the facts which have been found by the learned Judge, nothing turns upon that question excepting the question relating to an argument advanced by Mr. Mahabir Prasad appearing on behalf of the defendant-appellants with which I shall in a moment deal.

The defendants claimed to have been in possession of the property by a gift from Mt. Jumratan which was made just before her death; her death took place in 1928. The alternative case made by them was that the property in dispute was not the property of Khedan Mian, the ancestor, but had been purchased by Mohammad Rafiq, who was the son of Khedan Mian through his first wife Mt. Bano. There was another case put forward by the defendants and this was that the defendants had title by adverse possession. Certain questions of fact in those circumstances came to be considered by the learned Judge in the Court below. The learned Judge has found that the story of the gift has not been established. He has come to the conclusion that the property was not purchased by Muhammad Rafiq but that it was the property of Khedan Mian. He has also come to the conclusion that the defendants had no title by adverse possession. There were incidental questions which related to these principal questions, but it is unnecessary to refer to them.

Mr. Mahabir Prasad on behalf of the defendants-appellants contends that, in deciding the question whether the property was the property of Khedan Mian or whether it was the property of Muhammad Rafiq, the learned District Judge has failed to take into consideration one of the principal documents of title upon which the defendants relied; that was Ex. D. Ex. D purports to be a purchase by Muhammad Rafiq in the year 1890 for the purpose of building a house which is one of the properties, the subject-matter of this dispute. In my judgment, however, the argument is unsustainable. It is to be noticed that the case which the defendants attempted to make out in their written statement was that they had purchased the whole of the land upon which the house stood. It is true that the learned Judge in the Court below has not referred to this particular document (Ex. D) by name, but in considering the question of the title set up by the plaintiff, he has quite clearly referred to it. The circumstances were these. The defendants came to Court and adduced in evidence three documents Ex. D which referred to the land upon which the house stood, Ex. A and Ex. B, which related to the other land, the subject-matter of the dispute. They were met, however, by Ex. 2, the document produced by the plaintiff. Now it would appear that the defendants were unaware of the existence of this document Ex. 2. It was a document in the name of Khedan Mian, and, if once accepted by the Judge of fact, would dispose of the defendant's case entirely. The explanation which the defendants gave was that the purchase had in fact been made by Muhammad Rafiq, but in the benami name of his

father, Khedan Mian. This is a case which the learned Judge in the Court below did not accept. The matter therefore stands in this way that the defendants came into Court with a document which purported to show a title to the whole of the land upon which the house stood and were met by this document (Ex. 2) which they sought to explain in the manner which I have already indicated. It is impossible, after reading the judgment of the learned Judge on this question, to hold that he did not consider Ex. D. The learned Judge in disposing of this matter makes this statement :

> The appellants' case in the written statement was that Khedan had nothing to do with the properties and Rafiq acquired the whole of the properties in suit. But in the course of the trial the case of the appellants underwent a change. The defence witnesses gave evidence to the effect that there was an old ancestral house of Khedan, but that house fell down and Rafiq built a new house on the site by acquiring more land. This case is a new case which was never alleged in the written statement.

This statement of the learned Judge is borne out by a reference to para. 11 of the written statement. In my judgment, as I have already said, it is impossible to come to the conclusion that the learned Judge ignored Ex. D in coming to the conclusion on the question whether the property was the property of Khedan Mian or whether it had been purchased by Muhammad Rafiq. The other question relating to title to the property in dispute, as set up by the defendants, is this. The case of the defendants was that the property was purchased benami and the only point advanced by Mr. Mahabir Prasad on this part of the case is that the learned Judge failed to consider one of the most important facts in the case which would go to establish the case made out by the defendants. The fact to which he referred is that the documents of title were produced from the custody of the defendants. It is impossible to say that a fact of that kind is of no importance in considering a question of benami, but it is equally impossible to say that a Judge in considering a question of this character is bound to come to the conclusion, in the event of a document being produced from the custody of the person asserting that title, that his case is made out. The learned Judge, as far as we can see in this case, was disposed to find against the defendants for a very simple reason and that is that a number of transactions to which reference was made in the Court below (of a benami character that is to say) were transactions by Khedan Mian not in the benami name of Mahommad Rafiq as the defendants would seek to make out, but in the benami name of his wife ; in other words, the practice of Khedan Mian was not, as suggested by the defendants, to use the name of his son, but to use the name of his wife. It is a matter entirely within the competence of the learned Judge to place what value he thought upon this fact, and he having come to a conclusion on what is a question of fact, it is impossible for this Court to disturb that decision in second appeal.

The only other substantial question argued by Mr. Mahabir Prasad on behalf of the appellants is that relating to adverse possession. Now what appears to have been found here is that after the death of Khedan Mian his cousin Jan Ali had the properties recorded in his name, and after the death of Jan Ali, they were recorded in the name of his wife Mt. Jumratan. The other fact that the learned Judge has found is that the other co-sharers from whom the plaintiff claimed his title did not enjoy the rents of the properties in dispute nor did they live in the house which also was the subject-matter of this action. Mr. Mahabir Prasad contends that although the entry in the record-of-rights is not sufficient in itself, that taken together with the finding of fact, that the other co-sharers did not enjoy the rents and profits of these properties, was conclusive on the question of adverse possession of Jan Ali. Mr. Mahabir Prasad is driven to that position because once it is admitted that those facts were merely evidence of ouster, it would be for the learned Judge in the Court below to consider whether in the circumstances of the case ouster was established. The argument is put in another way. The learned Judge commences this part of his judgment by stating :

> This brings us to the question of law regarding adverse possession, the most important point which has been agitated before me on behalf of the appellants.

Mr. Mahabir Prasad contends that the learned Judge has held that the entry in the Record-of-Rights in the name of Jan Ali and the non-receipt of rents by the other co-sharers are as a matter of law, not evidence of ouster. Reference

was made by the learned Judge in the Court below to the decision in 34 C W N 246 (1). During the course of his judgment in the case Mukerji, J., referred to the case of 11 Ad & El 1008 (2) in which Lord Denman said :

> But where the claimant, tenant-in-common, has not been in the participation of the rents and profits for a considerable length of time and other circumstances concur, the Judge will direct the jury to take into consideration whether they will presume that there had been an ouster ;

and, then referring to the case reported in 1912 A C 230 (3), makes this observation :

> Speaking of extinguishment of title of a person by reason of adverse possession on the part of his co-owners, the House of Lords observed that nothing short of ouster or something equivalent to ouster could bring about the same result.

Then Mukherji, J., observed :

> Exclusion or ouster involves not merely the act of the person ousting but the state of mind of the person ousted. Knowledge on the part of the latter therefore is essential. Such knowledge may be proved directly or inferentially.

I refer to the case of 11 Ad & El 1008 (2) for the reason that their Lordships of the Privy Council in the case of 46 I A 285 (4), referred to this case and Lord Cave, delivering the judgment of the Privy Council, said:

> Whether this rule (that is the rule that the possession of one part-owner is the possession of others) is applicable to sharers in an unpartitioned agricultural village in India not holding their shares as members of a joint family, it is unnecessary for the purposes of the present case to decide; for upon the facts of the case the rule has no application. The limits of the rule were defined in 11 Ad & El 1008 (2) as follows,

and then refers to the passage which I have read from the judgment of Mukherji, J. It is perfectly clear in the first place that the mere fact of itself, that is to say, non-receipt of rents is not conclusive evidence of ouster by the co-sharer who is in possession. Even taking the facts together with the fact proved in this case, namely, the entry in the Record-of-Rights of Jan Ali's name, it is a question, as Lord Denman said, for the jury (that is to say the Court of fact) to say whether they will presume that there has been an outser. But in my judgment in this case it was necessary to prove facts other than those which have been established here ; to use the words of Mukherji, J. :

> Exclusion or ouster involves not merely the act of the person ousting but the state of mind of the person ousted. Knowledge on the part of the latter, therefore, is essential.

Now the position is this that in the first place something other than that which has been proved was necessary. The onus with regard to the matter was upon the defendants here who were setting up their adverse title. Even assuming that they had established all that was necessary in the circumstances, it was for the Court of fact to say whether in the circumstances an ouster could be presumed. Now that leaves only one question to be decided, namely, whether the learned Judge in the Court below has decided this as a question of law or whether he has taken the evidence into consideration and decided it as a question of fact. In my judgment the learned Judge here has not misdirected himself. He has stated, as Mr. Mahabir Prasad admits, the law correctly and has come to the conclusion that in the circumstances of the case no ouster was proved, and therefore the title which was set up by the defendants was not established. For those reasons, in my judgment, the decision of the learned Judge in the Court below is correct and the appeal therefore fails which must be dismissed with costs.

Rowland, J.—I agree. It is perhaps unfortunate that whereas the arguments in the case before the District Judge were concluded on 23rd July 1931 ; it was not till 6th February 1932, that he delivered his judgment. The findings at which the District Judge arrived were that the purchaser of the properties in suit was Khedan and not Rafiq ; that the heirs of Khedan were Musiman, Safihan, Jumratan and Khedan's cousin Jan Ali ; that the entry of the properties in the Record-of-Rights and other papers in the name of Jan Ali and thereafter of Jumratan did not amount to ouster of the other co-sharers; and that on the death of Jumratan in 1928, Musiman and Safihan had good title to confer on the plaintiff by the sale-deeds, dated respectively 1st January 1929, 8th February 1929 and 30th May 1929. Perhaps the long delay between the hearing of arguments and delivery of judgment may have something to do with the omission of the District

1. Abdul Wahed v. Mohan Bashi Saha, 1930 Cal 466=128 I C 103=34 C W N 246.
2. Culley v. Taylerson, (1840) 11 Ad & El 1008 =3 P & D 539=9 L J Q B 288.
3. Corea v. Appuhamy, (1912) A C 230 = 81 L J P C 151=105 L T 836.
4. Varada Pillai v. Jeevaratnammal, 1919 P C 44=53 I C 901=46 I A 285=43 Mad 244 (PC).

Judge to consider in his judgment exhibit D, the lease taken in the name of Rafiq in 1890 of a portion of land for the building of a residential house. This has left a loop-hole to Mr. Mahabir Prasad to argue that the District Judge's finding that the purchase of the property was by Khedan is not a proper finding of fact concluding the matter. It has been contended that had Ex. D been considered by the Courts below the conclusion should have been otherwise. In fact I do not think that, if the District Judge had considered Ex. D along with Exs. 2, A and B, it would have made any difference to his finding. He has on other grounds found the evidence of the witnesses for the defendants to be unreliable, and he has expressed a strong opinion as to the improbability of Rafiq taking the property in the farzi name of his father. I have no doubt that in the view that the District Judge was disposed to take of that transaction he would have had little hesitation in holding that it was more likely that the father should take property in the name of his son and that Rafiq's name in Ex. D caused no difficulty in adhering to that view. It is then said that the District Judge's finding is open to criticism because he has not considered the fact that exhibits A, B and D came from the custody of the defendants. Now this custody could be accounted for by the fact that there seemed to have been friendly relation between Jumratan and Kulsom and there is no improbability in the defendants thus having got the custody of the documents from Jumratan. It will be remembered that the defendants had set up a case of gift by Jumratan to the defendants. That case was negatived by the District Judge ; but on the findings on the other issues it makes no difference whether Jumratan purported to give the property which she was holding only as a co-sharer, so that the failure of the District Judge to consider Exs. A, B and D is another matter having no effect on the validity of the findings.

The other finding that has been attacked is that the possession of Jan Ali and Jumratan did not amount to ouster of the other co-sharers. This point has been examined in detail in the judgment of my learned brother, and it is only necessary to say that I have no doubt the District Judge correctly applied the principle that where possession can be referred to a lawful title, it will not in the absence of very cogent reasons be deemed to be derived from usurpation. I agree therefore that the appeal should be dismissed.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1936 Patna 140

WORT AND ROWLAND, JJ.

(Firm) Mohan Lal Ram Gopal—Plaintiff—Appellant.

v.

(Firm) Udai Ram-Sewa Ram and others—Defendants—Respondents.

Appeal No. 695 of 1932, Decided on 10th December 1935, from appellate decree of Sub-Judge, Motihari, D/- 5th February 1932.

(a) Civil P. C. (1908), O. 30. R. 1 — Plaintiff describing himself as "Firm *X*, situate in *Y*, through *B*, proprietor of said firm"—Plaint signed by *B* — Plaintiff cannot be deemed to be suing in firm's name but in his own name—*Obiter.*

Obiter.—What is contemplated by O. 30, R. 1 is that two or more persons under a firm may sue without mentioning the names of the individuals. [P 141 C 1]

That is not the case, where the plaint describes the plaintiff himself as the "firm *X*, situate in *Y*, etc., through *B*, proprietor of the said firm" and the plaint is signed by *B*, as the plaintiff cannot be deemed to be suing in the firm's name but in his own name, and the mere fact of the firm's name being mentioned, in no way affects the matter. [P 141 C 1]

(b) Civil P. C., (1908) S. 100—Finding of fact however gross and inexcusable is binding.

A finding of fact in second appeal is binding upon the High Court however gross and inexcusable that finding may be : 17 *I A* 123, *Foll.* [P 141 C 1, 2]

(c) Practice — Pleadings — Frame of suit defective—Court must give party opportunity of putting pleadings in order.

Per *Rowland, J.*—The technical rule governing the framing of pleadings are not intended to deprive a litigant of his remedies but to serve the ends of justice. Where, therefore, a Court finds that the frame of a suit is defective it should give the plaintiff an opportunity of putting his pleadings in order : 1930 *Bom* 216, *Foll.* [P 142 C 2]

Sarju Prasad and *K. Dayal* — for Appellant.

A. K. Roy and *Harihar Prasad Sinha* —for Respondents.

Wort, J.—This is the plaintiff's appeal in an action in which balance of account was claimed to the amount of Rs. 1,027-1-3. The plaintiff's case was that there being money-lending transac-

tion between the plaintiff-firm and the defendants, after certain payments made by the defendants there was a balance the figure of which I have just mentioned. The trial Court gave judgment for the plaintiff, but that decision was reversed in the lower appellate Court. The first point upon which the learned Judge in the Court below reversed the decision of the trial Court was as to the maintainability of the suit, as it was described. The plaintiff in this plaint had described the plaintiff himself as the

> Firm Mohan Lal Ram Gopal, situate in Bettiah town, etc., through Babu Bhagat Lall, proprietor of the said firm,

and the plaint was signed by Babu Bhagat Lall. The Judge in the Court below has decided against the plaintiff on the assumption that the plaintiff was suing under the firm's name. It will be a waste of public time to refer to authorities in this matter. The short answer to the point, so far as it is necessary to mention it in this appeal, is that the plaintiff was suing not in the firm's name but in his own name, and the mere fact of the firm's name being mentioned in no way affects the matter. What is contemplated in O. 30, R. 1, Civil P. C., is that two or more persons under a firm may sue without mentioning the names of the individuals. That is not this case. The point is answered in the manner I have already indicated. But in the circumstances it is unnecessary to come to any definite conclusion on that matter for the reason that the learned Judge in the Court below has decided it against the plaintiff upon the merits. Mr. Sarju Prasad appearing on behalf of the appellant frankly admits that his argument relates to questions of fact, but he has contended that the decision of the learned Judge in the Court below is not binding upon us, because the learned Judge misconceived the pleadings, misconceived the evidence and has been guilty of one or two instances of errors of record. We have no jurisdiction even to discuss this matter as was pointed out by their Lordships of the Judicial Committee in the well-known case of 17 I A 122 (1) at p. 127 where it was laid down that a finding of fact in second appeal is binding upon the High Court however gross or inexcusable that finding may be. The first point (I mention the points merely to show that they are questions of fact) is this: that the learned Judge in the Court below is said to have committed an error of record because he states that the plaintiff admits the transactions were not in his presence. We have been referred to a passage in the evidence of the plaintiff which might be read in the manner in which Mr. Sarju Prasad wishes us to read it; but all I propose to say with regard to the matter that having regard also to a statement at the end of the cross-examination of the plaintiff with regard to a hundi which was not the subject-matter of the action but which the plaintiff made a part of his evidence, I am of opinion that the finding of the Judge was excusable, to put it no higher. The second error of record so called is that the learned Judge states in his judgment with regard to the hundi which I have mentioned, the following:

> Except the entry in the plaintiff's account books about the payment of the hundi to defendant 1, there is no evidence on the point and defendant 1 has denied his alleged endorsement on the hundi stating that he did not receive the money entered in it.

The passage taken as a whole seems to be clear. We have looked at the evidence not for the purpose of deciding the fact but to understand the point, and it clearly appears that no specific question was put to the defendant as to his signature, but when asked questions regarding the transaction which the hundi represented, he denied it in its entirety. It seems to me quite clear what the learned Judge means when he says that he denied the alleged endorsement on the hundi stating that he did not receive the money being the consideration for it. But the whole matter of the appeal is disposed of by the other findings, more particularly those relating to the books. The judgment of the Judge in the Court below can be summarised by stating that he has disbelieved the account books produced by the plaintiff, and once having arrived at that view of the case, although the Judge might have been guilty of an error of record (I do not decide that he was) the reversal of his decision on the points which are said to be the subject-matter of that error of record would in no way assist the plaintiff having regard to his finding. In my judgment the finding of the Court below, whatever criti-

1. Mt. Durga Choudhrain v. Jawahir Singh, (1891) 18 Cal 23=17 I A 122=5 Sar 560 (P C).

cism there may be of it, was a finding of fact and is binding upon us in second appeal. The appeal therefore fails and must be dismissed with costs.

Rowland, J.—I agree. With reference to the question of maintainability of the suit as framed I would like just to add that if the Subordinate Judge had been right in his view that the frame of the suit was defective, he would have done better to give the plaintiff an opportunity of putting his pleadings in order. Such procedure is provided for in O. 1, R. 10, Civil P. C., where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff. Again O. 6, R. 17, provides for allowing alteration or amendment of pleadings "at any stage," and points out that

> all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

The technical rules governing the framing of pleadings are not intended to deprive a litigant of his remedy, but to serve the ends of justice. If the learned Subordinate Judge had read with attention the decision in 1930 Bom 216 (2), on which he relies, he would have observed that what was actually done by the Court in that case was to allow the title to be corrected so as to bring the parties face to face and allow determination on the merits of the real point at issue. The appeal must be dismissed for the reasons given by my learned brother.

R.M./R.K. *Appeal dismissed.*

2. Samrathrai Khetsidas v. Kasturbhai Jagabhai, 1930 Bom 216=127 I C 412=32 Bom L R 212.

A. I. R. 1936 Patna 142

MOHAMMAD NOOR AND VARMA, JJ.

Nitai Lal Dutta—Plaintiff—Appellant.

v.

Gobinda Bhushan Sen and *others*—Defendants—Respondents.

Appeal No. 163 of 1931, Decided on 19th December 1935, from original decree of Sub-Judge, Dhanbad, D/- 15th June 1931.

(a) Practice—Pleadings — Plaintiff joining in one suit two independent claims — Court should not try suit in that form — It should ask plaintiff to elect.

Where the plaintiff sues in one suit for a declaration of his title as proprietor in respect of a portion in certain land and for partition of his share after the declaration of his title and also sues in the same suit the admitted raiyats of the land, calling upon them to remove a building from his holding and thus joins two claims and causes of action which are absolutely independent and unconcerned with one another, the suit should not be tried in the form in which it is instituted. The Court should ask the plaintiff to elect to proceed with one of the claims. [P 143 C 2]

(b) Chota Nagpur Tenancy Act (6 of 1908), Ss. 21, 22 and 139 (4) — Suit by landlord for ejecting occupancy tenant for using land in way detrimental to tenancy is entertainable exclusively by Deputy Commissioner under S. 139 (4) — It is doubtful whether suit lies in Civil Court for injunction restraining such use of land—*Quaere.*

Quaere.—A suit by a landlord for ejecting an occupancy raiyat for having used the land occupied by him on a way as to render it unfit for purpose of tenancy is entertainable exclusively by the Deputy Commissioner under S. 139 (4), Chota Nagpur Tenancy Act, and it is doubtful whether under the Tenancy Law of Chota Nagpur, a suit lies in a civil Court against an occupancy raiyat for an injunction to restrain him from using the land in a way detrimental to the tenancy. The landlord by bringing such a suit circumvents the jurisdiction of the Deputy Commissioner. [P 144 C 1]

(c) Record of rights—Value of—Record of rights has presumptive evidentiary value.

A Record-of-Rights has a presumptive evidentiary value. Under the law the entries must be presumed to be correct unless the contrary is proved by evidence. [P 144 C 2]

(d) Hindu Law — Dayabhaga — Partition—Partition between brothers — All properties must be deemed to be separate.

Where the parties are governed by Dayabhaga school, once there is a partition between the brothers, it must be taken that all the properties are separated. The mere fact that the brothers execute certain documents jointly does not show that they have not separated. [P 144 C 2]

Abani Bhushan Mukharji and *S. C. Mazumdar*—for Appellant.

P. K. Sen and *U. N. Banerji* — for Respondents.

Mohammad Noor, J.—The facts of the case out of which this appeal has arisen are simple though a number of unnecessary facts and documents brought on the record have made them somewhat complicated and have clouded the real issue involved in it. The suit relates to two pieces of land, being survey plots Nos. 2396 and 2397 situated within the town of Jharia in the district of Manbhum. They are within the area referred in the suit as Manbad which is the barmottar property of some Brahmins who for the sake of brevity may be called 'the Hazras'. After division and subdivision among the

Hazras these two plots came to the share of one Ramkumar Hazra, and on his death to the share of his three sons, Raghu, Sibu and Sambhu. It is an admitted fact that these plots along with some other plots of land formed the occupancy holding of one Lochan Dutt the ancestor of defendants 2, 3 and 4, the Hazras being their landlords. After division and subdivision among the descendants of Lochan Dutt, these two plots along with another plot No. 1269 came to be possessed by one Bileshwar Dutt, the father of defendants 2 to 4 as raiyat with an annual rent of Rs. 1-8-0. So far the position is admitted, i. e., defendants 2 to 4 are the raiyats of the three plots 1269, 2396 and 2397 on an annual rent of Rs. 1-8-0, and Raghu Hazra and his brother were their landlords. The plaintiff claims to have acquired from the Hazras mukarrari of plot 1269 along with some other lands under a deed dated 8th October 1913 (Ex. 3). We are however not concerned with that plot as the suit is, as I have said, in respect of the other two plots only. It appears that Raghu Hazra executed a sale deed (Ex. A-1), on 20th January 1917 in respect of all the three plots of land in favour of defendant 1 who is the sister's son of defendants 2 to 4. Thereafter there was the settlement proceeding in which defendant 1 alone was recorded as the landlord of these two plots and the plaintiff was recorded in respect of plot No. 1269. After the settlement operation the plaintiff got a sale-deed in respect of two-thirds of these two plots from Sibu and Sambhu, the two brothers of Raghu who claimed to have that much share in them presumably on the ground that Raghu had no more than one-third share in them. The simple question in this case is whether the defendant 1 acquired any title to the proprietary right in these two plots from Raghu by virtue of the sale-deed (Ex. A-1) dated 20th January 1917, or whether that sale-deed did not operate beyond one-third share of the two plots, the other two-thirds being the property of Raghu's two brothers Sibu and Sambhu, who conveyed it to the plaintiff under Ex. 8 dated 17th February 1925.

The present suit is for a declaration of the plaintiff's title to the two-thirds share of the two plots on the basis of his purchase from Sibu and Sambhu, and for partition by metes and bounds between him and defendant 1 so as to separate his two-thirds share from the one-third share of defendant 1 by virtue of the latter's purchase from Raghu alone. The plaintiff also impleaded in the suit the raiyats, defendants 2 to 4, and asked for a permanent injunction against them restraining them from erecting any house upon the land and for an order that any house which may have been built by them upon the land should be removed and in case of failure on their part to do so it should be demolished by the Court. The defence was a denial of the plaintiff's title to the two plots in question. It was claimed to be entirely owned by defendant 1 by virtue of his purchase from Raghu under Ex. A-1. It was alleged by the defendants that there was a partition among the three brothers Raghu, Sibu and Sambhu and the two plots in suit and some other land fell to the share of Raghu alone. The learned Subordinate Judge has dismissed the suit holding that the plaintiff had no title and that the suit was barred by limitation. The plaintiff has preferred this appeal. I must state at the outset that the suit seems to me of a very peculiar nature. Two causes of action against two sets of defendants have been combined in one suit. In one suit the plaintiff has sued for a declaration of his title as proprietor in respect of two-thirds of the land against defendant 1 and for partition of his share after a declaration of that title and has also sued the admitted raiyats of the land for an independent relief against them in respect of the house which they have built on it.

It is again curious that the plaintiff has not confined his relief for injunction and demolition of house on land which may eventually fall to his share after his title be established and his portion separated. He has asked for demolition of house standing on any portion of the two plots. In my opinion the learned Subordinate Judge ought to have called upon the plaintiff to elect. The two claims in the suit were absolutely independent and unconcerned with one another. A suit against an alleged co-sharer for declaration of title and partition has nothing whatsoever to do with a suit against occupancy raiyats calling upon to remove a building from his holding. The suit, in my opinion, ought not to have been tried in this

form. The result has been that a number of unnecessary materials were brought on the record which must have prolonged the trial and has in fact unnecessarily prolonged the hearing of the appeal.

Again, I am not quite sure whether the plaintiff's suit, so far as the tenant defendants are concerned, is maintainable at any rate in the civil Court. Under S. 21, Chota Nagpur Tenancy Act, an occupancy raiyat is not entitled to use his land in such a way as to render it unfit for the purpose of tenancy. The penalty for such use is provided in S. 22, and the raiyat is liable to be ejected. A suit for such ejectment is entertainable exclusively by the Deputy Commissioner under S. 139 (4), Chota Nagpur Tenancy Act. I have grave doubts whether under the tenancy law of Chota Nagpur a suit lies against an occupancy raiyat for injunction to restrain him from using his land in a way detrimental to the tenancy. The landlord by suing for injunction and demolition of the house cannot circumvent the jurisdiction of the Deputy Commissioner. Even under the Bengal Tenancy Act the right of the landlord is to get compensation and to have the misuse remedied if it is remediable. In case compensation be not paid and the remediable misuse be not remedied, the landlord is entitled to ejectment: S. 155, Bengal Tenancy Act.

I find that the question about the jurisdiction of the civil Court to entertain a suit like this was raised but seems to have not been pressed by the defendants. At any rate, the plaintiff's suit so far as it relates to the relief against defendants 2 to 4 is bad as it is combined with a suit which is for declaration of title and partition against the plaintiff's alleged co-sharer, defendant 1. However, as the plaintiff's suit fails on the merits it is not necessary for me to pursue this point further. I now come to the main point in the case, viz., whether the plaintiff is entitled to two-thirds share of the two plots and, as I have said, the only question is whether Raghu the elder brother, was entitled to transfer the whole of it to defendant 1 on 20th January 1917. The learned Subordinate Judge has said that perhaps defendant 1 is a benamidar for defendants 2 to 4. This was not the case of the plaintiff nor was it of any of the defendants, and so far as this case is concerned the question is immaterial. Now the Record of Rights is entirely against the plaintiff It has a presumptive evidentiary value. Under the law the entries must be presumed to be correct unless the contrary is proved by evidence. Defendant 1 has been recorded as landlord of the two plots by virtue of his purchase from Raghu. It is of importance that while a purchaser from Raghu Hazra i.e., defendant 1, was getting his name recorded as the landlord of these two plots during the settlement operation, no objection whatsoever was raised on behalf of the two brothers. The plaintiff in his deposition has admitted that during the time of the settlement operations he understood that defendant 1 was the sole landlord of the two plots. It was later, on information received from Sibu and Sambhu, that he came to know that their share was not affected by the sale by Raghu. Defendants' case is, as I have said, that the three brothers had separated and that these two plots along with some other lands of Manbad came into exclusive share of Raghu. That there was partition between the three brothers seems to have been admitted by the plaintiff's witness No. 5, though he makes a reservation that so far as the land in suit is concerned there was no partition.

In my opinion, the learned Subordinate Judge has rightly held (the parties being governed by the Dayabhag school) that once there is a partition between brothers, it must be taken that all the properties had been separated. From the two documents which are of very great importance, viz.. Exs. C (2) and E (2) executed by Raghu alone, it is clear that at the time of their execution (1914-15) Raghu at least claimed to have separated from his two brothers. The learned Advocate for the appellant has referred to a number of documents showing that the three brothers executed them jointly. But their joining in a particular document in respect of other properties will not show that they had not separated. The utmost which these documents show is that the three brothers had shares in those properties. It appears that one of the brothers Sibu, was present in Court and as soon as the attention of the Court was drawn to his presence he walked away. Though present in Court he did not dare to come into the witness-box to prove that he was joint with Raghu and that in 1917

Raghu had no exclusive right to transfer these two plots. It is unnecessary for me to refer to the documents in detail. In my opinion, there are clear indications on the record to show that the brothers had separated and that Raghu was entitled to transfer the two plots exclusively, and he having done so in favour of defendant 1 the two brothers had no right to transfer it to the plaintiff after the Record of Rights in 1925. It seems that the plaintiff entered into what may be called a speculative transaction. The value of the property is not at all considerable, the rent realizable by the plaintiff even if his case succeeded will be Re. 0-10-8. The real object of the plaintiff was to acquire a portion of the landlord's right in these two pieces of land and thereby use measures against defendants 2 to 4 to exact some money from them as they had put up buildings on these lands. Even if the plaintiff had any title, for the reasons given by the learned Subordinate Judge and for what I have stated in the earlier part of my judgment, the plaintiff was not entitled to any relief against defendants 2 to 4, at any rate, in the present suit. In my opinion, there is no merit in this appeal and I would dismiss it with costs to the contesting respondents.

Varma, J.—I agree.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1936 Patna 145

JAMES, J.

In the matter of, *Ramjas Marwari*

v.

Purulia Municipality

Criminal Ref. No. 47 of 1935, Decided on 6th December 1935, made by Sess. Judge, Manbhum, D/- 14th November 1935.

(a) Bihar and Orissa Municipal Act (7 of 1922), Ss. 285, 286—Articles not intended for sale within Municipality cannot be legally seized under S. 286.

Articles of the kind described in S. 285 intended for sale within the Municipatily, which are in course of transit in public roads can be seized by the Commissioners in virtue of the general powers given to them by S. 285. Where however the articles are not intended for sale within the Municipality they cannot be legally seized under S. 286. [P 142 C 2]

(b) Bihar and Orissa Municipal Act (7 of 1922), Ss. 285, 286—Articles described in S. 285 cannot be inspected merely because they are in Municipal limits in transitu—Articles seized and their condition warranting complaint under S. 3, Food Adulteration Act — Commissioners can make complaint before Magistrate.

Articles of the kind described in S. 285 cannot be inspected by Commissioners merely because they are within the Municipal limits, in transitu. But when they have been seized and it is found that their condition warrants a complaint of an offence punishable under S. 3, Food Adulteration Act, committed within the Municipal area, the commissioners are entitled to make a complaint in proper form before a Magistrate. [P 146 C 2]

(c) Crimimal P. C. (1898), Ss. 200, 537 (a) —Complaint by Commissioner seizing article under S. 286, Bihar and Orissa Municipal Act, of offence under S. 3, Bihar and Orissa Food Adulteration Act —Complaint should not be treated as one by public servant—Complainant must be examined under S. 200—Omission to examine however amounts to irregularity curable under S. 537 (a), Criminal P. C.

Where a Commissioner seizes certain articles while in transit under S. 286, Bihar and Orissa Municipal Act, and finding that their condition warrants a complaint under S. 3, Bihar and Orissa Food Adulteration Act, makes a complaint in proper form before a Magistrate, the complaint should not be treated as a complaint by a public servant. The complainant ought to be examined under S. 200, Criminal P. C., before process is issued. Mere omission to examine the complainant however can at worst be regarded an irregularity which can be disregarded by virtue of the provisions of S. 537 (a), Criminal P. C. [P 146 C 2]

(d) Bihar and Orissa Food Adulteration Act (2 of 1919), S. 3—Magistrate can take cognizance of offence punishable under Act, wherever offence may be discovered.

There is nothing in the Bihar and Orissa Food Adulteration Act which prohibits a Magistrate from taking cognisance on complaint of an offence punishable under the Act wherever that offence may have been discovered. [P 147 C 1]

(e) Bihar and Orissa Food Adulteration Act (2 of 1919), S. 3 (4)—Offence under S. 3 —Tins of mustard oil found to have been manufactured and delivered from mill owned by accused—Court can apply presumption under S. 3 (4) that oil is manufactured by accused.

Where in an offence under S. 3, Bihar and Orissa Food Adulteration Act, certain tins of mustard oil are found to have been manufactured in the mill owned by the accused and also proved to have been delivered in the mill for being carried to another place, the Court is entitled to apply the presumption under subs. (4), S. 3 of the Act that the oil is manufactured by the accused who is the proprietor of the mill. [P 147 C 1]

S. C. Mazumdar—for Reference.

S. M. Gupta—against the Reference.

Order.—Ramjas Marwari is the proprietor of an oil mill within the limits of the Purulia Municipality in which mustard oil is manufactured as an article

of sale for human consumption. In the beginning of February 1935 two carters who came from Balarampure were at the mill when some servant of the mill gave them twenty tins of mustard oil to deliver to a man of Balarampore to whom they had been sold. The carts broke down near the house of the Vice-Chairman of the Municipality, whereupon the Municipal servant who performs these functions was directed by the Chairman to seize the tins, acting under S. 285, Bihar and Orissa Municipal Act. The tins were sent to the Sub-Divisional Officer with the request that samples might be sent to the Public Analyst, which was done, with the result that the mustard oil was found to be below the standard fixed by the Local Government under the Food and Drugs Adulteration Act. The Commissioners then directed that a complaint should be made ; and in due course, a formal complaint was made against Ramjas Marwari of an offence punishable under S. 3 (2), Bihar and Orissa Food Adulteration Act. The Magistrate took cognisance on the complaint, and in due course, he convicted Ramjas Marwari and fined him fifty rupees. The Sessions Judge of Manbhum has referred the proceedings to this Court under S. 438, Criminal P. C., because he considers that the original seizure was illegal, and that the oil ought not to have been sent for analysis without notice to the petitioner and behind his back. The learned Sessions Judge is of opinion that storage of these tins in a broken-down bullock cart does not make that place a place used for the storage of articles intended for human consumption within the meaning of S. 285, Municipal Act, but if these articles had been intended for sale within the Municipality, I do not consider that there would have been necessarily anything irregular in their seizure under S. 286 of the Act.

Section 285 empowers the Commissioners without warrant to enter certain enclosed places for the inspection of articles intended for sale for human consumption ; and S. 287 empowers them to obtain a warrant from a Magistrate for the inspection of such articles in other enclosed places ; but it does not follow from this that they have no power to make an inspection of such articles which are not in enclosed places at all; otherwise itinerant vendors would not be liable to inspection. The greater includes the less; if the Commissioners can inspect and seize in a shop by virtue of a special provision which excludes the operations of the ordinary law of trespass, they should be held to be enabled also to inspect and seize on Municipal open places. It would follow that articles of the kind described in S. 285 intended for sale within the Municipality, which are in course of transit in public roads, can be seized by the Commissioners in virtue of the general powers given to them by S. 285, Municipal Act. But these articles were not intended for sale within the Municipality. I think that the learned Sessions Judge is right in thinking that they could not be legally seized under S. 286, Bihar and Orissa Municipal Act, not for the reasons given by him, but because the mustard oil was not being conveyed for sale within the Municipality. Articles of the kind described by S. 285, Municipal Act, cannot be inspected by the Commissioners merely because they are within Municipal limits in transitu. But when they had been seized, and it was found that their condition warranted a complaint of an offence punishable under S. 3, Food Adulteration Act, committed within the Municipal area, there was nothing to prevent the Commissioners from making a complaint in proper form before a Magistrate. The complaint was treated, I think wrongly, as a complaint by a public servant. The complainant ought to have been examined under S. 200, Criminal P. C., before process issued ; but it is difficult to see how the formal examination of the complainant under S. 200, Criminal P. C., could have in any way been of benefit to the petitioner, and the omission to examine the complainant must at the worst be regarded as an irregularity which is to be disregarded by virtue of the provisions of S. 537 (a), Criminal P. C.

The learned Sessions Judge also regards the proceedings as irregular because the procedure laid down in Ss. 5, 6 and 7, Food Adulteration Act, was not followed at the time of the seizure, so that the proceedings were taken, as the learned Sessions Judge says, behind the back of the manufacturer. If a purchase had been made in the manner prescribed by Ss. 5, 6 or 7, Food Adulteration Act, from the vendee of the mustard oil, the proceedings would have been equally behind

the back of the manufacturer until he received notice from the Court when process issued on complaint. There is nothing in the Food Adulteration Act which prohibits a Magistrate from taking cognisance on complaint of an offence punishable under the Act wherever that offence may have been discovered. The learned advocate for the petitioner says that there is no evidence to connect him with the tins of mustard oil which are found to have been manufactured in his mill. But the petitioner Ramjas Marwari did not deny that it was his mill, and the evidence of the carter made it clear that these tins were handed over to him in the mill before delivering them to Balarampore. In the circumstances the learned Magistrate was entitled to apply the presumption which is permitted by subs. (4), S. 3, Bihar and Orissa Food Adulteration Act, that this mustard oil had been manufactured in that Mill; that is to say by Ramjas Marwari, who is the proprietor of the mill. I cannot interfere in this case. The reference is discharged and I maintain the finding and sentence.

R.M./R.K. *Reference discharged.*

A. I. R. 1936 Patna 147

WORT, J.

Mohamad Yusuf and *others* — Defendants—Appellants.

v.

Mohamad Waheed — Plaintiff — Respondent.

Appeal No. 215 of 1933, Decided on 3rd December 1935, from appellate decree of Dist. Judge, Gaya, D/- 20th September 1932.

(a) Limitation Act (1908), Art. 144 — Art. 144 only applies where defendant holds adversely to plaintiff without title.

Article 144 only properly applies to a case in which the defendant is holding adversely to the plaintiff without title : 1931 *P C* 196, *Foll.*

[P 147 C 2]

(b) Practice—Relief—Plaintiff entitled to relief although on other ground than those set forth in claim — Court should grant relief if defendant is not taken by surprise—Suit for ejectment—Court finding title to be made out by plaintiffs but not by defendants —Defendant found not tenant of plaintiffs —Court while proposing to give decree for possession can go into question of limitation —Defendant cannot be said to be prejudiced, onus of proof not being on him.

If a Court sees that the plaintiff is entitled to the relief which he claims, although on other grounds than those put forward in his claim, the Court would grant that relief if the defendant is not taken by surprise. [P 149 C 2]

A plaintiff who has established facts which would entitle him to a particular form of relief claimed should not be debarred from obtaining that relief merely because the allegations or some of them had not been established in their entirety. [P 149 C 2]

Where, in a suit for ejectment by a person claiming to be the landlord, the question of title of the parties is gone into and the Court comes to the conclusions that the plaintiff has made out his title and that the defendant has not, but finds that the defendant is not the tenant of the plaintiff, the Court can while proposing to give the plaintiff a decree for possession enter into the question of limitation. As the Court only goes into the question of possession of the respective parties and as the onus is not on the defendant, he cannot be said to have been taken by surprise or have been prejudiced by the Court deciding the question of limitation. The onus being on the plaintiff he is the only person who can claim about being taken by surprise : 25 *All* 498, *Foll.* ; 1934 *Pat* 184 and 35 *Cal* 189 (*PC*), *Disting.*

[P 148 C 1 ; P 149 C 2]

Khurshed Husnain, *Yasin Yunus* and *B. K. Prasad*—for Appellants.

S. M. Mullick, *Syed Ali Khan* and *H. R. Kazimi*—for Respondent.

Wort, J.—During the course of argument in this case I changed my mind from time to time on the various subjects which arose, more particularly on the question of whether Art. 142 or 144, Lim. Act, would apply to this action assuming that the question of limitation was the proper question to be decided in the case. But it seems to me quite clear that having regard to the observations of their Lordships of the Privy Council in 58 I A 279 (1), Art. 144 only properly applies to a case in which the defendant is holding adversely to the plaintiff without title, and their Lordships in that case went on to point out that the defendant there had claimed title in various ways and therefore Art. 142 applied and not Art. 144.

Mr. Khurshed Husnain appearing on behalf of the defendant-appellants presses me with the contention that the effect of the judgment of the learned Judge in the Court below has been to turn a case of one class into another and therefore to that extent he has been taken by surprise. The action was by the plaintiff who claimed to be the landlord of the defendants, and his action was based on the allegation that he had served the

---

1. Chhatra Kumari Devi v. Mohan Bikram Shah, 1931 P C 196 = 133 I C 705 = 58 I A 279=10 Pat 851 (PC).

defendants with a notice to quit, that the defendants had not gone out and he therefore claimed to eject the defendants. Now the Judge in the Court below, although differing from the decision of the Judge of the trial Court, has confirmed the trial Court's judgment ejecting the defendants. The trial Court had given the plaintiff a decree accepting the contention which the plaintiff had made and to which I have referred. That Court was satisfied that the plaintiff had made out his title, that the defendants had made out no title and that they were merely the tenants of the plaintiff. The appellate Court held that the plaintiff had made out his title, the defendants had made out no title, but that they were not the tenants of the landlord. It was then proposing to give a decree for possession, and in order to come to a conclusion on that matter the learned District Judge entered into the question of limitation. Now if the matter had rested there no possible argument could have been advanced, because the learned Judge quite distinctly holds that the onus was on the plaintiff and then comes to a certain conclusion as to whether the plaintiff was in possession within twelve years.

Mr. Khurshed Husnain on behalf of the defendant-appellant contends that this question should not have been gone into ; that once the allegation that the relationship of landlord and tenant had existed had been negatived, the plaintiff's case should have been dismissed. Reliance for that proposition is placed upon the case of 13 Pat 329 (2), the decision of a Special Bench, where the learned Chief Justice in delivering judgment relied upon a decision of the Calcutta High Court in 57 Cal 349 (3), where the following statement appears :

> On the other hand if the question of title were raised by the defendant and if it were found as a fact that there was no contract of tenancy the proper course would be to dismiss the suit and not to convert it into a declaratory and possessory suit which was of another nature entirely.

With great respect, if I may say so, that question did not arise, and the observation will be treated with the greatest respect as an expression of opinion. The facts were that the trial Court had entered into the question of Court-fee (that being the matter which came before the Special Bench) and allowed the plaintiff's claim. On appeal the District Judge came to the conclusion that, having regard to the proper valuation of the suit, the Subordinate Judge had no jurisdiction. The Special Bench came to the conclusion that the learned District Judge was wrong and remanded the case for the purpose of deciding the case on the merits. I do not propose to state in detail the decision but merely to state that the decision of the Calcutta High Court was in substance the same. There the trial Court had held that the proper valuation of a suit of this description was the valuation of the property itself as the defendant tenant, when once notice to quit was served upon him, became a trespasser, and therefore the action in substance was an action in ejectment or for possession of the property, and the correct valuation of the suit was the value of the property itself. The learned Judges deciding that case made the observations which I have just read from the judgment of the Special Bench of this Court. Now in connection with the argument that the Judge by his judgment has converted the suit into one of a different character, the decision of their Lordships of the Privy Council in 7 C L J 44 (4) is relied upon. That was a case in which their Lordships held that the result of the lower Court's decision was to convert the suit from one character into another. It was a suit in which the plaintiffs claimed possession of the property on the death of one Mt. Kewal Kuer, and their allegations incidentally against the defendants, who were the appellants before their Lordships of the Privy Council, was that certain alienations made by the widow were not justified in law. I say that question was raised incidentally.

The Courts in India having come to the conclusion on the facts that the lady was not dead, had however allowed the plaintiffs a declaration as to the nature of the alienations to which I have referred, and also a declaration to the effect that they were reversioners or successors as the case might be. The

---

2. Narayan Jha v. Jogni Prasad, 1934 Pat 184=147 I C 1222=13 Pat 329=15 P L T 189 (SB).
3. Govinda Kumar v. Mohini Mohan, 1930 Cal 42=125 I C 726=57 Cal 349=33 C W N 769.
4. Mt. Wali Han v. Jogeshwar Narayan, (1908 35 Cal 189=35 I A 38=7 C L J 44 (P C).

decision of the Courts in India converted the case into an entirely different character from that which it was at the commencement of the suit. In coming to that conclusion Lord Robertson delivering the judgment of the Judicial Committee made this statement :

> It appears to their Lordships that the circumstance that some of the media concludendi might be the same in other actions does not vest the Court with any right or duty to pronounce upon them in a suit which has gone by the board because of the failure of the ground of action.

Now I am referred again in this connection by Mr. Sushil Madhab Mullick on behalf of the respondent to the Full Bench decision of the Allahabad High Court in 25 All 498 (5), a decision directly in point. The learned Judges in that Court following a previous decision of the Allahabad High Court, came to the conclusion that the decision of the trial Court in the suit out of which the appeal arose was right, the trial Court there having held that the action was in ejectment, although holding at the same time that the plaintiff had failed to prove the relationship of landlord and tenant none the less gave a decree for the plaintiff. The appellate Court, being the Subordinate Judge, overruled the trial Court and dismissed the plaintiff's claim. That decision was confirmed by Knox, J., of the Allahabad High Court. Then the matter came before the Full Bench which reversed the decision of the Judge of the High Court holding in substance that as the plaintiff's claim was in substance the same, he was entitled to succeed. Now there is one difference between that case and the case before me, and it seems to me that the only real question of substance in this case is whether the difference to which I have referred entitles the appellants to succeed in this appeal. The difference there was this. Both parties had set up their contesting title that is to say, the plaintiff and the defendant. The defendant had expressly pleaded that the action was barred by limitation and that he was in adverse possession. Now one of the learned Judges in that case was Banerji, J., a Judge who is entitled to the greatest possible respect. Referring to the previous decision of the Allahabad High Court he makes this statement:

> If a Court sees that the plaintiff is entitled to the relief which he claims, although on grounds other than those put forward in his claim, the Court should grant that relief, if the defendants were not thereby taken by surprise;

and then states:

> This is not a case in which the defendant was or could be taken by surprise if the question of the title set up by the plaintiff in his plaint was determined.

Although I have noted the difference between that case and the one before me, the main question which the learned Judges in that case had to decide was whether the question of title had been raised and had been investigated by the parties. Now that much is true in this case. It was quite unnecessary for the defendants to do so. They in fact claimed adverse title in contradiction to title by adverse possession and they invited the Courts below to investigate it. Both Courts have come to the conclusion that they have not established that title. Now it would be a matter of surprise to me if at this time of the day in India a plaintiff, who has established facts which would entitle him to the particular form of relief claimed, should be debarred from obtaining that relief merely because the allegations or some of them had not been established in their entirety. In this case I would remind myself that the question which was not established in favour of the plaintiff here was the fact that the relationship of landlord and tenant existed; and, if I may be allowed to say, the true principle to be applied is that adopted and set out by Banerji, J. in the case to which I have referred, whether in the circumstances the parties, and in this case the defendants, could be said to have been taken by surprise. Now two things were gone into. Not only was the question of title gone into but also the actual possession of the parties. Now upon this question depended the issue which was never settled, the principle of limitation to be applied. Now if any one in this case were to complain about being taken by surprise, it would, I imagine, be the person upon whom the onus lay, and, having regard to my view of the Article to be applied in this case, I have no doubt that the onus was on the plaintiff. Now he might well have said, had the decision been the other way, that this was not in issue. He might have said: It is for me to establish if I had been in possession, and although I have given evidence of my pos-

5. Balmakund v. Dalu, (1903) 25 All 498=1903 A W N 112 (F B).

session, my evidence would have been of a somewhat different kind had this issue been specifically raised.

The onus was not on the defendants, and having regard to the fact that only the question of possession of the respective parties was gone into, it seems to me that I should be straining the facts of the case if I come to the conclusion that any party here had been prejudiced by the Judge deciding the question of limitation. It is true, as Mr. Khurshed Husnain states, that in the circumstances he might not have been bound to decide the question of limitation, had he in the first place come to the conclusion that the plaintiff had failed to establish the relationship of landlord and tenant, and dismissed the plaintiff's claim. But although in this Court in the notice of appeal, I see that the question is raised, there does not appear to have been any objection in the Court below to the Judge investigating this question. But in any event, having regard to the view I take of the case, namely that it was upon the plaintiff to establish this fact, it is impossible in my judgment to come to the conclusion that the defendants in this case have been prejudiced by the Judge investigating this matter to which I have made repeated reference, namely the question of limitation. The plaintiff had established a case which entitled him to eject the defendants and in those circumstances the only question which could possibly arise was the question of limitation. If the action of the plaintiff had been dismissed, I cannot imagine what evidence the plaintiff could have called other than the evidence he did produce and what evidence the defendants could have adduced in this case other than that they did adduce, namely that they attempted to establish the fact that they had actually been in possession for a period of thirty years. I need not refer in detail to the judgment of the learned Judge on this question. He has properly placed the onus upon the plaintiff. He has not been satisfied with the evidence of the defendants about the length of time they were in possession and he comes to conclusion that they could have been in possession for no more than eight years. For these reasons it seems to me that the learned Judge was right in the conclusion at which he arrived. The appeal fails and must be dismissed with costs. Leave to appeal under the Letters Patent is refused.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1936 Patna 150

COURTNEY-TERRELL, C. J. AND MOHAMMAD NOOR, J.

Banwari Lal and *another*—Defendants—Appellants.

v.

Badri Ram—Plaintiff—Respondent.

Letters Patent Appeal No. 10 of 1935, Decided on 4th December 1935, from decision of Wort, J., D/- 22nd January 1935.

Civil P. C. (1908), O. 21, R. 6—There is no power of transfer of decree obtained in Panchayat Court to civil Court for execution.

There is no power of transfer of a decree obtained in a panchyat Court to a civil Court for execution, and a civil Court to which such decree is transferred for execution has no jurisdiction to entertain the execution of the decree. The Civil Procedure Code does not apply to panchayat Courts and the panchayat Court is not in the least affected by the Code.

[P 150 C 2; P 151 C 1]

Rajeshwari Prasad—for Appellants.

Azizulah—for Respondent.

Courtney-Terrell, C. J.—This is a Letters Patent appeal from a decision of a learned Judge of this Court in second appeal reversing a decision of the Subordinate Judge. The appellant before us had obtained a decree in the panchayat Court. He sought to execute the decree according to the panchayat procedure and recovered a portion of the amount due. He then applied to have the decree transferred to the civil Court. An objection was taken to the jurisdiction of the civil Court to entertain the execution of the decree. The two lower Courts held that they had jurisdiction in execution and that there was jurisdiction to transfer the decree for that purpose. The suit that was brought was of a kind contemplated by S. 58, Village Administration Act. The plaintiff had his option to proceed either in the civil Court or in the panchayat Court and he chose the panchayat jurisdiction with its attendant advantages. There is no provision anywhere in the Village Administration Act, save in the Special Panchayat Courts of Chota Nagpur for the transfer of a decree to the civil Court for execution. The Civil Procedure Code does not apply to the panchayat Court and the panchayat Court is not in the least affected by the

Code. Accordingly, there was no power of transfer of the decree to the civil Court for execution. I agree entirely with the judgment of Wort, J., and would dismiss this appeal with costs.

Mohammad Noor, J.—I agree.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1936 Patna 151

ROWLAND, J.

Munshi Singh—Appellant.

v.

Peyara Singh and *others*—Respondents.

Appeals Nos. 1312 of 1933, and 123 to 169 of 1934, Decided on 9th August 1935, from appellate decrees of Addl. Dist. Judge, Patna, D/- 29th July 1933.

(a) Costs—Suit against principal and pro forma defendants—Former admitting but latter unsuccessfully contesting suit—Latter can be appropriately saddled with costs.

The suits were rent suits brought by the plaintiff appellant against the tenants entered in his jamabandi as defendants first party. The plaintiff also impleaded as defendants second party under S. 148-A, Ben. Ten. Act, the co-sharer landlords. The tenants did not contest the suit, but the co-sharer landlords did unsuccessfully, so the Court ordered that costs should be borne by defendants second party:

Held: that the order was within the Court's discretion which was properly exercised and the principle that the second party being pro forma defendants and not liable to payment should not be saddled with costs of suit arising from default of defendants first party did not apply: 12 *Cal* 179, *Disting.* [P 151 C 2; P 152 C 1]

(b) Costs — Appeal—Principle involved—Appeal and second appeal lies.

On a question of cost only an appeal and second appeal lie where a question of principle is involved or where a wrong principle has been followed. [P 151 C 2]

Sundar Lal, *B. C. De* and *Ramnandan Prasad*—for Appellant.

G. S. Prasad and *Rai Parasnath*—for Respondents.

Judgment.—In these appeals the only question raised is as to the correctness of the order of the lower appellate Court with regard to costs reversing the decision on that point of the Munsif. The suits were rent suits brought by the plaintiff appellant against the tenants entered in his jamabandi as defendants first party. The plaintiff also impleaded as defendants second party under S. 148-A, Ben. Ten. Act, the co-sharer landlords. The tenants did not contest the suit, but the co-sharer landlords pleaded that they had acquired these holdings either at auction sale or private sale and that they were the persons liable to pay rent for the holdings. They alleged also that the rents of certain bhaoli holdings had been commuted into cash rents, and they raised a plea of payment by adjustment of account. The Munsif found that the second party defendants had in fact purchased the holdings, but found against them on the other points and found that they had not been recognized by the plaintiff as his tenants. Therefore the Munsif had passed decrees for the rents against the defendants first party in each case and directed that the costs of the suits should be paid by the defendants second party because the latter by reason of contest had caused the litigation to be disputed and expensive. On appeal the Additional District Judge entertained the appeals against the order of costs only .and reversed the decision of the Munsif observing:

> If the pro forma defendants are not liable for the payment of rent, as held by the lower Court, I do not see how they can be held liable for the payment of costs arising from the default made by the principal defendants against whom as already said the decrees have been passed.

The principle on which the learned Additional District Judge acted would appear to be the principle which was laid down in 12 Cal 179 (1), when the order making defendant 2 liable for costs was set aside on the ground that there was no cause of action against the latter. At the hearing of this appeal it was first suggested that on a question of cost only an appeal does not lie. The contention must be negatived ; such an appeal lies where a question of principle is involved or where a wrong principle has been followed. Moreover in this particular case it appears from the judgment of the Additional District Judge that it had been decided by the Hon'ble High Court that these appeals will lie against the order of costs only. Where there is a question of principle and an appeal lies, in such a case a second appeal also will lie and the question of principle can be entered into in second appeal. It seems to me it is not correct to say that there was no cause of action against the defendants second party. To begin with they are co-sharer landlords and necessary parties to a suit instituted under the provisions of S. 148-A, Ben. Ten. Act. A decree obtained in their absence would

1. Bunwari Lall v. Drup Nath Singh, (1886) 12 Cal 179.

not be a rent decree whereas the effect of a rent decree being passed in their presence will be that such a decree will be effective against them in this sense that an execution sale based on it will pass the raiyats' interest which they have acquired. That would result in the plaintiff eventually getting a very substantial relief from these second party defendants. This is a consideration arising on the pleadings and in addition it is to be considered that the defendants second party have by their action materially contributed to increasing the costs of the litigation. The principle under which the learned Additional District Judge exempted these defendants from payment of costs appears therefore to be not applicable to the facts of this case. In my opinion the order of the Munsif was an order which it was within his discretion to pass and in passing which he exercised his discretion with propriety. The order should not have been set aside on appeal and must now be restored. The appeals will therefore be allowed with costs. There will be one set of hearing fee for the batch of appeals.

M.N./R.K. *Appeals allowed.*

✻ A. I. R. 1936 Patna 152

JAMES, J.

Sheikh Elahi Bux—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 676 of 1935, Decided on 15th January 1936, from order of Dist. Magistrate, Purnea, D/- 14th October 1935.

✻ Penal Code (1860), S. 378—Taking away fish from running stream does not constitute theft.

A proprietor of jalkar right in a running stream has not such possession of the fishes in the stream, as to make the taking away of the fish, theft within the meaning of S. 378, and no theft can be committed in respect of such fish: 15 *Cal* 388, *Foll.*; 14 *C W N* 408, *Disting.*

[P 152 C 1, 2]

B. C. De—for Petitioner.

Sambhu Barmeshwar Prasad for *B. P. Sinha*—for the Crown.

Order. — The petitioner has been fined fifty rupees under S. 379, I. P. C., for taking fish from a river in which the jalkar rights were vested in the complainant's master. It appears that this is a running stream and Mr. B. C. De on behalf of the petitioner argues that the proprietor of the jalkar right in a running stream has not such possession as to make the taking away of the fish theft within the meaning of S. 378 I. P. C. On behalf of the complainant reference is made to the decision in 14 C W N 408 (1), but in that case the fish were taken from a tank, which is another matter. It is suggested that in those cases in which it has been held that fish in a river cannot be said to be property in the possession of the person who has the fishery right, the river has been a public navigable river in which the ownership of the bed did not vest in the proprietor of the jalkar. The question is not affected by the question of who may own the bed; the question is of whether the ownership of the jalkar gives possession of the fish of the river within the meaning of S. 378, I. P. C. The real question is whether the river is a flowing river or whether the fish are enclosed in such a way that they may be said to be practically in confinement and to be brought into possession of the owner of the fishery right. The true principle will be found expressed in the judgment of the Calcutta High Court in 15 Cal 388 (2), wherein the Judges observed:

> We take it that it is a flowing river, and that fish enter it, and leave it, at their pleasure; and that the lessee of the fishery has no control whatever over them. The fish are not stored or bred there; they are not confined within an enclosed space, and are therefore free to go wherever they please. They are farae naturae, and as such nobody can be said to be in 'possession' of them, and therefore no theft can be committed in respect of such fish.

It is suggested on behalf of the complainant that if the petitioner did not commit the offence of theft, he committed the offence of criminal trespass. On the findings of the criminal Courts, it would appear that he committed a trespass; but I do not find anything on the record to indicate that he committed a criminal trespass. It is suggested that he went on to the complainant's water for the purpose of intimidating the complainant, because he had a number of men with him; but when the complainant arrived, he and his companions abandoned their boats and their nets and left the place which negatives any intention to intimidate. It does not appear that he went to the place in order to insult or annoy the

1. Dhirendra Mohan Gossain v. Emperor, (1910) 14 C W N 408=5 I C 794=11 Cr L J 248.
2. Bhagiram Dome v. Abar Dome, (1888) 15 Cal 388.

complainant; and I do not consider that the facts found would sustain a conviction of the offence of criminal trespass. The application is allowed and the conviction and sentence of fine will be set aside. The fine if paid will be refunded.

R.M./R.K. *Application allowed.*

---

* A. I. R. 1936 Patna 153

WORT AND ROWLAND, JJ.

Rai Satyadeva Narayan Sinha and *others*—Defendants—Appellants.

v.

Tirbeni Prasad—Plaintiff and *others*—Defendants—Respondents.

Appeal No. 1032 of 1932, Decided on 13th January 1936, from appellate decree of Sub-Judge, Darbhanga, D/- 29th March 1932.

(a) Parties—Person interested in equity of redemption not party—Omission is not fatal—Court can add parties under O. 1, R. 10, C.P.C.

Failure to make a person interested in the equity of redemption a party to the mortgage suit is not fatal, as the Court may exercise its powers of joining parties under O. 1, R 10, Civil P. C. [P 154 C 1]

(b) Minor—Guardian — Order appointing fresh guardian discharges former guardian by implication.

The order of appointing a fresh guardian may be read as involving, by implication, the discharge of the former guardian. [P 156 C 1, 2]

(c) Appeal—Limitation—Appeal preferred against minor—Appointment of guardian not preliminary requisite for filing appeal — Period of limitation to be calculated when appeal is actually preferred and not when guardian is appointed.

Where the person against whom an appeal is to be presented is the minor respondent and not his guardian, the appointment of a proper guardian is not a necessary preliminary to the filing of an appeal, although it is necessary before the appeal can be properly heard and disposed of. The appeal therefore must be deemed to have been presented in time by calculation of the date when it was actually presented. [P 156 C 2]

(d) Costs—Mortgage suit—Costs cannot be awarded personally except against mortgagor.

In a suit on a mortgage, costs are recoverable from the mortgaged property and not by a personal decree against any party other than the mortgagor. [P 156 C 2]

(e) Contract—Definition of contract built is on definitions of all elements forming contract.

The definition of "contract" in S. 2, Contract Act, appears to be built upon a succession of definitions of the elements which go to make a contract, that is to say, proposal, acceptance, promise, promisor, promisee, consideration and agreement. The expression "reciprocal promises" is explained and finally a contract is defined as an agreement enforceable by law. On the other hand an agreement not enforceable by law is said to be void; that is to say it is not a contract at all. [P 156 C 2; P 157 C 1]

*** (f) Minor—T. P. Act, S. 7, Contract Act, S. 11—Party to contract—Contract when becomes void—Consideration for contract is something done by minor—Other party promising to do something in favour of minor for what he has already done—Minor can enforce such promise (mortgage in his favour.)**

It is the promise by a minor which is unenforceable, and an agreement embodying such a promise cannot be a contract. But an agreement as defined in S. 2 (e) of Contract Act does not necessarily consist of a set of promises forming the consideration for each other. Every promise is an agreement, that is to say, a promise made by an adult in favour of a minor is an agreement by the adult. If the consideration for such a promise or such an agreement is a reciprocal promise by the minor, the whole thing is void; but if the consideration for it is not a promise, but is something actually done, there seems no bar in the statute and no reason in principle why the result should not be a valid contract. [P 157 C 1]

Where the consideration has been received for an agreement consisting of a promise in favour of the minor such promise can be enforced by the minor or on his behalf : 30 *Cal* 539 (*P C*) and 39 *Cal* 232 (*P C*), *Disting*; 1917 *Mad* 630 (*FB*) ; 1916 *All* 366 and 1919 *Pat* 561, *Foll.* [P 157 C 2]

So where a mortgagee, a minor, who has paid the consideration of the mortgage at the time of the execution of the mortgage deed, such minor mortgagee can sue on his mortgage. [P 157 C 2; P 158 C 1]

T. N. Sahay, A. N. Lal and *Ramnandan Prasad*—for Appellants.

D. N. Varma, Raghosaram Lal and *R. Chaudhari*—for Respondents.

Wort, J.—This appeal by defendants fourth party consists of defendants 5, 6 and 7 who are puisne mortgagees in an action by the plaintiff who is the assignee of the original mortgagee who was defendant third party in the suit for a mortgage decree. The appellate Court setting aside the trial Court's judgment under which a personal decree against the mortgagee was given, gave a mortgage decree for sale of the property binding upon all parties to the suit. Two points arise in the appeal but referring to the same matter. The appellants contend that they should be dismissed from the suit and the decree for money pronounced by the trial Court restored, first, by reason of the contention that they were not bound by the decree of the lower Court inasmuch as one of their members who was a minor defendant 7, was not properly represented in the appeal by a guardian

ad-litem, they all being parties to the mortgage and necessary parties to the suit; and, secondly, it being the fact that at the time the original mortgage was entered into and at all other material times the mortgagee was a minor, the mortgage transaction was void.

As to the first point the facts are these. Defendant 7 of the fourth party was properly represented at the trial of the suit by a guardian-ad-litem, but in the notice of appeal to the lower Court he was described as being represented by his father who was then dead. This was corrected before the hearing of the appeal on 27th July 1931 and the guardian-ad-litem who represented the minor during the trial, was duly named in the notice of appeal. It was then found that that guardian being a pleader who had given up practice could not be served. Then on 24th August 1931, a date which was out of time for the purposes of the appeal, the Court appointed a new guardian-ad-litem on petition without making any formal order discharging the old guardian. The respondents, in the Court below objected by a petition on the same day, i. e., on 24th August 1931, but this matter was ordered to be heard at the time of the hearing of the appeal.

The Judge in the Court below, dealing with the argument which appears to have been directed against the order of 27th July 1931 held that he had power to extend the time under S. 5, Lim. Act, and therefore the notice was in order. The mention of the deceased father in the first notice of appeal was clearly a mistake and there is equally no doubt that the appeal was properly constituted in the sense that the minor defendant was properly represented by a guardian-ad-litem. Assuming that he was not, it was contended that being proper parties to the suit and actually not being parties, the decree was a nullity as against defendants fourth party. It is now the unanimous opinion that failure to make a person interested in the equity of redemption a party to the mortgage suit is not fatal, as the Court may exercise its powers of joining parties under O. 1. In so far as the appellants rest their case on the contention that there was no formal discharge of the old guardian, I am of the opinion that it fails. The petition for the appointment of a new guardian claimed the discharge of the old, and I should hesitate to hold that the mere absence of a formal order discharging the old guardian while appointing a new one was fatal. For two reasons, first, by reason of the powers of joinder of parties given to the Court under the Civil Procedure Code and secondly as regards the other part of the argument for the reason which I have just stated, it seems to me that this part of the argument fails.

The second point as to the validity of the bond, the mortgagee being the minor, depends, upon the present state of authorities, on the question whether there was in the bond any obligation on the part of the mortgagee. In this case the consideration stated in the bond was Rs. 600, Rs. 438 paid in cash and Rs. 162 to be kept by the mortgagee and to be paid over to one of the creditors of the mortgagor. The trial Judge held in spite of the evidence to the effect that the whole of the Rs. 600 had been paid by the mortgagee at the time of the execution of the bond, that there was an obligation upon the mortgagee to pay this creditor Rs. 162, and therefore this obligation existing, the learned Judge came to the conclusion that the mortgage transaction was void and, as I have already stated, gave a personal decree against the original mortgagor. The appellate Court has held that in spite of the terms of the bond the evidence disclosed the fact (as is so often the case in matters of this kind) that the mortgagee had paid over the whole of Rs. 600 and thus discharged his obligation under the bond. In this connexion the contention of the appellants is shortly this : that the learned Judge was not entitled to go behind the terms of the bond itself. Now before dealing with that question I propose to deal with what, in my judgment, is one of the main points in the case. But in the view that I take the determination of the case depends upon the contention to which I have just referred, namely whether the learned Judge in the Court below was entitled to accept the evidence of the plaintiff and thus vary the terms of the bond, or, to use the expression of the learned Advocate appearing on behalf of the appellants, go behind the bond itself. It is contended that if there remained an obligation on the part of the mortgagee to pay the creditor (mortgagor) the mortgage was void. In 30 Cal 539

(1) their Lordships of the Privy Council, after stating that there was some difference of opinion in the Indian High Courts in the sense that certain decisions on the point had been arrived at only after vigorous protest by certain learned Judges, held that a minor could not enter into a contract, and that therefore by reason of S. 7, T. P. Act, a mortgage by a minor was invalid. The minor in that case executed the instrument himself; but that no distinction can be drawn in the case where the contract is entered into by a guardian or manager on behalf of the minor is seen from the decision of their Lordships of the Privy Council in 39 I A 1 (2), where their Lordships held that it was not within the competence of the manager or guardian to bind the minor or the minor's estate by a contract for the purchase of immoveable property.

Apart from authority I should have been inclined to the opinion that it was incompetent for a minor or his guardian on his behalf either to transfer a property or become a transferee of property, as apart from gift such a transfer must be preceded by a contract, that is to say, an agreement which, being enforceable, being a contract under the Contract Act.

In the alternative, if a minor was competent to be a transferee of property, the fact that consideration moving from him in the case of purchase or mortgage had not been wholly paid was a matter of indifference and his title to and ownership or interest in such property passed nonetheless: see the case of 30 All 125 (3) and also the case of 38 All 154 (4). But there is authority in my judgment binding us to the contrary and that is the decision in 4 Pat L J 682 (5). In that case this Court held that a mortgage in favour of a minor who had advanced the whole of the loan was not void and that it could be enforced against the mortgagor. Reliance was placed on the decision in 40 Mad 308 (6). But this Court had held in 3 Pat L J 518 (7) that a lease executed in favour of a minor was void inasmuch as it created liabilities in the shape of payment of rent, etc., upon the minor. But, as I have said, the authority of *Madhab Koeri's* case (5) binds this Court. I make that observation because it seems to me that it was upon the fact that the consideration had wholly passed or, to use the words of Sir Dawson Miller, 'the whole of the loan had been advanced,' that the decision in that case rested. In other words, when the document was executed, there remained no obligation on the part of the mortgagee. That is the only view that I can take of that authority and the view that the learned Chief Justice and the other Judge sitting with him in that case took is, in my opinion, explained by reason of the decision in the previous case to which I have referred and which is reported in 3 Pat L J 518 (7).

That decision, which was the earlier one, was with regard to a lease, and Sir Jwala Prasad delivering the judgment of the Court there held that as there were obligations on the minor in the way of payment of rent and other liabilities, the lease was void. It seems to me that Sir Dawson Miller was pressed with that decision and came to the conclusion that only in the circumstances where no obligation remained on the mortgagee that the mortgage was valid. Therefore in the view that I take of the authorities the question comes back to the point which I stated was argued that the learned Judge in the Court below was not entitled to go behind the terms of the deed. Now, shortly the point is, did the learned Judge, in accepting the evidence that the whole of the Rs. 600 had been paid at the time the mortgage was executed, go behind the terms of the deed? Although the recital in the deed or the obligation imposed upon the mortgagee to pay one of the creditors of the mortgagor was clearly evidence of the obligation, yet in my judgment the matter was not conclusive. An authority for this purpose is found in 12 M I A 275 (8).

In other words, the evidence which was adduced by the plaintiff in the Courts below

1. Mohori Bibee v. Dharmodas Ghose, (1903) 30 Cal 539=30 I A 114=8 Sar 374 (P C).
2. Mir Sarwarjan v. Fakhruddin Mahomed, (1912) 39 Cal 232=39 I A 1=13 I C 331 (P C).
3. Baijnath Singh v. Paltu (1908) 30 All 125=1908 A W N 38=5 A L J 196.
4. Narain Das v. Mt. Dhania 1916 All 366=35 I C 23=38 All 154=14 A L J 65.
5. Madhab Koeri v. Baikuntha Karmaker, 1919 Pat 561=52 I C 338=4 Pat L J 682.
6. Raghava Chariar v. Srinivasa Raghava Chariar, 1917 Mad 630=36 I C 921=40 Mad 308=31 M L J 575 (F B).
7. Pramila Bali Das v. Jogesher Mandal, 1918 Pat 626=46 I C 670=3 Pat L J 518.
8. Rajah Sahib Perhlad Sein v. Baboo Budhoo Singh (1867-69) 12 M I A 275=2 Beng L R 111=12 W R 6=2 Suther 225=2 Sar 429 (P C).

was to the effect that although there was an obligation imposed upon the mortgagee, that obligation had been complied with by the payment over to the mortgagee of the whole of the amount of consideration, the comment of the learned Judge in the Court below being that in cases of this description that arrangement is often found to exist. If the learned Judge was, in the view that I take, entitled to accept this evidence, whatever we may think with regard to the conclusion as regards the fact at which he has arrived, it seems quite clear that there was no obligation on the part of the mortgagee at the time of the execution of the mortgage deed; and consistent with the authorities of this Court to which I have made repeated reference, it seems to me that the mortgage transaction was a valid one. In those circumstances the learned Judge in the Court below was right and his judgment should be affirmed. As the defendants fourth party have alone contested the appeal the costs which they will have to pay of the appeal should not be a part of the mortgage debt. With that modification the appeal is dismissed with costs.

Rowland, J.—I agree that the appeal should be dismissed subject to a slight modification. On the question of representation of the minor defendant 7, this defendant was sued in the first Court through his brother as natural guardian. There was no defect in the proceedings of the first Court where the brother, not choosing to act, a pleader guardian was appointed who acted. In the appeal to the District Judge this defendant 7 was made a respondent, but by mistake his father, who was dead, was named as his guardian. The mistake was detected after the appeal had been pending for about a year. The Court allowed the memorandum of appeal to be amended and notice issued to the pleader guardian-ad-litem who had worked in the Court below. This notice could not be served, as the pleader had ceased to practise. Thereupon a fresh guardian-ad-litem was appointed who appeared in the appeal. The objection to the order appointing this fresh guardian on the ground that it was not stated by the District Judge in so many words that he discharged the former guardian-ad-litem is, I think lacking in substance, as the order of appointing a fresh guardian may be read as involving, by implication, the discharge of the former guardian. Then it is said that the appeal, as originally presented, was not properly constituted, and by the time the mistake was rectified, the period for presentation of an appeal had elapsed and so the appeal should be considered as out of time; that is to say, as not having been presented before the date on which it was put in proper form. No authority was cited in support of this contention which I do not think is sustainable. The person against whom an appeal is to be presented is the respondent. The appointment of a proper guardian is not a necessary preliminary to the filing of an appeal, although it is necessary before the appeal can be properly heard and disposed of. The appeal therefore must be deemed to have been presented in time by calculation of the date when it was actually presented.

Another objection was taken to the order directing costs to be recoverable from the defendants fourth party only. This order does not appear to be in conformity with the provisions of O. 34, Civil P. C., under which costs of the suit are made a part of the mortgage debt and realizable as such. Therefore they are recoverable from the mortgaged property and not by a personal decree against any party other than the mortgagor. Then there is the contention that the mortgage bond is void because the mortgagee was a minor, and it is said a minor cannot enter into a contract. I do not wish to repeat the reasoning of my learned brother with whose conclusion I am in agreement but I may point out that the same result follows from an examination of some of the provisions of the Indian Contract Act. In 30 Cal 539 (1), their Lordships examined a part of the definitions in S. 2 of the Act, so far no doubt as was necessary for the purposes of determining the validity of a mortgage bond executed by a minor. In the case before us which is in a way a converse position, that of a mortgage in favour of and not against a minor, a further examination may assist. The definition of 'contract' in S. 2 of the Act appears to be built upon a succession of definitions of the elements which go to make a contract, that is to say, proposal, acceptance, promise, promisor, promisee, consideration and agreement. The expression 'reciprocal

promises' is explained and finally a contract is defined as an agreement enforceable by law. On the other hand an agreement not enforceable by law is said to be void; that is to say it is not a contract at all. In *Mohori Bibee's case* (1) the agreement which the plaintiff sought to enforce was a promise by a minor; this was held to be void. In 39 Cal 232 (2), the agreement which was under consideration consisted of two promises each forming the consideration for the other: that is to say rcciprocal promise within the definition of S. 2. One of these reciprocal promises was a promise by a minor. That promise was void and therefore made the whole of the agreement void. Again in 3 Pat L J 518 (7), the decision that the lease in favour of a minor was void was based on the presence as an element in the agreement of a promise by a minor. This promise being void, the whole agreement fell to the ground. On these authorities and on the language of the definitions it seems to me that it is the promise by a minor which is unenforceable, and an agreement embodying such a promise cannot be contract. But an agreement as defined in S. 2 (e) of the Act does not necessarily consist of a set of promises forming the consideration for each other. Every promise is an agreement; that is to say a promise made by an adult in favour of a minor is an agreement by the adult. We have seen that if the consideration for such a promise or such an agreement is a reciprocal promise by the minor, the whole thing is void; but if the consideration for it is not a promise, but is something actually done, there seems no bar in the statute and no reason in principle why the result should not be a valid contract. I am referring to Cl. (d), S. 2 which defines consideration for a promise and deals with two cases, the first being where the promisee has done or does something, and the second being where the promisee promises to do something. The decisions examined dealing with cases where a minor has promised to do something have no application to the case of a minor who has done or does something which is the consideration for the promise made by other party. These principles, I think, are in no way inconsistent with the decisions above cited and are the principles underlying the decisions in the Madras High Court in 40 Mad 308 (6), in the Allahabad High Court in 38 All 154 (4), and in this High Court in 4 Pat L J 682 (5). In the result where the consideration has been received for an agreement consisting of a promise in favour of the minor such promise can be enforced by the minor or on his behalf.

In applying the aforesaid principles to the case before us we find that Rs. 438 had been advanced by the mortgagee to the mortgagor according to the recital in the document itself and according to the finding of both the Courts below. There seems to be no room for hesitation in passing a mortgage decree for this sum at least. As regards the balance of Rs. 162 making up the total consideration of Rs. 600, it has been argued that on a reading of the document it appears that this sum was to be paid later. Therefore it is said that the consideration for the mortgagor's agreement to repay was not something that had been done by the mortgagee, but a promise to do something. I would answer this in two ways, first by a reference to S. 2 (d), Contract Act, which refers to the case where the promisee "has done or does" something. In either case the consideration is the thing done and not the promise to do it. So I think if the money was actually paid, even if this had been done after the date of the bond, the payment of it, and not any promise to pay it, was the consideration for the mortgagee's promise to repay. It may be observed that in S. 58, Transfer of Property Act, which defines a mortgage, it is "the transfer of an interest in specific immoveable property for the purposes of securing the payment of money advanced or to be advanced;" that is to say, it takes effect as a transfer whether a part or all of the consideration money had passed, and is operative to the extent of the actual sum advanced. In case part of the consideration is paid at the time and a part later, it is the actual advance, and not merely any promise of an advance, which is the real consideration for the mortgage. That I think is in conformity with the decision in 2 Pat L J 168 (9). Secondly, the finding of the lower appellate Court is that the entire consideration money was paid at the time of the execution of the mortgage. On that finding no question

9. Makhan Lal v. Hanuman Bux, 1917 Pat 514 =38 I C 877=2 Pat L J 168.

of a "promise to pay" arises. My learned brother has dealt with the argument that the evidence on which this finding rests was not admissible and I have nothing further to say on this point.

I conclude in agreement with my learned brother that the appeal should be dismissed subject to the very slight modification indicated and that the appellant should bear the costs of this Court.

B.D./R.K. *Appeal dismissed.*

A. I. R. 1936 Patna 158

MOHAMMAD NOOR AND SAUNDERS, JJ.

Babu Ramji Das—Plaintiff—Appellant.

v.

Rai Mahamaya Prasad Singh Bahadur and *others*—Defendants—Respondents.

Appeal No. 19 of 1922, Decided on 16th August 1935, from original decree of Sub-Judge, Patna, D/- 23rd July 1921.

(a) Hindu Law — Maintenance—Claim on contract—Suit is not governed by Art. 128 or 129 but by Art. 115, Lim. Act.

The word "Hindu" in Arts. 128 and 129 does not refer to the religious persuasion of the plaintiff. It is inconceivable that the legislature ever intended to provide one period of limitation for a plaintiff on a particular religious faith and another period if he belongs to another faith. Those two articles apply where the maintenance is claimed not on the basis of contract, but on the basis of status of the plaintiff under the Hindu law and a suit for maintenance by even a Hindu under contract is governed by Art. 115 : 23 *Cal* 645, *Rel. on.* [P 159 C 2]

(b) Limitation Act (1908), Art. 131—Claim for money under recurring right is not governed by Art. 131.

There is a distinction between a suit to establish a periodical recurring right and a suit for the realisation of sums of money due on the basis of that right and the latter claim is not governed by Art. 131 : 1926 *Pat* 205, *Foll.* [P 159 C 2]

(c) Hindu Law—Debts — Great-grandsons are equally liable with grandsons—*Obiter.*

The great-grandsons are liable for payments due under contract by the great-grandfather and in this respect there is no difference between a great-grandson and a grandson: 1926 *P C* 105 and 1928 *Oudh* 378, *Foll.* [P 160 C 1]

Harihar Prasad Sinha and *Brajeswari Prasad*—for Appellant.

R. Misra and *A. D. Sinha*—for Respondents.

Mohammad Noor, J.— This appeal arises out of a suit instituted by Ramji Das, father of the present appellant, for realisation of a certain sum of money from the heirs of the late Rai Bahadur Ganga Prasad Singh and for certain declarations. The plaintiff's (Ramji Dass) case was that Rai Bahadur Ganga Prasad Singh was anxious to marry his daughter to him, and in consideration of his marrying her, the Rai Bahadur promised to pay certain recurring amounts to him. They were (1) Rs. 50 per month by way of maintenance allowance, (2) Rs. 8 per month for house rent, (3) three maunds and thirty two and half seers of grain, viz., rice, wheat, pulse etc., per month, and (4) Rs. 50 annually for winter clothing. According to the plaintiff the descendants of the Rai Bahadur did not pay the aforesaid allowances to him and therefore he instituted a suit for recovery of Rs. 5,441-8 principal and Rs. 1,729-5-9 interest, making a total of Rs. 7,170-15 for the period from Sawan Sambat 1971 up to the date of the suit (16th August 1919). He also asked for declarations (1) that the defendants were bound to pay the plaintiff's claim as the sons and descendants of Rai Bahadur Ganga Prasad Singh to the extent of the joint family properties existing at the time of the late Rai Bahadur, which came into their hands, (2) that the other defendants were not competent and could not object to the realisation of the plaintiff's decree as specified above, and (3) that the defendants were bound to pay the plaintiff from Sambat 1976 the amounts specified above. In other words, the plaintiff wanted a declaration that in future the defendants were bound to pay the above sums to the plaintiff.

There were various pleas raised by the defendants which need not be considered at present. The only pleas with which we are concerned in the present appeal, as I shall presently show, is that of limitation and the liability of the great-grandsons of Rai Bahadur Ganga Prasad Singh who were originally defendants 14 to 18 in the suit. The learned Subordinate Judge passed a modified decree for three years' arrears holding that the claim for the remaining period was barred by limitation. He also held that the great grandsons of the Rai Bahadur were not liable for the promise made by him. He further held that the plaintiff was not entitled to the declarations as he had not sought them in a previous suit. The plaintiff preferred this appeal. During its pendency the original appellant Ramji Das died and the present appellant (his son) under the guardianship of his mother

Maha Lakshmi Bibi was substituted in his place. Later on, this Maha Lakshmi Bibi also died, leaving the appellant without a next friend in the appeal. As no step was taken by anybody to have a next friend appointed, on 19th March 1925, a Bench of this Court ordered the proceedings to be stayed till the appellant became major and took steps for the prosecution of the appeal. When the appellant came of age he applied for the continuation of the appeal and his prayer was granted on 10th September 1934. In the meantime, a number of respondents had died and the appeal against them at any rate had abated. On the application of the appellant, however, the abatement was set aside and the representatives of the deceased respondents were substituted in their places. The appeal has now come up for hearing.

It may be stated at the outset that the appeal so far as it is against the refusal by the lower Court to grant the various declarations to the plaintiffs has, in my opinion, become infructuous on account of the death of the original plaintiff. In the plaint the declarations were sought in favour of the original plaintiff Ramji Das. Assuming that he was entitled to the declarations he sought there is nothing to show that the right has devolved upon the present appellant. There is no allegation in the plaint that the amounts promised to be personally paid to the plaintiff by Rai Bahadur Ganga Prasad Singh were to be paid to his heirs and representatives on his death. The claim was personal and the suit has been tried on that basis. Therefore, on the plaint as it stands, the present appellant is not entitled to a declaration in his favour. The question whether or not the appellant is entitled to get all those things which his father was promised by Rai Bahadur Ganga Prasad Singh is not before us. If he claims such a right he may take such steps in this connexion as he may be advised. He is certainly entitled to realize what became due to his father and which is safe from limitation. The question of his future right must be left open.

Coming to the appeal against the dismissal of a portion of the claim and the exoneration of some of the defendants, as I have said, two questions arise. One is that of limitation and the other of the liability of the greatgrandsons of the Rai Bahadur. Now as to limitation, the learned Subordinate Judge relying upon a decision of the Calcutta High Court in 23 Cal 645 (1), has applied Art. 115, Lim. Act. The learned advocate for the appellant has contended before us, as was contended on behalf of his client before the learned Subordinate Judge, that the articles applicable are 128 and 129. In my opinion, the learned Subordinate Judge has rightly held that the word "Hindu" in those articles does not refer to the religious persuasion of the plaintiff. It is inconceivable that the legislature ever intended to provide one period of limitation for a plaintiff of a particular religious faith and another period if he belongs to another faith. Those two articles apply where the maintenance is claimed not on the basis of contract, but on the basis of status of the plaintiff under the Hindu law.

The next article which the learned advocate tried to apply was 131, and he placed before us a certain decision of a Full Bench of the Madras High Court. That decision was considered by a Division Bench of this Court in the case of 5 Pat 249 (2). The late Chief Justice of this Court, Sir Dawson Miller, has clearly held that there was a distinction between a suit to establish a periodical recurring right and a suit for the realisation of sums of money due on the basis of that right. As I have said, the Madras case was referred to, and was not followed. It appears that some of the learned Judges, who composed the Full Bench of the Madras High Court were doubtful, but they felt themselves bound by some earlier decisions of that Court. I think we should follow the decision of the Division Bench of this Court. I am therefore clearly of opinion that the learned Subordinate Judge has rightly applied Art. 115, Lim. Act, and the plaintiff's suit in respect of the claim for the remaining years has been rightly dismissed. The next point was about the liability of the great grandsons. The learned advocate for the respondents has very fairly conceded that the decision of the Privy Council in 53 I A 204 (3) and

1. Girijanand Datta Jha v. Sailajanund Dutta Jha, (1896) 23 Cal 645.
2. Baidyanath Jiu v. Har Dutt Dwari, 1926 Pat 205=94 I C 826=5 Pat 249=7 P L T 465.
3. Masitullah v. Damodar Prasad, 1926 P C 105 =98 I C 1031=53 I A 204=48 All 513 (P C).

the decision of a Full Bench of the Oudh Chief Court in 3 Luck 700 (4) have clearly laid down that the greatgrandsons are liable and in this respect there is no difference between a greatgrandson and a grandson. Though in my opinion the question is more or less of an academic interest only, since all the sons of the late Rai Bahadur Ganga Prasad Singh are dead, and the default having been made by them, the greatgrandsons of the Rai Bahadur are liable as they are the grandsons of the defaulters. In this respect the decree of the learned Subordinate Judge is wrong.

The result is that I would modify the decree of the learned Subordinate Judge only to this extent: that there should be a decree against all the defendants for the sum which the learned Subordinate Judge has found due; otherwise the appeal is dismissed. Taking the circumstances of this case, and the course this appeal has taken, I would order the parties to bear their own costs of this Court.

Saunders, J.—I agree.

M.N/R.K. *Decree modified.*

4. Sheo Ram v. Durga Baksh, 1928 Oudh 378=112 I C 288=3 Luck 700=5 O W N 735 (F B).

A. I. R. 1936 Patna 160

COURTNEY-TERRELL, C. J.
AND VARMA, J.

Rampat Sahu—Defendant—Appellant.

v.

Bhajju Sahu and *another*—Plaintiffs—Respondents.

Appeal No. 178 of 1934, Decided on 17th July 1935, from appellate order of Sub-Judge, Darbhanga, D/- 8th February 1934.

(a) Practice—Remand—Statutory and inherent powers of remand should not be exercised to provide merely another opportunity to unsuccessful party.

It is true that appellate Courts have inherent powers of remand as well as specific powers of remand given them by the Code, but the Courts as has been pointed out more than once, should be slow to exercise that jurisdiction and should only use it in appropriate cases. The power of remand is not intended to allow an unsuccessful plaintiff, whom had failed to prove his cause of action to have another attempt and call witness who he might have called on the first occasion: 1934 *Pat* 284, *Rel. on.* [P 161 C 1]

(b) Revision—Remand.

An improper order of remand can be interfered with in revision: 1927 *Cal* 850, *Rel. on.* [P 161 C 1]

A. C. Ray and *Sambhu Bharmeshwar Prasad*—for Appellant.

Hasan Jan and *Syed Ali Khan*—for Respondents,

Courtney-Terrell, C. J.—This is an appeal from an order by the Subordinate Judge, sitting in appeal, remanding a suit to the Munsif for re-trial upon fresh evidence. There not having been a final determination of the rights of the parties no appeal in the regular sense lies; but we have been asked to treat it as an application in revision on the basis that the Subordinate Judge had no jurisdiction to order the remand in question. We have acceded to that request and heard the case as an application in revision.

In the suit before the Munsif which was one to recover a sum of some Rs. 200 odd on a bahikhata, the plaintiff, supported by a formidable array of legal talent consisting of an advocate and two pleaders, sought to prove the very simple issues involved in such a suit. They called a witness who however proved nothing at all. First of all he said that he was employed by the plaintiff firm; that he knew their business; that he knew the handwriting of the person who kept the bahikhatas; and the entries therein were in that person's handwriting but he offered no evidence of the transactions themselves and indeed did not prove the debts which were purported to have been recorded in the bahikhata. His evidence in cross-examination went somewhat nearer to the points which the plaintiff had to record if he wished to succeed, but, notwithstanding the efforts of the three pleaders on behalf of the defendants, who conducted the cross-examination, to facilitate the plaintiff's case, even they failed to elicit from the single witness the points which were necessary for the plaintiff's success. The learned Munsif however considered that the plaintiff was entitled to succeed and gave judgment for him. The defendant thereupon went to the appellate Court.

The Subordinate Judge rightly apprehended that the evidence adduced by the plaintiff and strengthened by the cross-examination on behalf of the defendant did not prove that case but he took an unusual course, for, instead of acting upon the conclusion of fact at which he had arrived, namely that the witnesses called on behalf of the plaintiff had not proved the plaintiff's case, and allowing the

appeal and dismissing the suit, he decided that it was only right that the plaintiff should have another chance of making out his case, and thereupon he made the order that the case should be remanded to the lower Court for retrial upon fresh evidence. Now it is true that appellate Courts have inherent power of remand as well as specific power of remand given them by the Code, but the Courts, as has been pointed out more than once, should be slow to exercise that jurisdiction and should only use it in appropriate cases. The power of remand is not intended to allow an unsuccessful plaintiff, who had failed to prove his cause of action to have another attempt and call witnesses whom he might have called on the first occasion. These principles have been referred to in the judgment of James, J. in 15 P L T 142 (1), and the right of this Court to interfere in revision with an improper order of remand is dealt with in the case of 55 Cal 219 (2). The learned Subordinate Judge in appeal should have confined himself to acting upon the conclusion of fact at which he had arrived that the plaintiff had failed to prove his case and should have allowed the appeal and dismissed the suit with costs throughout and that is the course which it is our duty to follow in this case. The appeal is allowed with costs. We assess the hearing fee at two gold mohurs.

Varma, J.—I agree.

M.N. *Appeal allowed.*

1. Gorakh Prasad Srivastava v. Jhari Shanker Prasad, 1934 Pat 284=15 P L T 142.
2. Banka Behari Deb v. Birendra Nath Dutt. 1927 Cal 850=55 Cal 219=47 C L J 69.

A. I. R. 1936 Patna 161

COURTNEY TERRELL, C. J. AND VARMA, J.

Panchi Mandal—Pauper—Applicant.

v.

Gena Mander—Opposite Party.

Miscellaneous J. C. (Pauper) No. 83 of 1934, Decided on 29th April 1935.

(a) Award—Application for passing decree in accordance with—Arbitrators need not be made parties.

There is no provision of law under which it is necessary to make the arbitrators parties to a suit for passing a decree in accordance with an award. [P 162 C 1]

(b) Limitation Act (1908), S. 6—S. 6 does not apply to applications under Sch. 2, Para. 20, Civil P. C.

Section 6, Lim. Act, does not apply to cases under Para. 20, Sch. 2, Civil P. C.: 1915 *All* 369 and 1923 *Rang* 226, *Ref.* [P 162 C 1]

S. M. Gupta—for Applicant.

D. C. Varma—for Opposite Party.

Varma, J.—This was a rule issued on the trial Court to show cause why the decision in Suit 26 of 1924 should not be set aside and why a decree should not be passed in terms of the award. The circumstances under which this case came before the High Court have been dealt with in some of the previous orders of this Court. In order to understand them I shall put the circumstances shortly. There were two brothers Nathan and Darbhangi. Darbhangi's wife was called Ima and his daughter was called Sonabhati. His sons were dead. Nathan had four sons who were minors. After the death of Darbhangi, Ima and his daughter lived with Nathan. Nathan had borrowed a sum of Rs. 200 from Gena Mandar on 26th June 1919. It is said that after the death of Nathan one bigha of land was given to Gena by a registered sale deed. Gena married Sonabati, and from Ima he got half of the joint property on transfer. With regard to this transfer a panchayat was held on 29th July 1923. It appears that almost all the villagers took part in the panchayati and their award was to the effect that nothing was due to Gena. On 2nd August 1923, just a few days after the date of the award, Gena filed a suit against the minors to realize his debt of Rs. 200. This suit was No. 648 of 1923. It was decreed ex parte on 11th December 1923.

There is some dispute as to whether the minors actually appeared or not through their guardian, but at present we need not express any opinion upon that. On 4th February 1924 (there is some dispute about the exact date, because it may be 12th February as appears from the record) a petition was filed on behalf of the minors under Para. 20, Sch. 2, Civil P. C., requesting the Court to pass a decree in terms of the award. This suit was dismissed on various grounds, the two chief grounds being that the petition was filed beyond time and that all the arbitrators were not made parties. It appears that the petitioners brought a suit, which was Suit No. 52 of 1925, on 25th May 1925, to set aside the decree passed ex parte in Suit No. 648 of 1923, on the ground that the decree was vitiated by fraud. But it further appears that

they filed the suit as paupers. The Munsif dismissed the suit. The appeal before the District Judge of Bhagalpur was also dismissed, as there was no point of law; and a revision before this Honbl'e Court was also dismissed. Mr. Gupta, appearing on behalf of the petitioners, urges that the trial Court was wrong in dismissing the Suit No. 26 of 1924 on the ground that all the arbitrators were not made parties. This contention of Mr. Gupta is justified for there is no provision of law under which it is necessary to make the arbitrators parties to the suit. On the question of limitation the position is different. Mr. Gupta urges that during the minority of the petitioners limitation did not run against them. Mr. Janak Kishore, appearing on behalf of the opposite party, points out that S. 6, Lim. Act, does not apply to cases under para. 20, Sch. 2, Civil P. C., see 38 All 85 (1) and 1 Rang 256 (2). In the face of these decisions it must be held that the application was time-barred. We regret that we are obliged to arrive at this decision because there are circumstances in the case which we could have wished to investigate but the law leaves us no choice in the matter. The rule is therefore discharged.

Courtney-Terrell, C. J.—I agree.

M.N. *Rule discharged.*

1. Ram Ugrah Pande v. Achraj Nath, 1915 All 369=31 I C 899=38 All 85=13 A L J 1115.
2. Ma Thein Tin v. Maung Ba Than, 1923 Rang 226=76 I C 493=1 Rang 256.

A. I. R. 1936 Patna 162

ROWLAND, J.

Nawalal Jha and *another*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 234 of 1935, Decided on 4th November 1935.

(a) Criminal P. C. (1898), S. 476—Absence of finding that inquiry should be started for justice is not fatal—Court of first instance not applying its mind to facts—Appellate Court may do so without presuming correctness of lower Court's findings — Court below finding prosecution desirable but omitting to use exact words of section—Order to prosecute should not be set aside on mere technical ground.

The absence of a finding by the Court ordering prosecution, that it is expedient in the interest of justice that an inquiry should be made is not fatal to the proceedings started under S. 476. Prosecution should only be started under S. 476 when the Court ordering a prosecution has directed its mind towards the matter and formed a definite opinion that prosecution is in the interest of justice. Where the Court of the first instance has not applied its own mind to the facts, the appellate Court may look at them independently and in doing so, will not make the usual presumptions in favour of the correctness of the first Court's findings. An order to prosecute should not be set aside on purely technical grounds if it appears from the facts that the Court below had come to a finding as to the desirability of a prosecution and the only defect was the omission to use the exact words of the section : 1928 *Cal* 862 ; 1933 *Cal* 147 and 1933 *Pat* 713, *Rel. on.* [P 163 C 2; P 164 C 1]

(b) Penal Code (1860), S. 193 — Accused, Hindus, giving evidence regarding use of mosque during certain interval—Magistrate disbelieving evidence—Only four witnesses, all Mohamedans cited by Magistrate in petition of complaint—Only witness referred to in judgment and relied on was sub-Inspector—Sub-Inspector stating that certain Hindus made certain statement to him inconsistent with that of accused — Prosecution held should not proceed.

During the course of a trial, the accused who were Hindus, gave evidence regarding the use to which a particular mosque was put during a certain interval of time. The Magistrate disbelieved the evidence given by the accused not because superior rebutting evidence was adduced on the other side but because of some discrepancies in the evidence of the witnesses and some speculations and inferences as to the probabilities drawn by the Magistrate. In the petition of complaint made by the Magistrate only four witnesses were cited, all of whom were Mohamedans. The only one referred to in the judgment of the Magistrate as the witness on whom he was disposed to place reliance was the Sub-Inspector, who stated that he was informed by some Hindus as to the conduct of the Mohamedans, and that one *A*, a Hindu Marwari, had made a certain statement to him inconsistent with what the accused were deposing. The Magistrate had not before him the evidence of those unnamed Hindus who had made statements to the Sub-Inspector nor the evidence of *A*. The use to which the mosque was put during the interval was one on which it was difficult to arrive at a conclusion with any certainty or to reach any conclusion on the balance of probabilities :

Held : that it was not expedient in the interest of justice that prosecution should proceed further. [P 164 C 1]

Sambhu Barmeshwar Prasad—for Appellants.

K. K. Banerji for *Assistant Government Advocate*—for the Crown.

Judgment.—This is an appeal under S. 476-B, Criminal P. C., from the order of the Sessions Judge of Monghyr directing the prosecution of the two appellants and one other person, namely Thakur Prasad, and complaining against them for the alleged commission of offences under S. 193, I. P. C., said to have been committed by them in the course of deposi-

tions which they gave before the Sessions Judge in the trial of Junab Khan and others. This trial was itself an off-shoot of a Sessions trial held by the Sessions Judge of Bhagalpur before whom Junab and others had deposed as prosecution witnesses against a number of Hindus who were accused of murder. In the Bhagalpur trial it was alleged that a mob of Hindus on 2nd April 1934, attacked Mahomedans engaged in prayer in a mosque killing three of them. The building which was alleged to be a mosque was said to have been built for that purpose and to have been in use as such for three years. The Sessions Judge of Bhagalpur acquitted those Hindus and found that the house had not been built as a mosque, that it had been used as a house at least until 15th January 1934, and that the deposition of the Mahomedan witnesses to the effect that the building had been used as a mosque from its erection until 15th January 1934, was wilfully false. It was on this finding that the Sessions Judge of Bhagalpur ordered the prosecution and framed a complaint against those Mahomedan witnesses in respect of the statements in their evidence to the effect that the house had been built as a mosque and used as a mosque prior to 15th January 1934. Out of eleven Mahomedans thus ordered to be prosecuted one died and ten were convicted by the Sessions Judge of Monghyr and in the course of this trial he had occasion to take the evidence of Nawalal, Jamuna Lal and Thakur Prasad. It had been the case of the Hindus in the Bhagalpur trial that the building had never been used as a mosque and this was the purport of the evidence of these three witnesses.

The Sessions Judge of Monghyr was of opinion that the evidence given by these witnesses in so far as it referred to the period after 15th January 1935, was false and he ordered their prosecution and drew up a complaint against them on 13th June 1935, the very date on which he pronounced judgment in the Sessions case. The three persons concerned were not invited to show cause against their prosecution before the filing of the complaint. One of them Thakur Prasad thereafter put in a petition before the Sessions Judge explaining that the statement that the building in question was not used as a mosque during the period after 15th January 1935, did not appear in his deposition and that he had not made any such statement. On this the complaint against him was withdrawn on 28th August 1935. The other two Nawalal and Jamuna Lal have appealed to this Court. It is contended on their behalf that the Sessions Judge has not recorded any finding such as is contemplated by S. 476, Criminal P. C., to the effect that he is of opinion that it is expedient in the interests of justice that an enquiry should be made into the alleged offence. It is further contended that the Sessions Judge of Bhagalpur having taken a different view of the facts, the Sessions Judge of Monghyr should not have ordered prosecution on what is practically a contradictory finding. It is also said that the complaint petition cites as witnesses four persons, all Mahomedans, and three of them were disbelieved by Mr. Lucas himself in the trial out of which this prosecution arises. The absence of a finding by the Sessions Judge that it is expedient in the interest of justice that an enquiry should be made is not in itself fatal to the proceedings. The position is clearly stated in 55 Cal 1312 (1). The Code intends that prosecution should only be started under this section when the Court ordering a prosecution has directed its mind towards the matter and formed a definite opinion that prosecution is in the interests of justice. Where the order does not disclose that the Court had paid attention to this matter Rankin, C. J., observed:

> In the present case the learned Sessions Judge has taken no pains to do what he is ordered to do by S. 476. I look in vain for any recorded finding to the effect that 'it is expedient in the interests of justice that an enquiry should be made' into the offence in this case.

These observations apply to the procedure of the Sessions Judge of Monghyr. In such circumstances a Bench of the Calcutta High Court observed in 1933 Cal 147 (2), that the order under S. 476, should not be maintained and the headnote goes further and says that "a complaint is not maintainable. That goes beyond the judgment and certainly beyond anything that has been laid down in this Court. The correct view, if I may say so, is that where the Court of first instance has not applied its own mind to the facts, the appellate Court may look at them

1. Keramat Ali v. Emperor, 1928 Cal 862=113 I C 842=55 Cal 1312=30 Cr L J 221.
2. Nabani Nath Mukerjee v. Emperor, 1933 Cal 147=1933 Cr C 224=34 Cr L J 684.

independently and in doing so will not make the usual presumptions in favour of the correctness of the first Court's findings. As Rankin, C. J., said in 55 Cal 1312 (1) :

> As the learned Sessions Judge has not recorded that finding I do not feel it is incumbent on me to assume that he properly considered this matter and came to a right conclusion.

I have myself held in 14 P L T 635 (3), that an order to prosecute should not be set aside on purely technical ground if it appears on the facts that the Court below had come to a finding as to the desirability of a prosecution and the only defect was the omission to use the exact words of the section.

Turning now to the facts of this case, I have referred to the judgment of the Sessions Judge of Monghyr in the trial of Junab Khan and others for the reasons for which he is dissatisfied with the evidence of the Hindu witnesses regarding the use to which the building was put between 15th January and 2nd April. I find that he has disbelieved the evidence of these witnesses not because superior rebutting evidence is adduced on the other side, but because of some discrepancies in the evidence of the witnesses and of some speculations and inferences as to probabilities drawn by the Sessions Judge. I note that in the petition of complaint only four witnesses are cited, all Mahomedans, and the only one referred to in the judgment of the Sessions Judge as a witness on whom he was disposed to place reliance was the Sub-Inspector Najmul Hasan. But on referring to the judgment it seems that the important part of the deposition of Najmul Hasan before the Sessions Judge and that part which most influenced the Sessions Judge in coming to the view that the Hindu witnesses regarding the alleged mosque were unreliable was that in which he had stated that he has been informed by certain Hindus (whose names he did not record and could not give) as to the conduct of the Mahomedans after the earthquake of 15th January and the learned Sessions Judge also appears to have relied strongly on a statement of the Sub-Inspector that one Askaran, a Hindu Marwari, had made a certain statement to him inconsistent with what the Hindu witnesses had been deposing. Mr. Lucas had not before him the evidence of those unnamed Hindus who had made statements to the Sub-Inspector nor the evidence of Askaran Marwari and I am wholly at a loss to understand how the learned Sessions Judge could have permitted the Sub-Inspector to give in his deposition any evidence at all regarding the hearsay statements made to him by persons who were not witnesses. Another ground, if I understand the judgment correctly is that there has been some development in the story told by members of the Hindu party from time to time regarding the building in dispute. Now, such developments may be very relevant for the purpose of discrediting a prosecution witness, but the position is very different when it comes to putting him in the dock and trying to prove him guilty of perjury. He and not his opponent will then be entitled to the benefit of any doubt and of any presumptions that are to be made.

In view of these considerations the prospects of a conviction in the case instituted on the complaint of the Sessions Judge of Monghyr are very much more remote than they must have appeared to him at the time when he presented his complaint. The matter in dispute, that is to say, the use to which the disputed building was put in February and March 1934 is one on which it would be very difficult to arrive at certainty or to reach any conclusion which can be rated more highly than the most likely conclusion on the balance of probabilities. In a case of this nature it is seldom desirable to launch criminal prosecutions lightly against every witness who may be suspected of having departed from the truth in some particular. My own opinion on a consideration of the circumstances generally is that it is not expedient in the interests of justice that the prosecution should proceed further. Accordingly I allow the appeal and direct the complaint to be withdrawn.

S.R./R.K. *Appeal allowed.*

3. Bankey Lal v. Rampadarath, 1933 Pat 713= 1933 Cr C 1536=14 P L T 635=35 Cr L J 459.

A. I. R. 1936 Patna 165

DHAVLE, J.

Inderdeo Tiwari—Petitioner.

v.

Ram Ran Bijay Prasad Singh—Opposite Party.

Civil Revn. No. 40 of 1935, Decided on 9th August 1935.

(a) Bengal Tenancy Act (8 of 1885), S. 169 —Two months' period prescribed in S. 169 is for benefit of landlord rent decree-holder.

The Bengal Tenancy Act, as a whole, was intended to give simple remedies to the landlord rather than for dealing with the claims of other parties against the tenant. [P 165 C 2]

The period of two months prescribed in S. 169 is meant for the benefit of the landlord who has obtained the rent decree, and not for the benefit of other persons having claims against the judgment-debtors. 1917 *Pat* 433, *Rel. on.* [P 165 C 2]

(b) Execution—Sale—Compromise between judgment-debtor, decree-holder and auction-purchaser to confirm sale without auction-purchaser having to pay balance of purchase money — Petition to record compromise should not be refused on ground that 30 days have not expired after sale.

Where after the sale in execution, the decree-holder, auction-purchaser and the judgment-debtor enter into a compromise to confirm the sale without the auction-purchaser having to pay the balance of purchase money, the fact that the period of 30 days for confirmation of the sale has not expired is no reason for rejecting or refusing to record the petition of compromise, though it may be a good reason for refusing to confirm the sale: 1926 *Cal* 1236; 1928 *Pat* 40 and 1916 *Cal* 64, *Rel. on.* [P 166 C 1]

Sultan Ahmad and *D. N. Varma*—for Petitioner.

R. S. Chattarji and *Sundar Lal*—for Opposite Party.

Order.—This is an application by the auction-purchaser in a rent execution sale against the order of the Munsif of the Second Court, Buxar, refusing to record a compromise according to which the sale was to be confirmed. To this compromise, the judgment-debtor and the decree-holder, besides the auction-purchaser, were parties. The sale was held on 8th December 1934, and the compromise was filed on 21st of that month and the prayer in effect was that the compromise be recorded and the sale confirmed. One Ramekbal Singh, who was not a party to the suit, came forward to oppose the application on the ground that he had some interest in the holding by virtue of a certain agreement with the judgment-debtor, but the lower Court held that he had no locus standi in the matter. The learned Munsif, however, proceeded to "reject the petition of compromise" mainly on the ground that S. 169, Ben. Ten. Act, which entitles the judgment-debtor to receive the balance of the sale proceeds only upon the expiration of two months from the confirmation of the sale (which itself depends upon the auction-purchaser depositing the balance), shows "an intention on the part of the legislature to accommodate such persons as could have claims against the judgment-debtor" and that, therefore, an order confirming the sale "would really operate to the prejudice of such persons." S. 169, however, makes a special provision in favour of the decree-holder in lieu of the general provision contained in S. 73, Civil P. C., which makes the proceeds of execution sales liable to rateable distribution among the decree-holder and other creditors of the judgment-debtor who may have obtained other decrees against him. On the face of it the period of two months prescribed in that section is meant for the benefit of the landlord who has obtained the rent decree: the Act, as a whole, was intended to give simple remedies to the landlord rather than for dealing with the claims of other parties against the tenant. The Section came under consideration in 2 P L J 722 (1), where their Lordships said :

There is nothing in the Code (the Bengal Tenancy Act?) to suggest that the application is not maintainable if made after two months. All that the Code indicates is that the legislature is of opinion that two months is a sufficient time to give the landlord a reasonable opportunity of exercising his rights; and if he fails to exercise them within that time he runs the risk of losing his money by being anticipated by the judgment-debtor.

The next ground on which the learned Munsif refused the application was that "there was nothing in the compromise petition in so far as the payment of the poundage fee is concerned." But the poundage fee is only to be realised under the H. C., G. R. and C. O. Civil, Vol. 1, pp. 123 and 124 when an application is made to the Court for the withdrawal of the money in deposit; the auction-purchaser has already deposited twenty-five per cent. of the price for which the property was knocked down to him, and as under the compromise this is to go to the decree-holder, there cannot be any question that the poundage fee will be paid when the decree-holder applies for withdrawal of the money. The third ground on which the learned Munsif refused the application was that thirty days, the period of limitation during which the judgment-debtor could come to Court and apply to have the sale set aside

1. Rameshwar Singh v. Mohammad Waiz, 1917 Pat 433=41 I C 734=2 Pat L J 722.

under O. 21, R. 90, Civil P. C., had not expired, and confirmation on the date of the application would be to the prejudice of persons who may choose thereafter to apply under that provision of the law. This, however, was plainly no reason for rejecting or refusing to record the petition of compromise, though it would have been a good reason for refusing to confirm the sale before the expiry of thirty days. That period is now long past, and there can now be no objection to confirming the sale.

The real point of the compromise was that the sale should be confirmed without the auction-purchaser having to deposit in Court the balance of the purchase money. The only persons who were interested in this balance of the purchase money, so far as the rent execution was concerned, would be the judgment-debtor and the decree-holder, and they were parties to the compromise set up by the auction-purchaser. A somewhat similar point was dealt with in 1926 Cal 1236 (2), where a sale was set aside though the judgment-debtor, instead of actually depositing the money in Court under S. 174, Ben. Ten. Act, for the satisfaction of the decree, arrived at an arrangement with the decree-holder by which he was satisfied, and deposited in Court only five per cent. purchase money which was due for payment to the auction-purchaser. Sir Sultan Ahmad has also brought to my notice the decision in 1928 Pat 40 (3), a case in which James, J., declined to hold that :

> Where, after a sale has taken place, the purchasers and the decree-holders, being the same persons, certify that the decree has been settled out of Court and pray that the sale may be set aside, the Court must nevertheless confirm the sale unless the owner of the property goes through the form of filing an application under O. 21, R. 89 and depositing the money due under the decree in Court.

The concurrent wish of the parties and the obvious requirement of the case—to borrow the expression used in 27 I C 601 (4),—not only gave jurisdiction to the lower Court to record the petition of compromise, but required it to do so, though the prayer for confirmation of the sale could not be allowed on that day but would have had to wait for a few days. Mr. B. P. Sinha endeavoured to intervene in this revisional application on behalf of the third party Ramekbal Singh. Ramekbal is admittedly not a registered tenant; he may or may not have good claims against the judgment-debtor, but the present execution matter is between the judgment-debtor on the one hand and the decree-holder and the auction-purchaser on the other. It was contended on Ramekbal's behalf that if the balance of the purchase money is allowed to go to the judgment-debtor without being deposited in Court, he, Ramekbal, would lose a possible chance of getting his money. That may be ; but the present proceedings are intended to adjust the relations of the landlord and the tenant and also by reason of the execution sale, the auction-purchaser, and cannot be extended to whatever relations may exist between third parties and the judgment-debtor. Mr. Sinha suggested that he could be heard as amicus curiae, but plainly he could not claim to come in on that footing. He also referred to the interest that the public may be presumed to have in seeing that the Courts follow the procedure prescribed for them. But the procedure applicable on the present occasion is clearly intended for adjusting the relations of the decree-holder, the judgment-debtor and the auction-purchaser, and it is impossible to recognize the claim of a member of the public having a not undisclosed private interest in a matter that is confined to the three parties I have mentioned. The judgment-debtor, opposite party No. 2, before me, supported the application of the auction-purchaser before me. The landlord decree-holder, opposite party No. 1, was indifferent but urged that there should be no costs against him. It seems to me clear that the lower Court had no jurisdiction to reject or refuse to record the compromise or, at any rate, acted with material irregularity in the exercise of its jurisdiction in doing so. That order must be set aside, the compromise recorded and (now that the period of thirty days has expired) the sale confirmed ; the balance of the purchase money need not be deposited by the auction-purchaser. There will be no order regarding the costs of this application, but Mr. B. P. Sinha's application is dismissed with costs (including a hearing fee of one gold

---

2. Hemanta Kumari Debi v. Rajendra Kishore Nath, 1926 Cal 1236=97 I C 306.
3. Shivaram Sand v. Manu Lal Khemka, 1928 Pat 40=104 I C 753.
4. Ram Prasad v. Ram Charan Singh, 1916 Cal 64=27 I C 601.

mohur) payable to the auction-purchaser who is the petitioner before me.

S.R./R.K. *Order accordingly.*

A. I. R. 1936 Patna 167

WORT, J.

(*Shree Shree*) *Narayan Thakur*—Petitioner.

v.

Kamalrani Debi—Opposite Party.

Civil Revn. No. 192 of 1935, Decided on 16th October 1935.

(a) Bengal Land Registration Act (7 of 1876), Ss. 52, 55—Application for registration of name under the Act—Officer deciding objection must come to conclusion only as to possession of one or other party.

The officer deciding objections to an application for registration of a name under the Land Registration Act has to investigate only into the possession of either the applicant applying for his or her name to be registered or the objector: 1922 *Pat* 315; 35 *Cal* 120 and 1924 *Pat* 134, *Rel. on.* [P 167 C 2]

(b) Bengal Land Registration Act (7 of 1876), S. 62—Order of civil Court on reference under the Act is final.—*Obiter.*

Obiter.—The words of the latter part of S. 62 are exhaustive and the order passed by the Civil Court on a reference to it under the Land Registration Act is final. [P 168 C 1, 2]

(c) Bengal Land Registration Act (7 of 1876), Ss. 55, 62—Land Registration Officer has jurisdiction to make reference under S. 55 to civil Court—Mere fact that he exercises his discretion in irregular manner does not affect jurisdiction of Civil Court.

The Land Registration Deputy Collector has jurisdiction to make a reference under S. 55, Land Registration Act, to the civil Court. The exercise of the jurisdiction comes within his power and the mere fact that he has exercised his jurisdiction in an irregular manner does not affect the jurisdiction of the civil Court to decide the matter referred to it. [P 169 C 1]

(d) Civil P. C. (1908), S. 115—High Court will not interfere where another remedy is open—Party losing on reference under S. 55, Bengal Land Registration Act, entitled to bring suit under S. 59 of the Act—High Court will not interfere in revision.

Whatever S. 115, Civil P. C., provides the practice of the Patna High Court is not to interfere when there is another remedy open to the petitioner.

Where, therefore, on the decision of the Civil Court, on a reference under S. 55, Land Registration Act, it is open to the losing party to bring a regular suit under S. 59, the High Court would not interfere in revision and exercise its jurisdiction in deciding the question as to which of the parties should bring the suit. [P 169 C 1, 2]

B. C. De and *K. K. Banarji*—for Petitioner.

S. M. Mullick and *L. K. Chaudhury*—for Opposite Party.

Order. — This rule is directed against the order of the Subordinate Judge made under a reference by the Land Registration Deputy Collector to the Civil Court and purporting to be made under S. 55 of the Act. The contention of Mr. De, with whom appears Mr. Banarji, on behalf of the objector in those proceedings and the petitioner before me in support of the rule, is that the order of the Land Registration Deputy Collector is entirely without jurisdiction. This point depends upon the construction of the sections of the Land Registration Act, more particularly Ss. 52 to 55. The effect of those sections is that when an application is made for registration of a name under the Land Registration Act a notice, which is a general notice, is issued by the Collector, and on the day mentioned in that notice the Collector or his Deputy proceeds to consider the objections to the application. It is quite clear from the Act and perhaps even clearer from certain authorities particularly the decision in 35 Cal 120 (1) that the officer deciding such matter has to investigate into the possession of either the applicant applying for his or her name to be registered or the objector. It is unnecessary to enter into various details which the Collector might have to consider, such as whether the applicant or the objector is in possession by reason of succession or otherwise, and it will suffice to state that the only question that the Court has to consider is the question of possession. The most important section for the purposes of this argument is S. 55 which contemplates a consideration of the question to which I have referred and also the possibility of the Land Registration Court being unable to come to any conclusion as to the matter in hand, viz., the question of possession. Having arrived at that stage the section proceeds to state:

> The Collector shall determine summarily the right to possession of the same, and shall deliver possession accordingly, and shall make the necessary entry in the registers.

Now the words preceding the ones I have just read are:

---

1. Umatul Mehdi v. Kulsum, (1908) 35 Cal 120 =8 C L J 245=12 C W N 16.

and if it is not proved to the satisfaction of the Collector that any person is in possession of the interest in dispute.

Now it is the contention of the petitioner before me that in this case the condition precedent to a reference to the Civil Court does not exist. I should have stated before making that observation that the sub-paragraph of the fifty-fifth section part of which I have read, provides for the dispute to be sent to and determined by a civil Court in the event of the Collector finding that the matter is one which can be better determined by that Court. As I was stating, the contention is that the condition precedent for this reference to the civil Court does not exist. What happened was that the first Land Registration Court came to the conclusion that the applicant was in possession and made order accordingly. Then the Deputy Collector with appellate powers came, on appeal, to a somewhat different conclusion and was of opinion that the applicant was not in possession. I must say in advance that after reading the order of the Deputy Collector it is difficult to say that he expressly found that nobody was in possession, or to put it more accurately, that he was not satisfied that any person was in possession within the meaning of S. 55. But he does state specifically that he is not satisfied with the evidence of the applicant and he would have proceeded to determine summarily the question of the right to possession had it not been that he was of the opinion that that matter would be better determined by a civil Court, and accordingly he made the reference. Now, as I have stated, Mr. De and Mr. Banarji, appearing on behalf of the petitioner, have both contended that not having come to any specific finding that possession was not found either with the applicant or the objector, the order of the Land Registration Deputy Collector was without jurisdiction, and, if that order was without jurisdiction, the order of the Subordinate Judge was also without jurisdiction. Had I been forced to come to a conclusion on the matter, I certainly should have been inclined to hold that by reason of S. 62 of the Act I am powerless so far as this order of the Subordinate Judge is concerned. The words of the latter part of S. 62 seem to me to be exhaustive. Refering to the order of the civil Court the section says 'it shall be final not subject to any appeal or order for review.' There may be a different view held in some High Courts, but I am content in this case leaving the matter there as in the circumstances it is quite unnecessary for me to determine that point.

There are two aspects of the case one, that Mr. De has argued and the other is a purely legal aspect of the matter. The first aspect as I call it is this: that the Court referring the matter to the Subordinate Judge has come to no conclusion as to the possession of the objector. It is true that there is no express conclusion to that effect, but it is rather difficult for me to believe that the Land Registration Deputy Collector was so ignorant of his business that he failed to decide the only question which came before him, the question of possession of the applicant as well as the objector I assume (as he is fallible) that he was quite unaware of or had forgotten the provisions of S. 55 of the Act, and that in order to give him jurisdiction he either had to come to a conclusion or failed to come to a conclusion as to possession of either party. But Mr. Sushil Madhab Mullick appearing for the respondent, contends that taking all the facts and circumstances into consideration it could only be held that a conclusion was definitely come to (although not specifically stated) that the objector had not satisfied the Court that he was in possession. If I had to express an opinion (although I do not propose to decide the case on this point), I should feel inclined to hold first that the applicant was found to be in possession and secondly, although the objector could have questioned that order, he let it go and made no complaint as to its validity. But it seems to me that the case can and must be decided on an entirely different ground.

There is abundant authority and I think the Act itself is quite clear in favour of Mr. De's argument that the Land Registration Deputy Collector must come to the conclusion as to the possession of one or the other party—the applicant or the objector. The authority of this Court is the decision in 1 Pat 68 (2), where the question of the proper construction of the section was considered.

2. Ali Zamin v. Muhammad Akbar, 1922 Pat 315=65 I C 135=1 Pat 68=3 P L T 406.

There is also an authority of the Calcutta High Court on the same matter upon which Mr. De relies, viz., 35 Cal 120 (1), which I have already cited. There is yet another case to which reference must be made—the case of 4 P L T 718 (3), which is on a more limited point to which I shall in a moment refer. But I am assuming it for the moment that Mr. De's argument is well founded, namely that in order to give the learned Land Registration Deputy Collector jurisdiction, he must come to some conclusion or fail to do so as to the possession of the applicant or the objector. In this connexion I refer to the recent decision of the Chief Justice of this Court in 13 P L T 728 (4), which as regards the provisions of the Act is in consonance with two Divisional Court cases to which I have referred. The decision does not mention them and unfortunately contains a misstatement (whether as result of wrong reporting or not, I cannot say) as to the powers of a civil Court. The learned Chief Justice is reported to have stated:

> It is very clear that neither the Deputy Collector nor the civil Court to which the question is referred under S. 55 has the right to enter into a question of title.

The only question which the civil Court has a right to enter into is the question of title; that is the only question referred to it. But although the judgment of the learned Chief Justice is the judgment of a Single Judge and a judgment which fails to notice certain cases, which I suppose is due to the fact that they were not called to his attention, that judgment together with another point in my judgment dispose of this case. Now assuming everything in Mr. De's favour, a very nice question arises. It cannot be contended for a moment that the learned Land Registration Deputy Collector had no jurisdiction to refer this matter to the civil Court. The Act expressly gives him that jurisdiction. He may have exercised it in an irregular manner, and, if Mr. De's argument has to be acceded to, that is what has been done. His exercise of jurisdiction comes within his power but in the circumstances (to use the words of S. 115, Civil P. C.), the jurisdiction might have been exercised 'illegally or with material irregularity.' But that in my judgment would not affect the jurisdiction of the civil Court. If the learned Land Registration Deputy Collector had no jurisdiction to exercise the power, or in other words if the statute had given him no jurisdiction to refer a matter of this kind to a civil Court, then in that case the civil Court could have no jurisdiction at all. But it is impossible to say that the civil Court could not entertain a matter referred to it by the Land Registration Deputy Collector. However irregular or illegal the exercise of the Land Registration Deputy Collector's jurisdiction may have been that in my judgment does not affect the jurisdiction of the civil Court. The cases referred to, do not, I think, affect my decision on the matter. That would be in my judgment one reason why it would have to be held that in this case this Court has no jurisdiction to interfere.

But there is yet a further aspect of this case and I decide that part of the case on the assumption that the view that I have just expressed is erroneous and that the jurisdiction of the civil Court is affected by the irregular exercise of jurisdiction by the Land Registration Deputy Collector. I am assuming that the order of the Subordinate Judge is without jurisdiction but the authorities to which I have referred have established and indeed so far as this question is concerned, there are numerous decisions of this Court which have not been noticed by the learned Chief Justice in the case reported in 13 P L T 728 (4), that whatever S. 115, Civil P. C., provides the practice of this Court is not to interfere where there is any other remedy open to the petitioner. It is referred to as being the practice of the Court for the reason I suppose that S. 115 provides that the jurisdiction shall not be exercised where an appeal lies : in other words there may be cases where there is no appeal within the meaning of S. 115 of the Code, but there may be some other remedy and it is the practice of this Court in those circumstances not to exercise its revisional powers in favour of the petitioner. Now there is and was another remedy in this case. S. 59 gives a right to the losing party to bring a regular suit and it comes to this : that this is nothing more than a dispute between the two parties as to who should bring that

---

3. Kapleshwar Jha v. Raghunandan Prasad, 1924 Pat 134=74 I C 474=4 P L T 718.
4. Janmejoy Pati v. Gopinath Bharthi, 1933 Pat 41=141 I C 477=13 P L T 728.

suit; that is all that it amounts to. If I exercise my discretion in favour of the objector, the petitioner would be forced to bring the suit, and if I decide this case in favour of the petitioner, the objector would be forced to bring the suit. I do not think that this Court should exercise its jurisdiction in order to decide this question between the two parties who are litigating.

But there is yet another aspect of the case which has some bearing on the original question, namely, whether the Land Registration Deputy Collector decided the question of possession of the objector. The fact that the Deputy Collector's order was made to which objection was taken, although of course there was no action, and the fact that the finding in appeal that the applicant's possession had not been established and also, according to Mr. De, no conclusion was come to as to the objector's possession entitled the objector to appeal under Cl. 3, S. 85, Land Registration Act, which provides that an appeal lies to the Commissioner of the Division 'against every order passed in appeal which modifies or reverses the order appealed against.' If it had been an order of reversal and the objector had objected to it, he could have applied to the Commissioner under the penultimate clause of S. 85. The order was against the objector in the sense that it was an order which did not find him in possession in which case his name would have been registered. The petitioner took no action, and in my judgment, it is impossible to come to the conclusion that this is a fit and proper case where, even if I hold the view that the order of the Land Registration Deputy Collector was without jurisdiction, I should exercise my jurisdiction under the revisional powers in favour of the petitioner. In all the facts and circumstances of the case, I think the Rule must be discharged with costs hearing fee five gold mohurs.

R.M./R.K. *Rule discharged.*

A. I. R. 1936 Patna 170

MACPHERSON, J.

Bhupat Mandal—Accused—Petitioner.

v.

Kartik Jha — Complainant—Opposite Party.

Criminal Revn. No. 384 of 1935, Decided on 15th August 1935, from order of Magistrate, Monghyr, D/- 20th May 1935.

Criminal Trespass—Not actual annoyance but intention to cause it is essential to constitute offence under Penal Code, S. 447.

It may be that the action of the accused necessarily resulted in annoyance to the owner of the land and indeed caused damage to him by preventing him from cultivating the land; but that is not sufficient to constitute criminal trespass in the absence of anything to show that in building the intention was to cause annoyance as that ingredient is essential in criminal trespass. [P 170 C 2]

K. N. Lal—for Petitioner.

Nitai Chandra Ghosh—for Opposite Party.

Order.— This is an application in revision against the conviction and fine of one Bhupat Mandal under S. 447, I. P. C. The findings are that just after the great earthquake on 15th January 1934 the petitioner placed a temporary hut on the dhanhar land of the complainant's master within the Jamalpur Municipality and on 16th February 1934 was building a permanent structure when the complainant, who is a peon of the owner, stopped him and was met with abuse and intimidation. The petitioner endeavoured to establish that he was previously in possession and adduced a considerable amount of documentary evidence which however appeared futile in the light of the prosecution evidence and the statement of his own defence witnesses that he had not been in possession of any land in Faridpur, the mauza in which the land is situated, during the past six or seven years. The only point which could possibly arise in the present case is whether the definition of criminal trespass in S. 441, I. P. C., has been satisfied. The Magistrate, not without justification, designated the action of the petitioner as mean. He went on to say that his action in attempting to build a permanent structure "must have caused annoyance" to the owner of the land (who had let him remain temporarily on sufferance) and therefore it constituted a criminal trespass. That however is not the law. It may be that the action of the petitioner necessarily resulted in annoyance to the owner of the land and indeed caused damage to him by preventing him from cultivating the land; but there is nothing at all to show that in building, the intention was to cause annoyance and that ingredient is essential in criminal trespass. Accordingly the application must be allowed, the con-

viction and sentence are set aside and the fine, if paid, must be refunded.

M.N. *Conviction set aside.*

A. I. R. 1936 Patna 171

MOHAMMAD NOOR AND VARMA, JJ.

Sitaram Sinha—Plaintiff—Appellant.

v.

Jogendra Narayan Sinha and *others*—Defendants—Respondents.

Appeal No. 42 of 1933, Decided on 6th January 1936, from original decree of Sub-Judge, Pakur, D/- 6th August 1933.

(a) Sonthal Parganas Settlement Regulation (3 of 1872), S. 25-A — S. 25-A covers cases in which Settlement Officer refused to record name of claimant to zamindari.

The words "Zamindars and Proprietors" in S. 25-A mean persons who claim to be zamindars or proprietors as against another zamindar or proprietor. S. 25-A covers cases in which the Settlement Officer refuses to record the name of a claimant to the zamindari. [P 172 C 1]

(b) Court-fees — Computation of — Court must look at plaint only for purpose of Court-fee—Court-fee cannot be demanded merely on ground that question of possession will arise in suit — It is not open to Court to say that plaintiff should have asked for consequential relief.

For the purposes of the court-fee, the Court must look at the plaint only. Court-fee cannot be demanded from the plaintiff on the ground that the question of possession will arise in the suit. Though it is open to a Court to say that the plaintiff has really asked for a consequential relief though he has tried to conceal it by casting the relief in a particular form, it is not open to the Court to say that the plaintiff should have asked for consequential relief and should have paid the proper fee in such a suit : 1925 *Pat* 210, *Foll.* [P 172 C 1]

(c) Court-fees Act (1870), Sch. 2, Art. 17 (1) and (3) — Suit under S. 25-A of Sonthal Parganas Settlement Regulation for declaration that Record of Rights is wrong as it omits plaintiff's name and extent of share in estate is declaratory suit—It is governed by Art. 17 (1) and (3).

Section 25-A, Sonathal Parganas Settlement Regulation 3 of 1872, contemplates a declaratory suit.

A suit under S. 25-A by a person claiming a share in an estate, for declaration that the decision of the Settlement Officer on his objection for recording his name is wrong and that the entries in the Record of Rights about the proprietory rights in the estate are incorrect inasmuch as the alleged one-fourth share of the plaintiff is not recorded therein is governed by Art. 17 (1) and (3), Sch 2, Court-fees Act, as the plaint simply asks for declaration that the Record of Rights is wrong as it omits plaintiff's name to the extent of his share, and the court-fee payable is Rs. 15. [P 172 C 2]

The fact that the plaintiff's name has not been recorded by the Settlement Officer is no ground for holding that he must sue for possession. The fact whether the plaintiff is or is not in possession and therefore is or is not entitled to the declaration is a matter which has to be decided in the trial of the suit. [P 172 C 2]

Sultan Ahmad, *B. C. De* and *N. C. Ghose*—for Appellant.

S. M. Mullick and *S. C. Mazumdar*—for Respondents.

Mohammad Noor, J.—This is an appeal against an order of the Subordinate Judge of Pakur rejecting the plaint of the appellant for insufficiency of court-fee, an order which is a decree under the Civil Procedure Code. The plaintiff claims one-fourth share of the Maheshpur estate in the district of the Santal Parganas. During the settlement operations of that district his name as a sharer of the estate was not recorded. He instituted the present suit paying a court-fee of Rs. 15 for a declaration that the decision of the Settlement Officer on his objection for recording his name was wrong and that the entries in the Record of Rights about the proprietary shares of the estate were incorrect inasmuch as the alleged one-fourth share of the plaintiff was not recorded therein. S. 11 of Regulation 3 of 1872 bars the jurisdiction of the civil Court regarding any matter decided by the Settlement Officer whose decision has the force of a civil Court decree except as provided in S. 25-A, and subject to it the Record of Rights becomes under S. 25 of the Regulation conclusive after six months of its publication. S. 25-A of the Regulation runs thus :

> Where only the rights of zamindars and other proprietors as between themselves are concerned, a suit may, unless it is barred by S. 13, Civil P. C., (relating to res judicata), be brought in a Court established under the Bengal, Agra and Assam Civil Courts Act 1887 to contest the finding or record of the Settlement Officer, within three years from the date of the publication of the Record of Rights or of the final order of the Revenue Court. . . . . .
>
> If in any such suit it is found that the finding of the Settlement Officer is erroneous, the record shall be amended accordingly.

The question is what is the nature of the suit contemplated by this section, what is the court-fee payable on the plaint of such a suit, and whether the present suit is governed by this section. The learned Subordinate Judge is of opinion that as the plaintiff's name is not recorded in the Collectorate nor in the Record of Rights the suit is one for recovery of possession as the question of

possession will arise in the suit. I am unable to understand what sort of suit can be instituted under this section by a man who has got his name recorded in the Collectorate and in the Settlement Department. He will have absolutely no necessity whatsoever to institute a suit. The learned Subordinate Judge seems to be of opinion that as the plaintiff's name is recorded neither in the Collectorate nor in the settlement record, he is not "Zamindar" within the meaning of S. 25-A. If this be so a person whose claim to have his name recorded is rejected by the Settlement Officer and who claims to have share in a Zamindary will have no remedy as S.25-A is the only section under which a decision of the Settlement Officer can be questioned by a person who is aggrieved by that order. The words "Zamindars" and "proprietors" in the section mean persons who claim to be zamindars or proprietors as against another zamindar or proprietor. The section covers cases in which the Settlement Officer refuses to record the name of a claimant to a zamindari. The fact whether the plaintiff is or is not in possession and therefore is not entitled to claim declaration is a matter which has to be decided in the trial of the suit. For purposes of the court-fee the Court must look to the plaint only. Court-fee cannot be demanded from a plaintiff on the ground that question of possession will arise in the suit.

It has been laid down in 3 Pat 915 (1), in connection with the report of the stamp reporter of the Court, that the question of court-fee must be decided on the plaint and though it is open to the Court to say that the plaintiff has really asked for a consequential relief though he has tried to conceal it by casting the reliefs in a particular form, it is not open to the Court to say that the plaintiff should have asked for a consequential relief and should have paid the proper fee as in such a suit. The learned Subordinate Judge has not held, as he could not have possibly held on the face of the plaint, that the plaintiff has sought a consequential relief in the suit. What the learned Subordinate Judge has held is that the plaintiff ought to have sought consequential relief and paid court-fee accordingly. What turn this case will eventually take is not for me to say. It is sufficient for the purpose of this appeal to hold that the plaint simply asks for a declaration that the Record of Rights is wrong as it omits the plaintiff's name and the extent of his share. Though the Specific Relief Act is not in force in the Santal Parganas, S. 25-A, Regulation 3 of 1872 contemplates a declaratory suit. The fact that the plaintiff's name has not been recorded by the Settlement Officer is no ground by itself for holding that he must sue for possession. The plaintiff claims to be a sharer of the estate as a member of a joint Hindu family. The utmost that can be said is that it is a suit to do away with the effect of the decision of the Settlement Officer. In either view of the matter the court-fee payable is Rs. 15 under Sch. 2, Art. 17 (1) and (3), Court-fees Act.

The appeal must therefore be allowed. The learned Subordinate Judge will restore the plaintiff's suit to its original number and proceed to dispose of it according to law. The appellant will be entitled to get half costs (exclusive of court-fee on the memorandum of appeal) from the contesting respondents. He will get a certificate under S. 13, Court-fees Act, for receiving back from the Collector the court-fee paid by him on the memorandum of appeal.

Varma, J.—I agree.

R.M./R.K. *Appeal allowed.*

1. Narayan Singh v. Dildar Ali Khan, 1925 Pat 210=80 I C 544=3 Pat 915=6 P L T 191.

A. I. R. 1936 Patna 172

SAUNDERS, J.

S. N. Ganguly—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 691 of 1935, Decided on 14th January 1936, from order of Offg. Deputy Commissioner, Ranchi, D/- 6th November 1935.

(a) Motor Vehicles Act (1914), S. 16—Rules under Act, R. 61—Cleaner is not "attendant" for purposes of R. 61.

A cleaner whose duties are to put luggage on the bus, to unload the luggage, put water in the radiator and start the bus by turning the starting handle is not an "attendant" for the purpose of R. 61. [P 173 C 1]

(b) Motor Vehicles Act (1914), S. 16—Rules under Act, R. 61 requires only one person besides driver for dealing with all matters unconnected with actual driving—It does not entail employment of three men.

Rule 61 requires only that there shall be one man besides the driver appointed for the purpose of dealing with and competent to deal with all matters that are unconnected with the actual driving of the bus, and it does not entail the employment of three men on each bus. [P 173 C 1,2]

K. K. Banerji—for Petitioner.

Manohar Lal—for the Crown.

Order.—The petitioner, who is the proprietor of a motor bus service, has been convicted of an offence punishable under S. 16, Vehicles Act, 1914, for having contravened the provisions of R. 61 of the rules made under the Act. This rule provides that:

Every motor bus shall at all times carry an attendant, who shall relieve the driver of all matters unconnected with the propulsion of the vehicle and its mechanical fitness.

It has been found by the Magistrate who tried the case and by the appellate Court that a man was employed on the bus who has been referred to in the evidence and by the petitioner himself as a cleaner whose duties were to put luggage on the bus, to unload the luggage, put water in the radiator and start the bus by turning the starting handle. It is contended on behalf of the petitioner that this cleaner is "an attendant" for the purposes of R. 61; and it is argued that if the cleaner did not relieve the driver of all matters unconnected with the propulsion of the vehicle and its mechanical fitness then the responsibilty was that of the cleaner. I am unable to accept this contention. It does not appear to have been the petitioner's case in the lower Courts, and it is not stated to be his case in the application he has made to this Court, that he had appointed the cleaner for the purpose stated in the rule. The driver was left with other duties to perform with regard, for example, to the issuing of tickets and the giving of information to the passengers. Apparently the cleaner was not permitted to do these things. The petitioner himself stated that the man was a cleaner though he said he called him an attendant. This designation however was evidently applied to him with a view nominally to comply with the requirements of the rule. It is objected on behalf of the petitioner that observance of the rule as the rule has been interpreted by the Magistrates would entail the employment of three men on each bus. This however is not the case. The rule requires only that there shall be one man besides the driver appointed for the purpose of dealing with and competent to deal with all matters that are unconnected with the actual driving of the bus. The application is dismissed.

R.M./R.K. *Application dismissed.*

A. I. R. 1936 Patna 173

FAZL ALI AND LUBY, JJ.

Shiya Janki Thakurain— Defendant —Appellant.

v.

Kirtanand Singh Bahadur and *others* —Plaintiffs—Respondents.

Appeal No. 924 of 1931, Decided on 5th September 1935, from appellate decree of Addl. Sub-Judge, Bhagalpur, D/- 7th March 1931.

(a) Landlord and Tenant— Non-transferable holding — Transfer of—Purchaser of non-transferable holding remaining in possession for over 12 years under transfer not authorised by landlord but not denying title of landlord — Purchaser becomes merely occupancy tenant of land and not full owner —Subsequent transfer by him is liable to be set aside at instance of landlord.

Where a purchaser of a non-transferable holding remains in possession of the holding for over 12 years, under a transfer, which has not been authorised by the landlord and without paying any rent but never asserting that he was the full owner of the land but asserting on the other hand that he was a tenant under the landlord, such purchaser merely acquires the status of an occupancy tenant and does not become the full owner of the land. Consequently when the purchaser purports to transfer the holding, the landlord is entitled to claim possession on the ground that the transfer is made without his consent. [P 174 C 1]

(b) Interpretation of Statutes—New law—It should be construed, as to interfere as little as possible with vested rights.

New law ought to be construed, so as to interfere as little as possible with vested rights. A statute is not to be construed to have a greater retrospective operation than its language renders necessary. [P 175 C 1]

(c) Interpretation of Statutes—New law—Subsequent enactment does not affect pending actions, unless it applies to them in express terms.

When the Legislature alters the rights of the parties by taking away or confirming any right of action, its enactments, unless in express terms they apply to pending actions, do not affect to them. [P 175 C 1]

A decree passed by a Court of competent jurisdiction remains a good decree until it is reversed or set aside on appeal. Such a decree cannot automatically become invalid merely because since the passing of the decree the law has changed, unless there is some clear provision in the new enactment to make it applica-

ble to pending suits and appeals: *In re Joseph Suche & Co. Ltd.*, (1876) 1 *Ch D* 48, *Rel. on.* [P 175 C 1]

(d) Bihar Tenancy Act (8 of 1934), S. 26 (o) —S. 26 (o) will not take away right vested in party by decree passed before Act comes into force.

Section 26 (o) of Bihar Tenancy Act does not affect pending action and take away a right which has vested in a party under a decree passed by a Court of competent jurisdiction before the Act came into force. According to S. 8, Bihar General Clauses Act, also the Bihar Tenancy Act, would not affect the rights acquired before the Act comes into force. [P 174 C 2]

K. Husnain and *K. M. Lal*—for Appellant.

D. L. Nandkeolyar and *Raghunath Jha*—for Respondents.

Fazl Ali, J.—This appeal arises out of a suit brought by the respondents who are the landlords of Mouza Majhgain to recover possession of a non-transferable holding situated in the mouza which was sold by defendant second party to defendant first party in 1924. It is common ground that the defendant second party purchased the holding from the original tenants who are the defendants third party and remained in possession for over 12 years before they transferred it to the defendant first party. It is also not disputed that the holding is not transferable, that the landlord did not give his consent either to the transfer made by defendant third party in favour of defendant second party or to the transfer made by defendant second party in favour of defendant first party and that both defendants first and second party have never paid rent to the landlord. The question is whether in these circumstances the landlords are entitled to claim possession on the ground that the last transfer was made without their consent. In order to answer this question, we shall have to determine whether the defendant second party became the full owner of the land or merely acquired the status of an occupancy tenant by being in possession of the land for over 12 years under a transfer which had not been authorised by the landlord and without paying rent to him. If he became the full owner of the land then he had all the rights that the landlord possessed in the land and the landlord's consent to the transfer made in favour of defendant first party was not necessary. If, on the other hand, he acquired merely the status of an occupancy tenant, the landlord would be entitled to claim his right of re-entry.

The lower appellate Court has come to the conclusion that the defendant second party merely acquired the rights of an occupancy tenant by prescription, and in my opinion, this view is correct, because during the period of his possession he merely asserted that he was a tenant under the plaintiffs and never asserted that he himself was landlord or full owner of the land. This has been found as a fact by the lower appellate Court and it is also clear from the recitals in the sale-deed (Ex. B) executed by defendant second party in favour of defendant first party. In that deed the holding is described as an occupancy jote bearing a rental of Rs. 39 odd within the zemindary of the plaintiffs and it is further recited:

> It is desired that the said vendee should enter into possession and occupation of the vended lands, and should on paying the rents to the proprietors or zemindars appropriate the sixteen annas of the produce . . . and should on removal of my name get her own name recorded in the zemindari Sherista.

These recitals support the finding of the lower appellate Court and show that the defendant second party never repudiated the title of the landlord as a landlord and that he prescribed merely for the limited right of a tenant. In these circumstances it seems clear that the defendant second party acquired merely the rights of an occupancy tenant and held the lands under the same terms as the other occupancy tenants of the village did. That being so, the decree passed by the lower appellate Court seems to be correct in law. The second point which was argued before us was that the present case would be governed by the Bihar Tenancy Act (VIII of 1934) and the only right which the landlord now possesses is to claim his transfer-fee which is prescribed under S. 26 of the Act. It is said that S. 26 (o) has a retrospective effect because it applies to sales of occupancy holdings effected between 1st January 1923 and 1st April 1934. The question, however, to be considered is whether this provision will affect a pending action and take away a right which has vested in a party under a decree passed by a Court of competent jurisdiction before the Act came into force. S. 8, Bihar General Clauses Act, provides that where any Bihar and Orissa Act repeals any en-

actment hitherto made or hereafter to be made, then unless a different intention appears, the repeal shall not affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder or affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed.

This clause is relied upon by the respondent to show that the provisions of the Bihar Tenancy Act cannot affect the rights acquired before the Act came into force. But even apart from this provision it is difficult to give effect to the contention of the appellant, because it militates against certain well-recognised rules of construction. One of the rules is that the new law ought to be construed so as to interfere as little as possible with vested rights, and a Statute is therefore not to be construed to have a greater retrospective operation than its language renders necessary. Another rule of construction is that when the legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions do not affect them: see (1876) 1 Ch D 48 (1). It is to be noted that the present suit was not merely pending at the time when the Act came into force but had already been decreed by the lower appellate Court in favour of the plaintiffs. A decree passed by a Court of competent jurisdiction remains a good decree until it is reversed or set aside on appeal. Such a decree cannot automatically become invalid, merely because since the passing of the decree the law has been changed, unless there is some clear provision in the new enactment to make it applicable to pending suits and appeals. I would, in these circumstances, dismiss the appeal with costs.

Luby, J.—I agree.

R.M./R.K. *Appeal dismissed.*

1. In re Joseph Suche & Co., Ltd.,(1876) 1 Ch D 48=45 L J Ch 12=24 W R 184=33 L T 774.

---

* A. I. R. 1936 Patna 175

DHAVLE AND AGARWALA, JJ.

Hira Kurmi

v.

Madan Sao and *another*

Criminal Ref. No. 43 of 1935, Decided on 10th December 1935, from Addl. Dist. Magistrate, Patna, D/- 31st October 1935.

*** Criminal Trial—Sentence—Admonition—Person trying to overawe witnesses for other side—Organizing assault party and taking part in assault on such witness—In criminal trial against such person by the witness winning over prosecution witnesses by bribing — Order of admonition against such person does not meet ends of justice.**

A person tried to overawe witnesses for the other side and as the witness refused to subdue he organized an assault party against the witness and took part in such assault. In a criminal case against him by the witness he won over the prosecution witnesses by bribing them. The Magistrate released the accused on admonition. The case was referred to the High Court by the Additional District Magistrate on point of inadequacy of sentence :

Held : that it was a serious state of things to allow such case to be compromised and an order of admonition was not sufficient to meet the ends of justice. [P 176 C 1]

K. P. Jayaswal and *Choudhury Mathura Prasad*—for Accused.

K. P. Sukul—for Complainant.

Order. — This is a reference made by the Additional District Magistrate of Patna recommending that the order of a Deputy Magistrate with Second Class powers releasing two persons, Rameswar and Madan Sao, after due admonition be considered in the exercise of our revisional jurisdiction. It appears that these two persons together with two others were convicted of offences under S. 323 and S. 323 read with S. 114, I. P. C., but that considering that Rameswar "is a man of position and a respectable person with grey hairs" the trying Magistrate thought it "desirable in the interest of justice" to deal with him under S. 562 (1-A), Criminal P. C., and to do the same to his nephew Madan Sao, "a hot-headed young man who took the law in his own hands" with the admonition and warning "that they should not indulge in such nefarious practice of assaulting anybody because their interest was at stake." The Additional District Magistrate points out that according to the trying Magistrate it was Rameswar's motive "to debar the complainant from giving evidence against him" in a certain civil suit. The age of Rameswar is not particularly in his favour nor is his physique, and it is reported that he is the man who not only organised the assault party and gave orders for the assault, but also took part in it, and that the motive for the assault was "reprehensible" because the assault was organised as the complainant did not agree to Rameswar's proposal "which

amounted to the suppression of evidence to be produced before a Court of justice." The Additional District Magistrate also says that it is clear from the trying Magistrate's judgment that this money-lender even during the course of the trial managed to gain over a number of prosecution witnesses by bribing them.

We have heard Mr. Jayaswal for Rameswar and Madan Sao, and Mr. Sukul for the complainant, and we have it from them that so far as the private aspect of the matter is concerned, the parties have made up their differences ; but the case obviously has a public aspect in view of what we have quoted from the Additional District Magistrate's letter of reference. We have here a money-lender and his nephew endeavouring to overawe a witness for the other side in a civil suit and because he refused to comply with the money-lender's demands, "organised an assault party," taking part in the assault on the man in question, and further during the course of the criminal trial winning over a number of prosecution witnesses by bribing them. This is undoubtedly a serious state of things, and it seems to us impossible to permit a compromise in such a case or to let the matter drop merely because the parties have made up their differences. The order of release after due admonition completely overlooked this aspect of the matter, and we must replace it by an order which the trying Magistrate ought to have passed namely a fine of Rs. 200 under S. 323 and S. 323 read with S. 114, I. P. C., with six weeks' rigorous imprisonment in default, in the case of Rameswar, and a fine of Rs. 50 under S. 323 with three weeks' rigorous imprisonment in default, in the case of Madan Sao. Rameswar and Madan will be allowed two weeks from this date to pay their fines in, and if the fines are not paid by that time, the other part of the order must be carried out. The reference is accepted.

B.D./R.K. *Reference accepted.*

A. I. R. 1936 Patna 176

JAMES, J.

Moharmani Kuer—Petitioner.

v.

Bhankumar Chand and *another* — Opposite Parties.

Civil Revn. No. 526 of 1935, Decided on 8th January 1936, from order of Sub-Judge, Arrab, D/- 11th July 1935.

Practice — Inherent powers — Application under O. 21, R. 58, Civil P. C. — Court requiring application to be put upon date fixed for execution and also ordering information to be sent to decree-holder—Decree-holder not informed by officers of Court—Order passed under O. 21, R. 58 in the absence of decree-holder — Court has inherent jurisdiction to recall such order.

A judicial order which may affect or prejudice any party cannot be finally made unless he has been afforded opportunity to be heard; and if such an order is made ex parte, that is to say, without notice to the opposite party, it would be made subject to the implication that it may be revoked at the instance of any party prejudiced thereby; and the Court has inherent power to give such directions as the justice of the case may require. [P 177 C 1, 2]

In an execution proceeding an application was made by a stranger under O. 21, R. 58. The Court passed an order registering the application and ordering that the application be put up on the date of hearing of the execution proceedings and that the decree-holder should be informed of the application and of the date fixed for hearing. The officers of the Court failed to inform the decree-holder as required. On the date fixed for hearing an order on the application under O. 21, R. 58 was passed in the absence of the decree-holder. The decree-holder moved the Court—its successor—to recall the order under its inherent jurisdiction:

Held: that since the ignorance of the decree-holder was due to the default of the officers of the Subordinate Judge's Court, the Judge had power to recall the order by invoking the powers conferred on it by S. 151, Civil P C.: 17 *C W N* 862 and 1921 *Pat* 293 *and* 491, *Applied*. [P 177 C 2]

Mahabir Prasad and *Harians Kumar* —for Petitioner.

S. N. Bose—for Opposite Parties.

Order. — This is an application for revision of an order of the Subordinate Judge of Arrah revoking an order which had been made under R. 58, O. 21, Civil P. C., without notice having been given to the decree-holder. When the petition under O. 21, R. 58 was filed by a stranger to the proceedings, on a date which was not one of the dates fixed for any step in the execution case, a direction was given that the petition should be registered, that it should be put up on the fixed date for hearing, and that the decree-holder should be informed. On the date fixed neither party appeared; but after adjournment the application was heard in the absence of the decree-holder. It was subsequently brought to the notice of the Subordinate Judge's successor that his predecessor's order that the decree-holder should be informed of the application and of the date fixed for hearing had

not been carried out. The decree-holder prayed that in exercise of the inherent powers of the Court, the order made under Rule 58 might be recalled and the case might be reheard. The Subordinate Judge after hearing the parties decided that he possessed the power to revoke the order made under Rule 58, relying mainly on the decision of the late Sir Jwala Prasad in 2 P L T 251 (1). The objector has applied for revision of the order.

The learned advocate for the petitioner argues that the Subordinate Judge had no jurisdiction to alter a judgment when it had once been delivered under O. 21, R. 58 or to recall an order, because O. 9, R. 13 has no application to execution proceedings, and the powers conferred by S. 151, Civil P. C., cannot be invoked to take the place of O. 9, R. 13 in a case to which that rule would not apply. He relies upon the decision of the Full Bench of the Madras High Court in 52 Mad 899 (2) wherein these two rules were definitely laid down. It may be conceded, and indeed it is conceded, by Mr. S. N. Bose, on behalf of the opposite party, that it is not possible to criticise this general statement as a general statement of the law: and if the decree-holder's absence had been after notice, although it might have been attributable to a cause which in a case in which R. 13, O. 9 was applicable would have justified the application of the provisions of that Rule, the explanation of absence could not have been set forward as a reason for revoking the order under O. 21, R. 58; and S. 151, Civil P. C., could not in those circumstances have been applied.

The learned Subordinate Judge appears to have correctly perceived the true principle, which was laid down by Sir Jwala Prasad in 2 P L T 270 (3), that the only justification for the exercise of the inherent powers under S. 151 in a case of this nature would be the fact that the wrong was caused by an error or mistake of the Court itself; in this case by the omission of the officers of the Court to bring the Court's order to the notice of the decree-holder. In 17 C W N 862 (4), the Calcutta High Court pointed out that a judicial order which may affect or prejudice any party cannot be finally made unless he has been afforded opportunity to be heard; and that if such an order is made ex parte, that is to say, without notice to the opposite party, it would be made subject to the implication that it may be revoked at the instance of any party prejudiced thereby; and the Court has inherent power to give such directions as the justice of the case may require. In the present case, since the ignorance of the decree-holder was due to the default of the officers of the Subordinate Judge's Court he rightly invoked the powers conferred by S. 151, Civil P. C., and I cannot interfere with his order. This application is dismissed with costs. Hearing fee one gold mohur.

B.D./R.K. *Application dismissed.*

1. Hanuman Lal v. Mt. Ram Peari, 1921 Pat 491=60 I C 368=2 P L T 251.
2. Alagasundaram Pillai v. Pichuvier, 1929 Mad 757=120 I C 567=52 Mad 899=57 M L J 381 (F B).
3. Bhikhan Gir Gossain v. Jalpadat Jha, 1921 Pat 293=62 I C 113=2 P L T 270.
4. Tikait Ajant Singh v. Sundar Mal, (1913) 17 C W N 862=16 I C 567.

A. I. R. 1936 Patna 177

MOHAMMAD NOOR AND VARMA, JJ.

Mt. Anchahi—Defendant—Appellant.

v.

(*Firm*) *Birjmohan Lall*, *Madan Lall* and *others*—Plaintiffs—Respondents.

Appeal No. 152 of 1935, Decided on 10th January 1936, from appellate decree of Dist. Judge, Shahabad, D/- 28th June 1935.

Execution—Transfer of decree — Decree cannot be transferred for execution to Court incompetent to try suit in which decree is passed—It is no case of irregularity but is want of jurisdiction.

The execution of a decree passed in a suit can only be carried out by a Court which is competent to entertain the suit of the particular value. A decree passed by a Subordinate Judge, whatever its amount may be, cannot be sent for execution to a Munsif with a limited pecuniary jurisdiction. This is not a case of irregularity which can be cured by waiver. This is a case of inherent want of jurisdiction: 1922 *Pat* 188, *Rel. on.* [P 178 C 1]

Mahabir Prasad and *J. N. Sahay*—for Appellant.

D. N. Varma and *Tarkeshwar Nath*—for Respondents.

Mohammad Noor, J. — This appeal arises out of an execution proceeding. It appears that in the course of a suit valued at more than Rs. 5,000 pending before the Subordinate Judge of Shahabad, that

officer passed an interlocutory order awarding certain costs to the plaintiffs against certain claimants and against "defendant" (or defendants). There is a controversy whether it was allowed against all the defendants or against a particular defendant. I shall refer to this point later on. The learned Subordinate Judge at the instance of the plaintiffs, to whom the cost was awarded, sent the decree or order for costs for execution by the Munsif of Buxar where execution was taken out against some moveable properties of the appellant. The appellant raised objection to the effect that there was no decree against her as the order for costs was against defendant (singular) and it meant defendant 1 only. This objection was overruled by the learned Munsif who was executing the decree and his order has been upheld in appeal by the learned District Judge of Shahabad. The objector has preferred this second appeal. Here a point has been taken which does not seem to have been raised before either of the Courts below, viz., that the learned Munsif had no power to execute the decree. In my opinion this point though not taken before either of the Courts below must prevail. In this case the decree or order for costs was passed by a Subordinate Judge. The execution of a decree passed in a suit can only be carried out by a Court which is competent to entertain the suit of the particular value. This is not a case of irregularity which can be cured by waiver. This is a case of inherent want of jurisdiction. It was laid down by this Court in 1 Pat 651 (1) that a Court which has no pecuniary jurisdiction to entertain and try an original suit is not competent to execute the decree in that case, which, therefore, cannot be transferred to it for execution under S. 39, Civil P. C. It does not require much argument to hold that it will be anomalous if a decree passed by a Subordinate Judge whatever its amount may be can be sent for execution to a Munsif with a limited pecuniary jurisdiction.

It must be noted that the Court which executes the decree is the Court which is to decide matters regarding the satisfaction of the decree arising between the parties and it will be unthinkable if the Munsif can be allowed to decide whether a decree for a lakh of rupees has or has not been satisfied. Then again the question of the forum of the appeal will be affected. An order passed in course of an execution of a decree by a Subordinate Judge, if the value of the suit, as in the present case, is more than Rs. 5,000, is appealable to this Court both on the question of law as well as on fact; whereas if the execution is taken out before a Munsif, as happened in this case, the appeal lies to the District Court and only a second appeal to this Court. I need not dwell on this topic any further. As I have said, there is a clear decision of this Court which we are bound to follow. In this view of the matter it is not necessary to enter into the merits of the objection raised by the appellant. The whole execution taken out before the Munsif was incompetent and the learned Munsif had no jurisdiction to attach and sell the property. We are, however, informed that in fact some moveable properties were attached and sold and the amount has been realized by the decree-holder. I think the proper order in this case would be to order the decree-holder to deposit the amount realized by them in the Court of the learned Munsif. The amount will then be made over to the appellant whose property was attached and sold. It will be open to the decree-holder to execute his decree before the learned Subordinate Judge who has got territorial and pecuniary jurisdiction in respect of the subject matter of the suit. Any objection to the execution will be decided by him. This order about the refund of the money to the appellant will be subject to any order of attachment which may be received by the learned Munsif from a proper tribunal. As the question of jurisdiction was not raised by the appellant in either of the Courts below she is not entitled to any cost. The parties will bear their own costs throughout.

Varma, J.—I agree.

B.D./R.K. *Order accordingly.*

---

1. Amrit Lal v. Murlidhar, 1922 Pat 188=67 I C 538=1 Pat 651=3 P L T 422.

A. I. R. 1936 Patna 179

COURTNEY-TERRELL, C. J. AND
MOHAMMAD NOOR, J.

Srish Chandra Nandy—Defendant 1—Appellant.

v.

Ramji Bechar Das and *others*—Plaintiff and *another*—Defendants—Respondents.

Appeal No. 42 of 1931, Decided on 5th December 1935, from original decree of Sub-Judge, Dhanbad, D/- 2nd June 1930.

(a) **Limitation Act (1908), Art. 48—Suit for compensation for wrongfully taking coal from one's land—Fact of encroachment and taking away of coal known to plaintiff for more than three years back—Suit is barred—Mistaken belief that property removed was not his will not help to save limitation.**

Where a person knew of the encroachment and of the removal of the coal from his land by another person long before three years from the date of institution of the suit against such person, the fact that the person did not know that the area from which coal was being removed was his, will be of no advantage to him and will not save the suit from being barred by limitation. The knowledge referred to in Art. 48, Lim. Act, is the knowledge of the taking away of the property. A mistaken belief by the plaintiff that the property removed was not his, will not affect the running of the period of limitation unless, of course, the knowledge of the fact was kept back from him by the fraudulent conduct of the defendant: 1929 *P C* 69 and 1930 *P C* 113, *Foll.* [P 183 C 1, 2]

(b) **Tort—Trespass—Owner of land trespassed upon not knowing that land was his—Trespasser is not exonerated.**

No principle of law exonerates a trespasser from the consequences of his act on the ground that the owner of the land trespassed was not aware that the land was his. [P 183 C 2]

Sultan Ahmad and *Nitai Chandra Ghosh*—for Appellant.

Mahabir Prasad, S. C. Mazumdar and *Harians Kumar*—for Respondents.

Mohammad Noor, J.—The facts of the case out of which this appeal has arisen are these: Two adjoining villages, Gararia and Ekra, belong to the Raja of Jheria, Gararia being to the north of Ekra. The mineral rights of these two villages have been leased out by the proprietor; those of Ekra to defendant 1, the Maharaja of Kasim Bazar, whose estate is at present managed by the Court of Wards, and those of Gararia to one Maheshwar Roy who subleased them to several persons in blocks. One such block of 50 bighas adjoining Ekra was on 22nd March 1901 subleased to the plaintiff, and another of 110 bighas to the east of the above block, also adjoining Ekra, was on 8th June 1901 subleased to one Sourendra Nath Dutta who is said to be a benamidar of defendant 1. Sourendra Nath Dutta in his turn transferred in 1905 his block to the plaintiff, though the deed was executed in 1907. The plaintiff thus got rights in the minerals of two blocks of one land of Gararia, one of 50 and the other of 110 bighas. To the south of these blocks is the colliery of defendant 1 in village Ekra. The plaintiff's case is that defendant 1, while working his colliery of village Ekra encroached upon the lands of village Gararia just to the north of Ekra and extracted coal from the two blocks the minerals of which belonged to him as stated above. He brought this suit for recovery of the price of the coal thus removed and for restraining the defendants by injunction from trespassing into the plaintiff's lands and removing any more coal therefrom.

Defendant 1 denied that he had encroached upon Gararia lands or removed any coal therefrom and in the alternative pleaded limitation and adverse possession. The learned Subordinate Judge has given the plaintiff a decree for Rs. 17,512-12-0 and also for injunction as prayed for by the plaintiff. Defendant 1 has preferred this appeal. The money decree has since been assigned by the plaintiff to Ramsewak Singh who has been added as respondent in the suit. The original plaintiff Ramji Bechar Das died during the pendency of the appeal and his four sons have been substituted in his place. There is also a cross-objection on behalf of the original plaintiff claiming Rs. 13,268-10-9 in excess of the amount decreed by the trial Court.

The southern boundary of village Gararia (as mentioned in the lease in favour of Maheshwar Roy and in the two subleases granted by him, one in favour of the plaintiff and the other in favour of Sourendra Nath Dutta for 50 and 110 bighas of land respectively) is village Ekra according to the Thak (revenue survey) map. In the sale of the sublease by Sourendra Nath Dutta to the plaintiff the southern boundary of the 110 bighas of land is "Ekra according to the Thak map and the railway line." The case of defendant 1 before the learned Subordinate Judge was that village Gararia extended only up to the

railway line which runs from east to west, or, in other words, the boundary of the village according to the revenue survey map coincided with the railway line. It was on this basis that the defendant denied the fact of encroachment, as his operations end south of the railway line. But the boundary line between the two villages has been found by the Court below on the report of the Commissioner to be a few hundred yards south of the railway line. It is, therefore, not disputed now that defendant 1, did in fact encroach upon the minerals of Gararia and extracted coal lying under its lands. The appeal is, therefore, confined to three points only:

(1) That the suit in respect of the coal removed is barred by limitation: (2) that the encroachment on the 110 bighas of land was in no case unlawful in view of the fact that the southern limit of those lands as mentioned in the sale deed of Sourendra Nath Dutta in favour of the plaintiff is the railway line, and the plaintiff is not entitled to any relief in respect of any act done by the defendant south of that line; (3) that defendant 1, by working the colliery and removing the gallery coal has acquired, by adverse possession, title over the area covered by his operations including the pillar coal which has been left and is entitled to remove it and the plaintiff is not entitled to an injunction to restrain the defendant from doing so.

The first question to be determined is whether the plaintiff's suit in respect of the coal removed is barred by limitation. As held by the Judicial Committee of the Privy Council in 56 I A 93 (1) and 57 I A 144 (2), the period of limitation in such cases under Art. 48, Lim. Act, is three years from the date when the person having the right to the possession of the property first learns in whose possession it is. Two questions therefore arise. One is as to when the conversion or wrongful taking of the coal took place and the second is as to when the plaintiff came to know of it. The defendant's case is that he worked in the area in dispute openly and publicly during the years 1900 to 1911, that the taking away of the coal complained of was much before the period of limitation and that the plaintiff had full knowledge of it all along. Now the coal of the disputed area has been removed from two seams 12 (upper) and 11 (lower). The extent of the defendant's operations in these two seams within the plaintiffs lands as the Commissioner found them is shown in his maps Nos. 2 and 3 which are parts of the decree. The former refers to seam No. 12 and the latter to seam No. 11. I shall first deal with seam No. 12. Ex. D is the working plan of the defendant, showing the work done in that seam up to 30th May 1911. The genuineness of this plan is not disputed.

Now the two maps (Commissioner's map No. 2 and Ex. D) show that this seam of the encroached area is reached and has obviously been worked by two inclines i.e., Nos. 8 and 13, the former being to the east of the latter. The total length of the encroached area in this seam between the foot of these two inclines is about 500 feet and the maximum breadth is about 70 feet. There is also some encroachment on the west of the foot of incline No. 13 which is not very large and this is in the 50 bighas of land which the plaintiff got from Shivnath directly. Almost the whole area between the two inclines is within the 110 bighas of land which the plaintiff obtained from Sourendra Nath Dutta. Only a small portion just on the east of incline No. 13 is within the said fifty bighas. A comparison of the two maps referred to above, i. e the commissioner's map (scale 50 feet = 1 inch) and Ex. D (scale 100 feet = 1 inch) clearly shows that the entire encroachment, with a slight exception, was prior to 30th May 1911, and almost all the coal of this seam for which compensation is sought in this suit was removed before that date. The condition of the encroached area as found by the Commissioner is, with a slight difference, the same as in 1911. Since then there has been a slight encroachment at one place only. Two galleries, which commence from the Commissioner's station, Nos. 11 and C-1, have been further extended northwards. The extent of this extension has been given by the Commissioner in his evidence in Court. The former (11) has been extended by about 58 feet and the latter (C-1) by about 36 feet. Perhaps the thickness of some of

1. L. P. E. Pugh v. Ashutosh Sen, 1929 P C 69 =114 I C 604=56 I A 93=8 Pat 516 (P C).
2. Adjai Coal Co. Ltd., v. Panna Lal Ghosh, 1930 P C 113=123 I C 726=57 I A 144=57 Cal 1341 (P C).

the pillars may have also been reduced in some cases. It is, however, necessary to determine whether there was any encroachment between 1905 and 1909 and if so the extent of it, as it is during this period that the plaintiff's connection with the defendant's colliery, as I shall show later, has been established.

The defendant has produced his account-books, the genuineness of which is not questioned. An extract from these accounts has been printed in part 3 of the paper-book. It shows that incline No. 8 was worked from 1900 up to the year 1909 and incline No. 13 from July 1901 onwards. Coal was taken out from these two inclines regularly. The encroached area is nearer the foot of these two inclines and one can reasonably hold that the area nearer the feet of the inclines was worked before the area further removed. Furthermore, the foot of incline No. 13 is in the plaintiff's land and in whatever direction from it gallery was first driven it must have been through the plaintiff's coal. I find the main eastern gallery from incline No. 13 was being driven in October 1901. This gallery goes towards incline No. 8 and for about 100 feet passes through the plaintiff's 50 bighas of land. Similarly, expenditure was incurred in 1901 for driving the main western gallery from incline No. 8. This gallery leads to the encroached area. The work from this incline must have been considerable because as early as 27th August 1901 a boiler was installed there (Part 3, page 52). On these facts I am clearly of opinion that a very large part of the encroachment in this seam was prior not only to 1911 but to 1909 or even to 1905, and not an inconsiderable quantity of coal from the 110 bighas was removed before 1905, i. e. before the plaintiff purchased this land from Sourendra Nath Dutta. By that time (1905) galleries were being driven and coal taken out from incline No. 8 for about six years and from incline No. 13 for about 5 years.

I now come to seam No. 11. The maps of this seam are Commissioner's map No. 3 and the defendant's working plan Ex. D-1. This seam was being worked from incline No. 21, the mouth of which is within village Ekra itself. In this case a very large portion of the encroachment was after 31st May 1911, as a comparison of the two maps will show. The encroachment prior to that date is comparatively small. The encroached area of this seam is covered in the Commissioner's map by two pillars and a portion of the third on the north and only a portion of a pillar in the south. Mr. Wardlow, defendant's witness 2, in his deposition after referring to the Commissioner's map stated that the plan showed seven pillars. In the other plan (Ex. D-1) only four pillars were shown and one more was in formation. The seven pillars of the Commissioner's plan seem to have been formed out of the five of the other plan. In this case the western gallery from incline No. 21 through which this seam has been worked does not touch the plaintiff's land for about 160 feet. Therefore, though there was some encroachment by 1911, there is nothing to show when the encroachment actually took place, nor is there any evidence to show when the bulk of the coal of this seam was removed. There are also no materials to show that the coal, which appears to have been extracted prior to 1911 was extracted before 1909, when the plaintiff was the raising contractor of the defendant. The account books of the defendants show that the plaintiff was paid bills in 1909 for raising coal from incline No. 21, but there is nothing to show that the plaintiff's coal was encroached upon by that time.

The next question is whether the plaintiff had knowledge of this taking away of the coal by the defendant. According to him, he first came to know of the wrongful extraction in November 1924 in the course of a survey by a Commissioner appointed by the Court in a similar suit against this very defendant instituted by Maheswar Rai, the original lessee of the minerals of Gararia. Then he made enquiries and discovered the full facts in June 1925. The defendants' case, on the other hand, as I have said, is that the plaintiff knew it all along, but he did not interfere as it was understood by all concerned that the railway line constituted the boundary, though as now found the actual boundary is farther south. The defendant's case is that the plaintiff was his raising contractor between 1905 and 1909 and also used to purchase coal from him and as such had free access to the colliery and the mines and used to visit them. To prove this the defendant relied upon his account-books already referred to and has examined witnesses. These accounts show that from

time to time money was paid to the plaintiff for raising coal from the mine. The explanation of the plaintiff's son, who has been examined, is that the plaintiff was only a financier of the business and got his share of profit from the contractor.

The name of his contractor has not been disclosed. On the other hand, there is the evidence of the defendant's witness No. 4 Ram Chandra to the effect that the plaintiff himself was the raising contractor and also used to purchase coal from the defendant and used to come to the colliery in those connections. Furthermore, this witness deposes that the office and house of the plaintiff were near the inclines of Ekra colliery. His siding was just on the other side of the railway line. The learned Subordinate Judge has found as a fact from the account-books of the defendant that the plaintiff was a raising contractor in the years 1906 and 1907 and perhaps in 1909 also. Mr. Mahabir Prasad, who appeared on behalf of the assignee of the decree, has not seriously challenged this finding, but has contended that he was only a financier and has also adopted in his argument the reason given by the learned Subordinate Judge that the fact that the plaintiff was a raising contractor is not sufficient to establish that he had knowledge of the encroachment as it has not been shown that the encroachment was made during those years. I have already shown that a considerable quantity of coal of seam No. 12 of the plaintiff's land was certainly removed between 1900 and 1905 through inclines Nos. 8 and 13. It is to be noted that the plaintiff has not offered his own evidence. It was said that he was lying ill at his home in Bhavnagar and his limbs trembled. But the plaintiff's son Jeoraj Ramji Das admits that about three or four months before the trial of the suit the plaintiff came to Gaya for pilgrimage and on that occasion he stayed at Gararia for three or four days. The plaint was not verified by the plaintiff himself, but by his son Ramjiwan Ramjidas who described himself as the agent of his father. This son also has not been examined. No explanation for this omission has been offered.

The position therefore is that neither the plaintiff nor his son, who had verified the plaint, has pledged his oath about the date of knowledge. The defendant's evidence about the plaintiff being his raising contractor and his visiting the colliery during the period has not been rebutted by any reliable evidence. There is no reason therefore why that evidence should not be accepted. Now the mouths of inclines Nos. 8 and 13, through which seam No. 12 was worked, are within Gararia north of the boundary line according to the survey map. The former is about 35 feet from it and the latter about 145 feet. Incline No. 8 is in the 110 bighas of land which the plaintiff bought from Sourendra Nath Dutta and that of No. 13 is in the 50 bighas of land which the plaintiff got directly from Shiva Nath. The foot of incline No. 8 is about 35 feet south of the boundary line, that is, it is in village Ekra, but that of incline No. 13 is within the land of Gararia and is at a distance of about 45 feet north of the boundary line. These inclines are so close to the boundary line of the two villages that the plaintiff must have been aware of their existence. Incline No. 13 is at such a distance from the boundary line that the plaintiff must have known that the shaft of the incline ended in the plaintiff's land, the coal layer of seam No. 12 being not at a very great depth from the surface. The plaintiff was not a layman who did not know anything about coal mines. He was a colliery owner and was in mining business. When the plaintiff's son, his witness No. 6, was questioned about his knowledge of these inclines he stated that there were inclines on the plaintiff's plot since before his purchase but that they did not touch the coal and that there never was any working from the said inclines in his time.

This is obviously untrue as I have shown that coal was being regularly taken out of inclines Nos. 8 and 13. Then this witness stated that the inclines south of the railway line were about 600 feet from the plaintiff's siding and that his house is about 300 feet from the siding and his office is also about 300 feet from it. Later on he was forced to admit that two inclines of the defendant on the plaintiff's land are inclines of seam No. 12. Then he stated that he saw a ditch in the shape of an incline in November 1924 for the first time; before that he always found it to be a simple ditch the length of which was 10 or 12 feet. This is again untrue as these inclines were in use from 1900 and 1901 respectively, and it cannot

be believed on the face of the unimpeachable testimony of the defendant's account-books supported by the evidence of the witnesses of the defendant. It has been established, as I have said, that the plaintiff as a raising contractor used to visit the colliery. A raising contractor has to employ labourers to cut coal and to raise it up to the mouth of the pit. It can hardly be believed that during the four or five years when the plaintiff was the raising contractor he never visited the galleries of the mine. If he did (as he must have done, being a man connected with coal mining), it would not have been difficult for him to appreciate that his own lands were being encroached upon and coal was being removed from it. According to the plaintiff he acquired the 110 bighas of land from Sourendra Nath Dutta in 1905, though the actual deed was executed in 1907. The plaintiff's son deposes that when he bought this land the southern boundary of it was shown to him ; it was south of the railway line. If he saw the boundary line at that time he must have noticed that coal was being taken out of the inclines, and, as I have shown, from the distance of the mouth of this incline from the boundary line it must have been apparent to him that the foot of the incline No. 13 was in his own land of 50 bighas. Coal from the encroached area was being taken out publicly and openly, and I am convinced that the plaintiff knew of it.

The only explanation of the plaintiff's conduct is what has been stated by defendant 1, that nobody knew that the actual boundary line was south of the railway line. This was discovered much later. I have stated above that a very small portion of the encroachment was subsequent to 30th May 1911, and that must have been at the most within a few years of 1911. Therefore, I have no doubt in my mind that the plaintiff knew of the encroachment and of the removal of the coal long before three years from the date of institution of the suit. It may be that the plaintiff did not know that the area from which coal was being removed was his, but that will be of no advantage to him and will not save the suit from being barred by limitation. The knowledge referred to in Art. 48, Lim. Act, is the knowledge of the taking away of the property. A mistaken belief by the plaintiff that the property removed was not his, will not affect the running of the period of limitation unless, of course, the knowledge of the fact was kept back from him by the fraudulent conduct of the defendant. In this case there is absolutely no fraud. I am therefore of opinion that the plaintiff's suit in respect of the coal removed from seam No. 12 is not only barred by limitation, but that a large quantity of the coal from 110 bighas of land was removed before that land became the property of the plaintiff.

Seam No. 11, however, stands upon a different footing. I have already indicated that up till 1911 removal of coal from this seam of the plaintiff was not very large, and the situation of incline No. 21 through which this seam was worked need not necessarily have aroused the suspicion of the plaintiff. He might not have known that the galleries from the foot of that incline were being driven in the plaintiff's land. There is no direct evidence on this point, and the onus being upon the defendant it must be held that so far as the coal of this seam is concerned the defendant has failed to prove that the plaintiff knew prior to three years of institution of the suit that it was being taken away. Therefore in my opinion, the suit in respect of the coal of this seam is not barred by limitation. The next point to be considered is whether the plaintiff is entitled to any compensation for encroachment on that portion of his 110 bighas of land which is south of the railway line, the southern limit of the lands mentioned in the sale deed of Sourendra Nath Dutta in his favour being the railway line. The appellant's contention is this: he says that Sourendra Nath Dutta was the benamidar of the plaintiff. Therefore it must be taken that when the plaintiff took the transfer from him he accepted the limit of the land to be only up to the railway line and impliedly abandoned his claim in respect of the coal underlying the strip of land between the railway line and the boundary of the two villages according to the revenue survey map and therefore he was not entitled to any compensation in respect of coal removed from this area. I am unable to accept this contention. I cannot find any principle of law which exonerates a trespasser from the consequences of his act on the ground that the owner of the land

trespassed was not aware that the land was his. The sublease of Shiva Nath to Sourendra Nath Dutta clearly specified the southern limit of the property to be the southern boundary of Gararia according to the revenue survey map. The railway line was not mentioned in that deed. The area was specified to be 110 bighas.

When Sourendra Nath Dutta transferred this sublease to the plaintiff he clearly stated in the sale deed that he was selling all what he got from Shiva Nath. There was no reservation. The same 110 bighas of land of which he took a sublease was transferred to the plaintiff. It is true that the railway line was also mentioned as the boundary, but it was under a misapprehension that the real boundary according to the survey map coincided with the railway line. The specification of the land however in the deed is very clear. A wrong boundary will not affect the plaintiff's title, especially when the boundary according to the survey map was also mentioned along with the railway line in the deed of sale. The sale deed gave the plaintiff title to all the lands for which the sublease was granted by Shiva Nath to Sourendra Nath Dutta. It is clear therefore that the plaintiff had title to the coal which was removed by the defendant. It is true that the defendant removed the coal from the plaintiff's land under a mistaken belief that the land appertained to Ekra and that the plaintiff was also under the same misapprehension. But this will not entitle the defendant to retain the property so removed or its price when the mistake is discovered, provided that the suit is within time. In my opinion therefore the plaintiff is entitled to succeed in respect of the coal removed for which his suit is not barred by limitation.

The next point is whether the defendant has acquired title by adverse possession to the coal of the pillars and on the area covered by his operations. In my opinion he has not. First of all, the removal of the coal was not adverse to the defendant. It was admittedly under a mistaken belief of the defendant about the extent of his land, and the plaintiff also, as I have said, shared that mistaken belief. Secondly, there is no evidence that after the removal of the coal the plaintiff exercised any act of possession over the area from which the coal was removed. It seems to me that when after the removal of coal the defendant realised that the land appertained to Gararia he refrained from further encroachment on the land in question. The defendant apparently realised the true state of affairs in the previous litigations with the owners of coal of other blocks of land just north of Ekra. In my opinion therefore this point must be decided against the defendant. I now come to the cross-objection of the original plaintiff which has been pressed on behalf of his four sons and who on his death during the pendency of the appeal were substituted in his place. This cross-objection refers to the rate of coal which has been allowed to the plaintiff by the learned Subordinate Judge. He has found the price of coal to be Rs. 4 per ton, but has allowed a deduction of Rs. 2/4 per ton for the cost of raising and establishment charges. Therefore, he has decreed the suit at a net rate of Rs. 1/12 per ton. He has allowed the cost of raising on the basis of Exs. A-1 to A-18. The objection of the respondents is that the learned Subordinate Judge has entirely misunderstood these exhibits. They are bills submitted by the plaintiff to the defendant for the supply of soft coke, and not for raising coal. They point out that the cost of raising the coal has been given by the plaintiff's son at the end of his examination-in-chief which comes to 13 annas 6 pies per ton. In my opinion the contention is well founded.

The learned Subordinate Judge has wrongly treated Exs. A-1 to A-18 as bills for raising coal. In fact they are bills for the supply of soft coke. This being the case, the question is how much should be allowed as cost for raising the coal. The plaintiff's son, no doubt, stated the cost of raising the coal to be 13 annas 6 pies per ton, but it appears from the account-books of the defendant that the plaintiff himself was being paid at the rate of Rs. 1/2 per ton. It is true that this amount includes the middleman's profit also, but when a large number of miners have to be employed, the employment of a middleman is always resorted to. In my opinion, therefore, Rs. 1/2 must be allowed as cost of raising to which two annas per ton should be added for establishment and overhead charges, with the result that Rs. 1/4 should be deducted from Rs. 4 as cost of raising. The learned

Subordinate Judge has given the plaintiff a decree at the rate of Rs. 1 / 12 per ton. The plaintiff is, therefore, entitled to an additional sum of Re. 1 per ton. As a result of my findings I would partly allow the defendant's appeal. The decree of the learned Subordinate Judge, in respect of injunction will stand. The money decree in favour of the plaintiff now assigned to the respondent Ram Sewak Singh will be modified. The claim in respect of the coal of seam No. 12 will be dismissed. There will be a decree in favour of the assignee only for 4,496 tons of coal which, according to the Commissioner's report, was removed from seam No. 11 at the rate of Rs. 1 / 12 per ton, the rate which was allowed by the learned Subordinate Judge. The decree will also be modified in respect of the costs in the lower Court. Defendant 1 will pay costs of the plaintiff on the sum which is decreed and will get his costs in respect of the claim which has been dismissed. The assignee of the decree and the plaintiff will bear their own costs in this Court in respect of this part of the case.

The cross-objection will also be partly allowed. There will be a decree against defendant 1 in favour of the respondents 1 to 4 who have been substituted in place of the original plaintiff Ramji Bechar Das for Rs. 4,496 in respect of 4,496 tons of coal removed from seam No. 11 at the rate of Rs. 1 per ton, with proportionate costs. The court-fee payable on this sum will be realisable by Government from defendant 1. The defendant will get from the respondent's costs in respect of such portion of the cross-objection having been valued at Rs. 13,268/10/9. The defendant's costs will be set-off against the decree which is being passed in favour of respondents 1 to 4. From the sum which will thus be payable by defendant 1 to respondents 1 to 4, the Government will be entitled to realise as a first charge the court-fee on that portion of the claim in the cross-objection which has been disallowed.

Courtney-Terrell, C. J.—I agree entirely.

B.D./R.K. *Order accordingly.*

A. I. R. 1936 Patna 185

DHAVLE AND AGARWALA, JJ.

Bhup Narayan Singh — Defendant—Appellants.

v.

Hira Lal—Plaintiff and another—Defendant—Respondents.

Appeal No. 836 of 1931, Decided on 17th December 1935, from appellate decree of Addl. Dist. Judge, Manbhun, D/- 25th August 1930.

(a) Second Appeal—Finding of fact—Finding marked by errors of law is not binding.

A finding of fact is not binding in second appeal if it is marked by errors of law as that of ignoring the presumption of correctness attaching to the Record of Rights. [P 187 C 1]

(b) Record of Rights—Record of Rights even if following another one in matter of boundary lines is entitled to presumption of correctness—Record of Rights of neighbouring district can be adopted in matter of dispute of boundary lines.

A Record of Rights is entitled to presumption of correctness even if it follows a previous Record of Rights in the matter of boundary lines between two districts. [P 187 C 1]

An entry in the Record of Rights operates in the same way between landlord and tenant as between the landlords of the same or of the neighbouring estates or mauzas in another district in the matter of disputed boundary line; it cannot be ignored merely because it is not shown to have been based on the decision of any boundary line dispute: 1924 *Pat* 719 *Rel. on.* [P 187 C 1]

(c) Specific Relief Act (1877), S. 42—Person admittedly in possession of mauza claiming land recorded by survey authorities as lying outside mauza—He is not entitled to mere declaration of title without also suing for possession.

Where a person who is admittedly in possession of a mauza, claims land which has been recorded by the survey and settlement authorities, as lying outside the mauza, he is not entitled to mere declaration of his title to the land in dispute without also suing for possession. The position would be different if it is found that the claimant is in actual possession of the disputed land as well. [P 188 C 1]

The plaintiff being out of possession in the eye of law, it is open to him to bring a suit to establish his title to recover possession or in the alternative to show that he had come in possession since the dispossession implicit in the decision of the boundary line dispute under S. 41, Bengal Survey Act. If he takes neither of these courses but merely sues for declaration of title without asking any relief as regards possession his suit is barred under S. 42, Specific Relief Act. [P 189 C 2]

(d) Bengal Survey Act (5 of 1875), Ss. 41, 62—Order determining boundary line dispute passed—Suit for confirmation of possession, on allegation that plaihtiff has been in possession from before order, is barred by S. 62.

Section 62 is a bar to a suit by a plaintiff against whom an order determining a boundary dispute has been made under the Survey Act, for confirmation of possession on the allegation that he has been in continuous possession from before the order, such an order having under S. 41, the effect of a civil Court decree which is binding on the parties as regards the question of possession : 14 *C W N* 366 *Foll.* and 1917 *Pat* 357, *Disting.* [P 188 C 2]

(e) Bengal Survey Act (5 of 1875), S. 41—Adoption of boundary line given in Record of Rights of neighbouring mauza, amounts to determination of boundary.

Adoption of a boundary line given in the Record of Rights of a neighbouring mauza, does amount to determination of boundary according to actual possession within the meaning of S. 41. [P 189 C 1]

(f) Bengal Survey Act (5 of 1875), S. 62—Entry in Record of Rights relating to boundary between the mauzas is governed by S. 62.

Entry in the Record of Rights relating to the boundary between two mauzas unlike many other entries is governed by S. 62: 14 *C W N* 366, *Foll.* [P 189 C 2]

(g) Practice — Amendment — Prayer for amendment of plaint made just before judgment of appellate Court—Prayer is made too late to be entertained.

Where suit is barred under S. 42, Specific Relief Act by reason of the plaintiff not praying for possession, a prayer for opportunity to amend the plaint, when made first before the delivery of the judgment of the appellate Court, the prayer is made too late to be entertained. [P 189 C 2]

S. C. Majumdar—for Appellant.

Atul Krishna Roy—for Respondents.

Dhavle, J.—This is an appeal by defendant 4, the Khorposhdar of mauza Pari. Plaintiff holds a mokarrari of mauza Kudagara in the district of Manbhun, lying immediately to the south of Pari and two other mauzas all included in the district of Hazaribagh. Plaintiff's case was that during the Survey and Settlement operations in Manbhun he found, when pointing out the boundaries of Kudagara, that the boundary between the two districts had been recorded in the Hazaribagh settlement to the north of the proper boundary. He raised a boundary dispute accordingly. But the Survey authorities decided to adopt the boundary laid down in the Hazaribagh settlement. Two hillocks, called Ranidera and Harapahari (otherwise called Karmatungri) were thus excluded from Kudagara and included in Pari and the other villages lying along the northern boundary of Kudagara. Plaintiff therefore sued for a declaration that the hillocks appertained to his mauza of Kudagara and that the settlement record regarding the same is erroneous. The defence was that the record was correct, that the suit was barred under S. 62, Bengal Tenancy Survey Act, 1875, and also barred by limitation, as the defendants were, and the plaintiff and his predecessors had never been in possession of the disputed lands. It was also urged that the effect of the Survey entry being the dispossession of the plaintiff the suit as framed could not proceed. These pleas were all accepted by the Munsif who first tried the suit and who found on the evidence that the Commissioner who had been deputed to lay down on the settlement map the Revenue Survey boundary line on which plaintiff's claim was based had not done so correctly. Plaintiff preferred an appeal which was heard by Babu Narendra Nath Banarji Subordinate Judge.

This officer held that though the Commissioner's map may be incorrect, it was impossible to determine the question of plaintiff's dispossession without correctly ascertaining the Revenue Survey line and its deviation if any, from the line adopted at the Cadastral Survey. He also held that as the Survey and Settlement authorities had not addressed themselves to this question, their adoption at the time of the Manbhun survey of the line adopted at the Hazaribagh Survey was not such a decision as to constitute a bar under S. 62, Bengal Survey Act, to the suit. Under the erroneous impression that plaintfff had claimed confirmation of possession, he also held that plaintiff was entitled to sue if his right was found to have been invaded by the survey boundary. He accordingly allowed the appeal and remanded the case to the lower Court for trial according to some directions. The Munsif who dealt with the case on remand came to much the same conclusions as the Munsif who had first disposed of the case, though in view of the finding of the appellate Court that the suit was not barred by the provisions of the Bengal Survey Act, he expressed no independent opinion on that point but felt compelled to hold that the suit was not barred by those provisions. As he dismissed the suit, plaintiff appealed and the appeal was heard by the Additional District Judge who allowed it after holding that the suit was not barred by S. 42, Specific Relief Act as the plaintiff was in actual possession of the disputed land. On the question whether the suit was barred

by S. 62, Bengal Survey Act, the learned Additional District Judge does not seem to have expressed any definite opinion of his own, probably because he felt that he had no authority to sit in judgment on the view of the Subordinate Judge who had first heard the appeal and ordered a remand—a remand which had been previously challenged in the High Court, but without success because it had been ordered under O. 41, R. 23, Civil P. C. It seems however from the observations of the Additional District Judge that he was inclined to take the view that S. 62, Bengal Survey Act, was no bar to the suit because the Manbhun Settlement authorities had not made any independent inquiry but had merely accepted as correct the decision of the Settlement authorities in Hazaribagh at the time they had surveyed the mauzas Jumra, Pari and Roria which lay immediately to the north of Kudagara.

It has been contended on behalf of the Khorposhdar of Pari that the finding of the lower appellate Court as regards plaintiff's actual possession of the disputed land is vitiated by errors of law. The learned advocate for the plaintiff-respondent has urged that it is a finding of fact, but it is clear that a finding of fact is not binding in second appeal if it is marked by errors of law. The Kudagara Record of Rights is by statute entitled to the presumption of correctness, even if it followed the Hazaribagh Record of Rights in the matter of the boundary line between the two districts. It is true that there may have been no boundary dispute raised at the time the southern boundary of the mauzas in Hazaribagh was determined in the course of the Survey and Settlement of that district, but as was pointed out in 1924 Pat 719 (1) the entry in the Record of Rights operates in the same way between landlord and tenant, as between landlords of the same or of the neighbouring estates or, it may be added of neighbouring mauzas, and the Hazaribagh Record of Rights which was adopted for Kudagara in the matter of the disputed boundary line cannot be ignored as the lower appellate Court has done merely on the ground that it is not shown to have been based on the decision of any boundary dispute. It must be added that it has never been the case of the plaintiff that either since the Hazaribagh Record of Rights which was finally published in 1912, or since the disposal in February 1920, of the boundary dispute raised by him in the survey of Kudagara, he has come into fresh possession of the land lying between the Revenue Survey and the Cadastral Survey boundaries. The lower appellate Court has ignored all these considerations and arrived at its finding of possession in favour of the plaintiff "on the evidence of possession as adduced by the parties." The learned Additional District Judge has preferred the evidence of the plaintiff's witnesses to that of the witnesses for the Khorposhdar of Pari on the ground that "there are no reliable documents on the side of the defendants."

But he has completely ignored what had been pointed out by both the Munsifs who dealt with the case, namely, that the plaintiff's witnesses had failed to point out their lands to the first Commissioner in the case with anything like approximate accuracy, and that the boundaries in the documents produced by the plaintiff were not specific enough to make a determination of the boundary between the mauzas possible; to describe the northern boundary as Gola Pargana for instance, can obviously give no assistance in a case in which it has to be found out where Gola Pargana ends and the plaintiff's mauza of Kudagara begins. The learned Additional District Judge has also apparently failed to notice the fact that much as the plaintiff's witnesses may speak of their possession of Ranidera, land called Ranidera is to be found in the Record of Rights of Pari no less than in that of Kudagara. Though we have the power in a proper case under S. 103, Civil P. C., to determine the fact of possession if it has been wrongly determined by the lower appellate Court by reason of the illegality of ignoring the presumption of correctness attaching to the Records of Rights of the two mauzas, the whole evidence has not been placed before us, and the appeal would have had to be remanded to the lower appellate Court for disposal according to law but for the fact that the plaintiff's suit must fail on another ground. This takes me to the contentions of the parties on Section 62, Bengal Survey Act, and S. 42,

1. Mazharul Ekbal v. Gopal Lal Ray, 1924 Pat 719=84 I C 488.

Specific Relief Act. As to the latter, there cannot be any question that if the plaintiff was not in possession at the date of the suit, it was not open to him to sue for a mere declaration of title without also seeking the further relief of recovery of possession which he has definitely omitted to pray and pay for.

The lower appellate Court considered that S. 42, Specific Relief Act, was no bar as the plaintiff was admittedly in possession of the mauza. But his admitted possession of the mauza would not entitle the plaintiff to a mere declaration of his title to the disputed land which has been recorded by the Survey and Settlement authorities as lying outside the mauza. The position may however possibly have been different if it had been found in accordance with the law that the plaintiff was in actual possession of the disputed land as well. It has been contended on behalf of the appellant that the lower appellate Court was not entitled to find, as it has done, that the plaintiff was in possession, in the face of S. 62, Bengal Survey Act. S. 40 of the Act lays down that if in the course of a survey under the Act it comes to the notice of the Collector that a dispute exists as to any boundary which should be surveyed, the Collector, after holding such inquiry as he may deem necessary, may determine such boundary as thereinafter provided under the Act. S. 41 provides that the Collector shall determine the boundary according to actual possession, and cause it to be secured by boundary-marks. It provides, further, that the order of the Collector under the section shall, until it be reversed or modified by competent authority, have the force of an order of any civil Court declaring the parties to be in possession of the land in accordance with the boundary as determined by the Collector.

Sections 59 and 60 provide for appeals against orders under S. 41 and S. 62, says that no suit shall be brought to set aside an order . . . deciding a boundary dispute, unless an appeal shall have been first preferred under S 59 or S. 60 . . . Now the surveys of Hazaribagh and Manbhum were made under the Bengal Survey Act, the Record of Rights being prepared under the Chota Nagpur Tenancy Act. So far as the Manbhum Survey and Settlement is concerned, there is also no question that a boundary dispute within the meaning of S. 40 was raised before the proper authority. It is also obvicus that that dispute must have been determined under the Act, for the Survey and Settlement operations were completed in 1922. The effect of S. 62 of the Act was considered in 14 C W N 366 (2), where it was held that the Section is a bar to a suit by a plaintiff, against whom an order determining a boundary dispute has been made under the Survey Act, for confirmation of possession on the allegation that he has been in continuous possession from before the order, such an order having under S. 41 of that Act the effect of a civil Court decree which is binding on the parties as regards the question of possession. That was a case where the plaintiff had sued for confirmation of possession on declaration of title, alleging that he was in possession, and had proved his title but failed to prove possession; and the learned Judges held that the Court ought not to award him recovery of possession, unless on the facts alleged in the plaint the action amounted to one for restoration of possession.

The learned Advocate for the respondent has relied on 40 I C 588 (3), but that was a case where the plaintiff had sued for recovery of possession on a declaration of his title and had made his claim on the express footing that he had been dispossessed by reason of the Survey and Settlement proceedings. Chamier, C. J., and Jwala Prasad, J., on that occasion pointed out that S. 62, Bengal Survey Act, had no application to a suit of that character, and distinguished *Bisseswar Koeri's case* (2) as one in which the plaintiff had sued for confirmation of possession, alleging but failing to prove that he was in possession, and therefore barred by S. 62, Survey Act. In the present case the plaintiff sued on the footing that he had been in continuous possession of the disputed land, and the lower appellate Court has accepted the claim. This was clearly contrary to Ss. 41 and 62, Bengal Survey Act, unless the determination of the boundary, such as it was, could be treated as a nullity. The learned Advocate for the respondent was not prepared to go quite so far as Babu Narendra Nath Banerji did when

2. Bisseswar Koeri v. Ram Pratap Singh, (1910) 14 C W N 366=4 I C 547.
3. Bara Lal Nawal Kishore v. Jaleshwar Dayal Singh, 1917 Pat 357=40 I C 588.

he heard the plaintiff's appeal at first. The view of that learned officer was that no real dispute could be held to exist unless it was ascertained that the Cadastral Survey line deviated from the Revenue Survey line, and that the mere adoption of the Hazaribagh boundary line was not a decision within S. 41, Bengal Survey Act so as to be impressed "with the sanctity of a decree of a civil Court."

The learned Subordinate Judge was mistaken both in his reasoning and in his law. There could be no doubt about the existence of a dispute when the plaintiff claimed as part of Kudagara land lying to the north of the southern boundary of Jumra, Pari and Roria as determined at the Hazaribagh Survey and Settlement. Whether or not the Revenue Survey line was relaid on the spot in order to find out how far exactly the cadastral survey line deviated from it, the dispute was there, and the error into which the learned Subordinate Judge fell lay in his failure to see that though it is true enough that it could not be said whether and how far, if at all, the plaintiff had been dispossessed without ascertaining whether the cadastral line deviated from the Revenue Survey line, the Record of Rights carried a statutory presumption of correctness in support of defendant's possession, and that unless this presumption was displaced by evidence, the plaintiff was bound to fail even though the Revenue Survey boundary was not ascertained. The learned Subordinate Judge was further in error when he held that the adoption of what may be called the Hazaribagh line was no determination of the boundary according to actual possession within the meaning of S. 41 of the Act. It was nobody's case that possession had changed since the determination of the Hazaribagh line, and that determination also carried a statutory presumption of correctness under S. 84 (3), Chota Nagpur Tenancy Act. The contention that the Manbhum Survey and Settlement authorities did not determine the boundary of Kudagara according to actual possession for themselves is fallacious. They did determine a boundary, and they could only have determined it according to actual possession, and they evidently proceeded on the statutory presumption of correctness attaching to the Hazaribagh line, for it was not the plaintiff's case that possession had since changed.

If the plaintiff conceived that there was any error in the procedure adopted by them, it was open to him to appeal under S. 59, and the law is quite clear that in default of such an appeal, plaintiff is not entitled to sue on the footing that he was nevertheless in possession. The learned Advocate for the respondent has urged that the presumption of correctness attaching to the Record of Rights can be displaced by a suit, and that therefore the plaintiff's suit was competent. The answer to this is that the entry in the Record of Rights relating to the boundary between the two mauzas, unlike many other entries, is governed by S. 62, Bengal Survey Act, as was so clearly pointed out in 14 C W N 366 (2). At the time the plaintiff brought his suit, the position in my view was that in the eye of the law he was out of possession but that it was open to him to bring a suit to establish his title and recover possession or, in the alternative, show that he had come into possession since the dispossession implicit in the decision of the boundary dispute under S. 41, Bengal Survey Act. As the plaintiff took neither of these courses, but merely sued for a declaration of his title without asking for any relief as regards possession, the suit was barred under S. 42, Specific Relief Act. It may perhaps be added that no attempt was made to amend the suit in spite of the objection taken by the defendant that as the plaintiff was never in possession of the lands and as the effect of the survey entry was to dispossess him the suit could not proceed until full court-fees were paid ; if that had been done at the proper time (not that any attempt has been made even now to remedy the defect), the plaint would also doubtless have been amended. I would therefore allow the appeal and dismiss the suit with costs in all Courts. Just before the delivery of this judgment, the learned Advocate for the plaintiff-respondent asked for an opportunity to amend the plaint. In my opinion this prayer is made much too late to be entertained.

Agarwala, J.—I agree.

R.M./R.K. *Appeal allowed.*

A. I. R. 1936 Patna 190

MACPHERSON, J.

Mahabir Prasad Saraoji—Petitioner.

v.

Mt. Jaidayi Bibi and *others*—Opposite Parties.

Civil Revn. No. 616 of 1934, Decided on 2nd September 1935, from order of Special Sub-Judge, Ranchi, D/- 13th September 1934.

Civil P. C. (1908), S. 115 — Application under S. 115 for setting aside order directing Court-fees to be paid under S. 7 (iv) (c), Court-fees Act—Remedy by way of appeal open to plaintiff—No likelihood of irreparable loss if order is not set aside — High Court will not interfere.

The High Court would not ordinarily interfere under S. 115, Civil P. C., on an application by a plaintiff contending that the Court-fee payable by him in his suit is only as upon a declaration and that the lower Court in coming to a contrary decision has acted with material irregularity. [P 190 C 1]

Where the plaintiff has his remedy by way of appeal, in case of his suit being dismissed and there is nothing to show that irreparable loss would be caused to him if the order to pay Court-fee under S. 7 (iv) (c), Court-fees Act, is not set aside, the High Court will not interfere in revision, more so when it cannot definitely hold that the decision of the lower Court having regard to the obscure plaint of the plaintiff is erroneous : 1918 *Pat* 131, *not Foll.* [P 191 C 1]

B. C. De and *K. K. Banarji*—for Petitioner.

S. M. Mullick and *L. K. Chaudhuri*—for Opposite Parties.

Order. — This Rule has been secured by the plaintiff in respect of the order of the Special Subordinate Judge of Ranchi requiring him to pay court-fees under S. 7 (iv) (c), Court-fees Act, ad valorem on the value of the suit under S. 8, Suits Valuation Act. The plaintiff contends that the court-fee payable is only Rs. 15 as upon a declaration and as paid by him and that the lower Court has acted with material irregularity in the exercise of its jurisdiction in coming to a contrary decision. The opposite party contends, first, that this Court has, in the circumstances, no power to interfere in revision and further that, even if it possessed such power, the order is correct in law. The declaration sought by the plaintiff (and it was the only relief claimed in the plaint) is :

That it be declared that the plaintiff is the adopted son of Nandlal deceased and defendents 3 to 5 are trustees holding the properties of the deceased Kedarmall in trust for the plaintiff who is the sole owner of the properties described in Sch. 2 hereunder.

The learned Subordinate Judge has come to the conclusion that in any event the three parts of this declaration are distinct from each other and plaintiff must pay separate court-fee, so that there was a deficit of Rs. 30. This view is substantially not contested by the petition. The learned Subordinate Judge, however, went on to hold generally and especially in view of the fact that the plaintiff about the same time when he filed his plaint, sought a temporary injunction (and indeed actually secured an ad interim injunction) under O. 39, R. 1 and S. 7, Civil P. C., to prevent waste, damage or alienation of the properties in suit and to preserve the same till the disposal of the suit, that the plaintiff had in effect claimed the relief of confirmation of possession and that by putting his relief in the form of a declaration he could not avoid the provisions of S. 7 (iv) (c), Court-fees Act, under which his claim fell. Reliance is, as usual, placed on the observations of Jenkins, C. J., in 39 Cal 704 (1). The petitioner would reply that the suit for declaration is tenable even if it may obviously have to be dismissed later on under the provisions of S. 42, Specific Relief Act.

The question whether interference in revision is at all permissible in cases of this kind and whether if it is, it is restricted to cases which relate to category only and not merely to quantum of court-fee, has frequently been discussed in this Court, and there is some conflict in the decisions as to whether a mistake in respect of category would be a sufficient foundation for jurisdiction under S. 115, Civil P. C. But the bar cannot indicate, and I have been unable to discover that on any occasion there has been any interference with the order of the Court below except in 4 P L J 191 (2), the decision in which is specifically disapproved in subsequent rulings. In other decisions where interference in revision has been adjudged to be legal, it is held to be proper only where there is no other remedy available to the plaintiff and where irreparable loss would be caused if the High Court did not intervene at

1. Deokali Kuar v. Kedar Nath, (1912) 39 Cal 704=15 I C 427.
2. Banke Behari v. Rambahadur, 1918 Pat 131 =44 I C 891=4 P L J 191.

that stage. Now, even if the present application falls within the category of cases with which S. 115 is concerned, there is certainly another remedy, that is to say, by appeal if the suit is dismissed, and there is nothing to show that irreparable loss will be caused to the plaintiff if the order to pay court-fee under S. 7 (iv) (c) is not set aside. But further I am unable on the materials presented to hold definitely that on the view taken by this Court the decision of the Special Subordinate Judge, on the amount of the court-fee due on the petitioner's obscure, and perhaps deliberately obscure, plaint, or the category within which the case falls, is erroneous. The Rule is discharged with costs. Pleader's fee one gold mohur. Let the record go down forthwith.

R.M./R.K. *Rule discharged.*

A. I. R. 1936 Patna 191

MOHAMMAD NOOR AND VARMA, JJ.

Apurba Krishna Mitra — Plaintiff—Appellant.

v.

Ram Bahadur and *others*—Defendants—Respondents.

Appeal No. 41 of 1932, Decided on 9th January 1936, from original decree of Sub-Judge, Muzaffarpur, D/- 11th August 1931.

(a) Civil P. C. (1908), S. 34—Interest pendente lite can be granted without plaintiff asking for it.

Court can grant interest pendente lite at the stipulated rate without the plaintiff's asking for it. [P 192 C 1]

(b) Civil P. C. (1908), O. 22, Rr. 4 and 11—Suit on basis of hand-note — Appeal for grant of pendente lite interest not-granted in suit — One of respondents dying—Legal representative not brought on record in time—Appeal abates as whole.

The proposition that where the liability of the defendant is joint and several, it is open to the plaintiff on the death of one of them, to proceed against the remaining defendants alone, is true so far as a suit is concerned but different considerations arise in an appeal. There may be cases in which a suit might not have abated but an appeal will abate. [P 192 C 2]

The test to be applied is whether in the event of appeal being allowed as against the remaining respondents there would or would not be contradictory decrees in the same litigation with respect to the same subject-matter. [P 193 C 1]

Where therefore in a suit on a hand note, the trial Court having either intentionally or through oversight omitted to grant interest pendente lite, the plaintiff appeals from the suit praying for grant of interest pendente lite and during the pendency of the appeal one of the respondent dies and the appellant fails to bring his legal representative on record within the prescribed period, the appeal abates as a whole because if the appeal is allowed there would be two inconsistent decrees on the basis of the same handnote. Against some of the defendants it will be a decree for principal and interest only up to the date of the suit and not for interest pendente lite, while against others there will be another for the amount as well as for the interest pendente lite: 11 *Pat* 538, *Rel. on.* [P 193 C 1]

(c) Civil P. C., (1908), O. 6, R. 17—Appellant seeking amendment of plaint in appeal on ground of mistake in typing—No explanation offered why mistake was not discovered earlier—Amendment will not be allowed.

Where the plaintiff-appellant prays in appeal for amendment of the plaint on the ground of mistake having been made in the typing of the draft plaint but no sufficient explanation is offered why the alleged mistake was not discovered by the plaintiff till after the disposal of the case by the lower Court, it is not a case in which the High Court would in appeal exercise its discretion in allowing the amendment. [P 193 C 2]

(d) Civil P. C., (1908), S. 34—Money suit—Plaintiff cannot as matter of right claim interest for period during which suit has been pending.

In money suits, when the suit has been instituted, the question of interest for the period subsequent to the institution of the suit passes from the domain of contract into that of judgment and the plaintiff cannot as a matter of right claim interest for the period during which the suit has been pending. There is no hard and fast rule that the interest pendente lite must be allowed in every case. Every case has to be decided on its merits. [P 193 C 2, P 194 C 1]

Manohar Lal, *A. K. Mitra* and *S. Mustafi*—for Appellant.

T. N. Sahay and *Ramnandan Prasad*—for Respondents.

Mohammad Noor, J. — This is an appeal by the plaintiff who has obtained a decree against the respondents in a suit based on a hand note executed by all the four defendants to the suit for a sum of Rs. 5,680 payable with interest at 12 per cent per annum. The plaintiff has obtained a decree for principal and interest up to the date of the suit and thereafter interest from the date of the decree on the entire decretal amount at the rate of six per cent per annum. The lower Court has not either intentionally or by an oversight allowed any interest pendente lite on the principal sum. The plaintiff has appealed and the only question involved is whether interest pendente lite should be allowed. The appeal has been valued at Rs. 567 being the

interest at one per cent. per annum on the principal sum of Rs. 5,680 for the period of the pendency of the suit. In the plaint as it stands the plaintiff appears to have asked for interest pendente lite at the rate of six per cent. per annum. There is however an application filed in this Court on his behalf stating that there has occurred an accidental mistake in the plaint the typist omitting to copy one full line of the draft, and there is a prayer for the amendment of the plaint. The prayer portion in the draft plaint which has been filed runs thus :

> That a decree for Rs. 6,848-4-6 for principal and interest up to date besides interest pendente lite at the rate of Rs. 12 per cent per annum and costs of this suit and interest at the rate of Rs. 6 per cent per annum. -

In the plaint, as it was filed, the words "at the rate of Rs. 12 per cent. per annum and costs of this suit and interest" do not occur and are said to have been omitted by mistake with the result that it now reads :

> That a decree for Rs. 6,848-4-6 the principal and interest up to date besides interest pendente lite at the rate of Rs. 6 per cent per annum.

Most likely there has been a mistake in the typing of the plaint. The plaintiff could not have asked for a lower rate of interest himself. Apart from this interest pendente lite can be granted without the plaintiff's asking for it. Had we thought that interference is justified and the plaintiff is entitled to interest pendente lite at the stipulated rate, we would have ordered the amendment of the plaint or allowed interest at that rate without amending it. Before I come to the merits of the appeal it is necessary to mention that when this case was taken up by us on the 7th instant the learned Advocate for the respondents, Mr. Rai Tribhuvan Nath Sahay, filed an affidavit to the effect that one of the respondents Parmeshwar had died on the 17th July last and contended that no substitution of his representative having been made till then the appeal had abated. He further urged that at any rate under the circumstances it would be improper to amend the plaint or modify the decree against the remaining respondents. Mr. Manohar Lal, on behalf of the appellant asked us to give him two days' adjournment in order to enable him to ascertain about the death of Parmeshwar. When the case was taken up to day Mr. Manohar Lal informed us that Parmeshwar had in fact died in July last though the actual date of his death could not be ascertained. He asked us to adjourn the case further to enable the appellant to apply for setting aside the abatement of the appeal at any rate against the deceased respondent. We refused to adjourn the case for this purpose. An application for setting aside the abatement has become barred by limitation and cannot be entertained unless sufficient reason be shown under S. 5, Lim. Act. Both the parties are residents of Muzaffarpur and it is difficult to imagine that the death of Parmeshwar who was a judgment-debtor of the appellant and against whom he was vigorously prosecuting this appeal, remained unknown to him so long. Apart from this, there was plenty of time for the plaintiff between the 7th of this month till now to file an application for substitution if he cared to do so.

This being the position, the first question is whether the appeal as it stands has abated not only against the deceased respondent but as a whole. The learned Advocate for the appellant contended that as the liability of the defendants was joint and several it was open to the plaintiff to proceed against the remaining respondents alone leaving out the deceased respondent altogether. This is so, so far as a suit is concerned; but different considerations arise in appeal. There may be cases in which a suit might not have abated but an appeal will abate. Here we have got a case in which a decree for a certain sum has already been passed against all the defendants. The question now is whether an additional sum should be allowed against the defendants who are left on the record in the absence of the representatives of the deceased defendant. It was held in a similar case of 11 Pat 538 (1) that this cannot be done. In that case the plaintiff obtained a decree against a number of defendants for mesne profits. He appealed to this Court claiming a larger amount. During the pendency of the appeal some of the defendants died and their heirs were not brought on the record of the appeal in time. An objection was taken that the appeal had abated. The Court held that it had. It was

1. Rameshwar Singh Bahadur v. Ram Charan Sahu, 1932 Pat 327=140 I C 300=11 Pat 538 =13 P L T 711.

held that the decree for mesne profits having been obtained against several defendants it was not open to the plaintiff to proceed in appeal against some only of the defendants leaving out others against whom the decree had become final, and therefore the appeal against the remaining respondents was incompetent. Mr. Manohar Lal however has urged that the present case is distinguishable from that case on the ground that there the decree was for mesne profits which arose out of a suit for possession of immoveable property while in the present case the decree is one on the basis of a handnote. He contends that a suit for possession of immoveable property cannot proceed in the absence of a necessary defendant while a suit based on a handnote can proceed against one or more of the several joint promisors, and that therefore the principle laid down in that case is not applicable to the present case. I am unable to accept the contention. In my opinion, the principle is what has been stated by Sir Dinshaw Mulla in his commentary on the Civil Procedure Code. Dealing with the question whether an appeal should or should not proceed in the absence of the representatives of a deceased respondent the learned commentator says as follows:

> The test often adopted in such cases is whether in the event of the appeal being allowed as against the remaining respondents there would or would not be two contradictory decrees in the same litigation with respect to the same subject-matter. It is clear that a Court should not be called upon to make two inconsistent decrees about the same property and in order to avoid conflicting decrees the Court has no alternative but to dismiss the appeal as a whole.

It is obvious in this case that if the appeal of the plaintiff is allowed there will be two inconsistent decrees on the basis of the same handnote. While against some of the defendants it will be a decree for principal and interest only up to the date of the suit and not for interest pendente lite, against the others there will be another decree for the aforesaid amount as well as for the additional sum of Rs. 567. Therefore, apart from the question of the merits of the appeal I am inclined to hold that the whole appeal has abated. Assuming however that the whole appeal has not abated the circumstances are such that we cannot reasonably exercise our discretion and give the plaintiff interest pendente lite and thereby interfere with the decree of the trial Court. The next consideration is whether the plaint should be amended at this stage. Here also, as I have said, even assuming that the appeal has not abated, this is not a case in which I would be inclined to exercise my discretion in allowing the amendment of the plaint. No sufficient explanation has been offered why this alleged mistake of the typist in copying the draft plaint was not discovered by the plaintiff till after the disposal of the case by the lower Court when, as I have said, the plaintiff cannot be accused of negligence or want of diligence as he has pursued his rights against the defendants up to this Court for a sum of Rs. 567 only. However the question is not of much importance. First of all there is a prayer for interest pendente lite at any rate at six per cent. per annum and secondly, as I have said, interest pendente lite can be allowed without the plaintiff specifically asking for it. I do not think on the merits of the case the plaintiff has made out a case for our interference. The learned Subordinate Judge has not expressly refused interest pendente lite but the order portion of his judgment clearly shows that he has not allowed it. The grievance of the appellant is that the lower Court was wrong in not allowing the interest without giving any reason for this omission. Now S. 34, Civil P. C., says:

> Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged, from the date . . . .

It will be seen that in money suits, when the suit has been instituted, the question of interest for the period subsequent to the institution of the suit passes from the domain of contract into that of judgment. The plaintiff cannot claim it as a matter of right that he is entitled to interest for the eight months during which the suit remained pending before the learned Subordinate Judge. Mr. Manohar Lal has drawn our attention to some observations of their Lordships of the Judicial Committee to the effect that in the absence of any reason to the contrary, interest at the contracted rate

ought to be allowed during the passing of the final decree. Some of those observations relate to mortgage suits where different considerations arise. I do not think their Lordships ever intended to lay down a hard and fast rule that interest pendente lite must always be allowed in every case. Every case has to be decided on its own merits. It is true that in this case the learned Subordinate Judge did not give any reasons for not allowing interest for the period of the pendency of the suit; but there are reasons for not interfering in this case. It seems that the learned Subordinate Judge was impressed by the financial difficulties of the defendants and allowed the payment of the decretal amounts by instalments. The major defendants allowed the suit to be decreed without raising any objection whatsoever. It may be that under the circumstances of the case the learned Subordinate Judge did not think it necessary to exercise his discretion of allowing interest pendente lite. Therefore, even if the appeal had not abated, I would not have been justified in exercising a discretionary power in modifying the decree of the learned Subordinate Judge. I would therefore dismiss the appeal with costs.

Varma, J.—I agree.

R.M./R.K. *Appeal dismissed.*

---

* A. I. R. 1936 Patna 194

MOHAMMAD NOOR AND SAUNDERS, JJ.

Ram Das and *others* — Defendants—Appellants.

v.

Ram Babu and *others* — Plaintiffs—Respondents.

Appeal No. 1571 of 1932, Decided on 23rd July 1935, from decision of Addl. Dist. Judge, Patna, D/- 28th September 1932.

(a) Partnership—Firm — Firm not juristic person—It is not firm that sues or is sued—Partners sue or are sued as individuals in name of firm.

In the eye of law a firm has no existence apart from the members which constitute that firm. A firm is not a person either natural or artificial and it is a person who can sue and be sued. Firm is not a juristic persona to be taken cognizance of as such by the law, such as an idol or corporation is. Although the Civil Procedure Code allows partners collectively to sue or to be sued in the name which the partners collectively adopt for the purposes of transacting their business, it is a facility given by the legislature in order to avoid mentioning large number of names either in the category of the plaintiffs or in the category of the defendants. Yet it is to be noted that the Code does not allow the firms to sue or be sued. It allows the individuals constituting the firm to sue and be sued in the name of the firm. The privilege is given to persons, but the Code does not treat the firm as a juristic persona. [P195 C 2, P 196 C 1]

(b) Partnership — Father trading under business name — Sons succeeding to trade—Sons are not partners because partnership is not status but creation of contract.

Where the father was carrying on business in a particular name which was an alias of his own name and not a name of any firm and the sons succeeded to the business on the father's death and carried on the business in the name used by the father:

Held : that the relationship between the sons themselves could not possibly be that of partners because partnership is not a status but is a creation of contract. [P 196 C 1, 2]

*** (c) Minor—Minor proprietor trading under trade name through manager — Hundi in favour of proprietor in trade name becoming payable during minority — Proprietor held entitled to benefit of S. 6, Lim. Act, though manager could sue.**

A minor was the proprietor of a business which was being conducted under a trade name through a manager on behalf of the minor. A hundi was drawn in favour of the proprietor but was not in his own name but under the trade name by which he was known to those with whom he had business relations. The hundi became payable during the minority of the proprietor. A suit on the hundi was brought by the proprietor within 3 years of attaining majority.

Held : that the proprietor could avail himself of the provisions of S. 6, Lim. Act, and the fact that there was a manager who could have sued during the minority of the proprietor made no difference. [P 196 C 2]

(d) Minority—Limitation—Plea not raised in plaint—Pleadings clear to show that money became due to minors during their minority—Issue of minority not depending on any issue of fact — Plea is not surprise and can be decided by Court.

Where it appears on the face of the record that the plaintiffs are minors and it is clear from the pleading itself that the money was taken from the plaintiffs during their minority and that the money became due to them during their minority, the decision of the question of limitation does not depend upon the determination of any issue of fact which ought to have been stated and which the defendants could not disprove and as such the Court can rightly decide on the plea of minority. [P 197 C 1]

(e) Contract Act (1872), S. 70 — Benefit done to another not gratuitously—Benefit enjoyed voluntarily—There should be option of refusing benefit—No law entitles anyone to start litigation for appointment of guardian of minor—Such person cannot call upon minor to recoup costs of litigation—S. 49, Guardians and Wards Act, makes provision for costs of such litigation.

Section 70, Contract Act, contemplates a case in which a certain benefit is done to another and is not intended to be done gratuitously, and the man to whom benefit is done enjoys the benefit voluntarily, that is to say he should have an option of refusing to enjoy the benefit. It does not mean that the benefit should be thrust upon him without his having the option of refusing it. Nobody has a right to force a benefit upon another. There is no law which entitles a man to start a litigation for the appointment of guardian of a minor and then later on call upon the minor to recoup him of the cost of litigation. Apart from this, S. 49, Guardians and Wards Act, gives the Court ample power to order who should bear the cost of the litigation. [P 197 C 2 P 198 C 1]

Khurshed Hussain and *Anand Prasad* —for Appellants.

G. P. Das—for Respondents.

Mohammad Noor, J. — This second appeal arises out of a simple money suit based on a hundi for Rs. 2,200, payable 60 days after the date of drawing which was drawn by a firm named Sastu Ram-Ram Kishun on itself in favour of Thagan Sao Ramchander. According to the plaint, and the fact was not disputed by the defendants, Thagan Sao-Ram Chander was the name in which Thagan Sao, the father of the plaintiffs, was carrying on his business, and Sastu Ram-Ram Kishun was the name of a firm of which one Bhagwan Das (now dead) and defendant 1 (his brother) were the partners. When Thagan Sao died the three present plaintiffs and their brother (now dead) succeeded to his business which was carried on by one Gopi Lal, their maternal grandfather, as their guardian in the same name of Thagan Sao-Ram Chander. It was during this period that the defendants borrowed the money and gave the hundi in question. Originally there were four plaintiffs, all minors. One of them died during the pendency of the suit which was continued by the remaining three. The defence, so far as it is relevant for the purposes of this appeal, were two : first, that the suit was barred by limitation, and, secondly, that the defendants were entitled to a certain set-off against the plaintiffs' claim. There was a third defence, which related to interest. The defendants' case was that the money, namely Rs. 2,200, was not a loan but was kept in deposit with them and that they were not liable for interest. This last plea was overruled by both the Courts below and has not been pressed before us. We are therefore concerned with the two pleas, namely that of limitation and set-off.

Coming to the plea of limitation, the plaint on the face of it, apart from other considerations, was barred by limitation, as the suit was instituted more than three years after the due date of the hundi. The plaintiffs in their plaint sought to save limitation by stating certain payments made by the defendants which would give them a fresh start of the period of limitation. These payments were held by the trial Court not sufficient to save the suit from limitation, but it held that it was not barred by limitation, as all the plaintiffs were minors. This view was upheld by the Court of appeal below. It has been contended before us by the learned advocate for the appellants, that as the hundi was drawn up not in favour of an individual but that of a firm, the firm cannot get the benefit of S. 6, Limitation Act. His argument, as far as I have been able to follow it, may be summarised thus : (1) that the hundi was in the name of a firm, (2) that the firm had an adult agent or manager, (3) that as the firm, though the partners were minors, could sue through its agents or manager, the benefit of S. 6, Lim. Act, is not available to the plaintiffs. In my opinion, there is no force in this contention..In the eye of the law, a firm has no existence apart from the members which constitute that firm. A firm is not a person either natural or artificial and it is a person who can sue and be sued. "Firm" was defined in S. 239, Contract Act, (the chapter in which this section occurred has since been repealed and has been replaced by the Indian Partnership Act) thus :

> "Partnership" is the relation which subsists between persons who have agreed to combine their property, labour or skill in some business, and to share the profits thereof between them. Persons who have entered into partnership with one another are called collectively a 'firm.'

The definition of 'firm' has been made more clear by the Indian Partnership Act of 1932, which says "persons who have entered into partnership with one another are called individually 'partners' and collectively 'a firm', and the name under which their business is carried on is called the 'firm name.' The name under which partners carry on a particular business is in fact the name of the partners taken as a whole. Firm is not a juristic persona to be taken cognizance

of as such by the law, such as, an idol or a corporation is. No doubt the Code of Civil Precedure, when it was re-enacted in 1908, allowed partners collectively to sue or to be sued in the name which the partners collectively adopt for the purpose of transacting their business. It is a facility given by the legislature in order to avoid mentioning large number of names either in the category of the plaintiffs or in the category of the defendants. It is to be noted that the Code does not allow the firms to sue or be sued. It allows the individuals constituting the firm to sue and be sued in the name of the firm. The privilege is given to persons, but the Code does not treat the firm as a juristic persona. I cannot do better than to quote a passage from Mulla's well-known treatise on the Indian Contract Act. Under S. 239, the learned commentator says :

> But the Common Law has no means of admitting any kind of legal existence between that of a formally constituted corporation and that of an individual human being (though the procedure of Courts of equity can go near it in what are called representative suits) ; and for English jurisprudence the firm is only a compendious name for certain persons who carry on business or have authorized one or more of their number to carry it on, in such a way that they are jointly entitled to the profits and jointly liable for the debts and losses of the undertaking.

He then proceeds :

> For the purpose of determining legal rights there is no such thing as a firm known to the law, and this is so likewise under this Act. It is true that under the Code of Civil Procedure, 1908, O. 30, as under the English Rules of Court, and, we are informed, by statute in many other jurisdictions, actions may be brought by and against partners in the name of the firm, and even between firms and their members ; but this is only a matter of procedure.

It is clear therefore that when a suit is instituted by or against a firm, it is really a suit by or against a group of individuals and the name of the firm is the collective name of the individuals. Now, in this particular case, as I have said, it was clearly stated in the plaint and was not disputed in the written statement that it was the plaintiffs' father alone, without any partner, who was carrying on his business under the name of Thagan Sao-Ram Chander. It is therefore clear that at the time when the plaintiffs' father was carrying on the business Thagan Sao-Ram Chander was not even the name of any firm but an alias of Thagan Sao only. Such a thing has been recognised in O. 30, R. 10, Civil P. C., which authorises an individual to be sued in the name in which he is carrying on his business, though it does not authorise him to sue as such. The principle is obvious. If a man is known among those with whom he has business relations by a particular name, those persons can sue him in that name, but the man himself must sue in his own name. When however the plaintiffs' father died, his four sons, all minors, succeeded him, the business was thereafter carried on through their guardian or agent in the name used by their father. Thagan Sao-Ram Chander became the name of the plaintiffs. The relationship between these four plaintiffs cannot possibly be that of partners. Partnership is not a status, but is a creation of contract, and these minors were unable on account of their minority to enter into any contract of partnership.

The correct position therefore was that after the death of Thagan Sao, Thagan Sao-Ram Chander became, as I have said, the name of his four minor sons collectively, something analogous to the position when an individual for the purpose of business adopts another name and it was by this name that they were known among those persons with whom they had business relations. When the defendants drew up the hundi in favour of Thagan Sao-Ram Chander, they in fact drew it in favour of the four sons of Thagan Sao, who were minors and whose business was being carried on by Gopi Lal, their maternal grandfather. In fact Bhagwan Das (the brother of defendant 1 and the father of defendant 7) was the brother-in-law of the plaintiffs and he was fully aware of the real situation. Now, when the hundi was in favour of the minors and became payable when they were minors, I see no reason why the plaintiffs cannot avail themselves of the provisions of S. 6, Lim. Act, simply because the hundi under which they were suing was given not in their own name but in a name by which they were known to those with whom they had business relations. The fact that there was a manager who could have sued during the minority of the plaintiffs makes no difference. It was then urged that this plea of minority to save limitation was not raised in the plaint and it came to the defendants as a surprise at the time of argument. Here again I find no force in

the contention. The very law, which prescribes that a certain class of suits must be instituted within a certain time, provides the circumstances under which certain other period will apply. It appears on the face of the record that the plaintiffs are minors. It is clear from the pleading itself that the money was taken from the plaintiffs during their minority and that the money became due to them during their minority. The decision of the question of limitation therefore did not depend upon the determination of any issue of fact which ought to have been stated and which the defendants could not disprove. I think the question of limitation was rightly decided against the defendants.

The next question is that of set-off. Four items were claimed as set-off by the defendants. Two of them, namely one of Rs. 600 and another of Rs. 164-0-3, have been allowed by both the Courts below and there is no question about them before us. Another item of Rs. 45-14-2 has been disallowed by both the Courts and there is no question about that either. The controversy before us was confined to item 4 of Rs. 666 odd, which was allowed by the trial Court and disallowed by the lower appellate Court. This item represents, according to the defendants, the cost of litigation which they incurred in the proceeding for the appointment of a guardian of the properties of the minor plaintiffs. It appears that the plaintiffs were under the guardianship of their maternal grandfather Gopi Lal. Bhagwan Das, a member of the firm which drew the hundi, applied to be appointed a guardian of the plaintiffs, and there was a dispute between him and Gopi Lal. It seems that the ultimate order of the Court was that a Pleader of the Court, Babu Gobind Prasad, be appointed guardian. The defendants want the plaintiffs to recoup them of this cost which was incurred by them in this guardianship litigation, and according to the accounts submitted by them, Rs. 666 odd is thus due. The genuineness of the account and the correctness of the amount spent have been doubted by the lower appellate Court. Be that as it may, the question for the present in second appeal is whether this amount is allowable under the law. The trial Court allowed this amount as an equitable set-off. The Court of appeal below was of opinion that in the circumstances of the case no question of equitable set-off arose. The learned Advocate for the appellants has not seriously pressed the question of equitable set-off and I myself fail to understand how this amount can be allowed as equitable set-off. The amount, which is said to have been spent in litigation, is in no way connected with the hundi transaction. The learned Advocate, however, contended that defendants were entitled to this amount under the Civil Procedure Code, it being an ascertained sum legally recoverable under S. 70, Contract Act. I have doubts whether this sum can be said to be an ascertained sum in the sense in which the word has been used in the Civil Procedure Code, as the necessity of each item of expenditure will have to be determined. I am however clearly of opinion that the amount is not legally recoverable from the plaintiffs. S. 70, Contract Act, runs thus:

> Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

The complete circumstances under which the guardianship litigation was carried on are not before us. We are not in a position to say how far that litigation was carried on in good faith nor are we in a position to say whether Bhagwan Das was not trying to become the guardian of the minors for his own benefit. Leaving this aspect of the case aside, this is not a case in which a person has supplied the necessities of life to a minor for which the minors are legally liable. S. 70, in my opinion, contemplates a case in which a certain benefit is done to another and is not intended to be done gratutiously, and the man to whom benefit is done enjoys the benefit voluntarily, that is to say, he should have an option of refusing to enjoy the benefit. It does not mean that the benefit should be thrust upon him without his having the option of refusing it. Nobody has a right to force a benefit upon another. There is no law of which I am aware, which entitles a man to start a litigation for the appointment of a guardian of a minor and then later on call upon the minor to recoup him of the cost of litigation. Apart from this, as has been

pointed out by the learned Advocate for the respondents, S. 49, Guardians and Wards Act, gives the Court ample power to order who should bear the cost of the litigation. If Bhagwan Das carried on this litigation honestly for the benefit of the estate of the minors, it was open to him to ask the Court to allow him that cost from the estate of the minors. This he did not do, and I am sure a suit for the recovery of this amount against the minors will, in no circumstances, be maintainable. I would, therefore, dismiss this appeal with costs.

Sunders, J.—I agree.

S.R./R.K. *Appeal dismissed.*

A. I. R. 1936 Patna 198

WORT, J.

District Board, Darbhanga and *another* —Defendants—Appellants.

v.

Suraj Narain Sinha—Plaintiff—Respondent.

Appeal No. 829 of 1932, Decided on 19th February 1935, from appellate decree of Sub-Judge, Darbhanga, D/- 19th March 1932.

(a) Res judicata—Appeal—If appeal fails or is not proceeded with, judgment appealed from, becomes final.

Although it is true that a judgment appealed from loses its finality for the time being, if the appeal fails or is not proceeded with, the judgment appealed from becomes final. [P 199 C 1]

(b) Bengal Ferries Act (1 of 1885), S. 17—Scope of—S. 17 refers to assessment of and not to recovery of compensation.

Section 17, Bengal Ferries Act, refers to the assessment of compensation in the first instance and has no relation to the question of recovery of compensation. [P 199 C 1]

(c) Res judicata—Question of law—Decision although wrong on point of law may be res judicata—All questions of law cannot however be dealt with, on same footing—Special considerations apply in reference to certain questions of law—In questions of jurisdiction Court and public also have interest—Decision on such question does not operate as res judicata.

A decision is nonetheless res judicata if in point of law that decision is wrong. But questions of law are of all kinds and cannot be dealt with as though all were the same. Questions of procedure, questions affecting jurisdiction, questions of limitation, may be all questions of law. In such questions the rights of parties are not the only matters for consideration. The Court and the public have an interest and when a plea of res judicata is raised with reference to these matters it is at least a question whether special considerations do not apply. In the question of jurisdiction not only the parties themselves but the Court and the public have an interest.

[P 199 C 2 ; P 200 C 1]

Where, therefore, in a suit for recovery of compensation under the Bengal Ferries Act, it appears that in a previous suit between the same parties, the Court of appeal had, without going into the merits of the case, held that the suit was not maintainable in a civil Court and that the District Magistrate was the only authority to entertain it, such decision does not operate as res judicata : 1928 *Cal* 777, *Ref.*

[P 199 C 1 ; P 200 C 1]

(d) Bengal Court of Wards Act (9 of 1879), Ss. 13 and 14—Estate held under Court of Wards is not legal entity—Manager of Court of Wards does not represent it—Only person entitled to bring suit on behalf of estate is proprietor—Suit in name of manager is not maintainable.

There is no provision in the Court of Wards Act which abrogates the rule under the Civil Procedure Code, the fundamental rule for the administration of justice, that a suit must be brought by the person having the cause of action and in his name. [P 200 C 2]

An estate held under the Court of Wards is not a legal entity. The manager of the Court of Wards cannot be said to represent it. The only person entitled to bring a suit on behalf of the estate is the proprietor. [P 200 C 2]

Where therefore on account of a dispute existing as to the proprietorship of the estate, a suit on behalf of the estate is brought in the name of the Manager, neither the estate nor the Manager, having any cause of action, the suit as framed is not maintainable. [P 200 C 2]

G. P. Sinha—for Appellants.

G. S. Prasad—for Respondent.

Judgment.—This appeal arises out of an action in which the plaintiff claimed arrears at the rate of Rs. 250 per annum for compensation under a contract by which the Government had taken over a ferry under Regulation 6 of 1819. The ferry appears to have been handed over to the District Board of Darbhanga under a contract by which the District Board was to pay this compensation. There was no dispute as to whether a contract between the proprietors of the estate and the Government could be enforced against the District Board, as apart from the common law, in India, it is clear that an action of that kind would be maintainable. I need not discuss that question further. The two main questions upon which the Courts below have founded their judgments are on the provisions of the Bengal Ferries Act (Bengal Act 1 of 1885), and the question of whether the matter in the action could be considered res judicata having regard to the following facts: there was a previous action which had gone on appeal to the District Judge against whose decision a second appeal has been preferred to the High Court which second appeal had abated on the

failure to make substitution in place of the deceased sole appellant. It was upon that case that the question of res judicata was argued in the Court below. The learned Judge in the Court below has come to the conclusion that the dispute was not res judicata on a ground which in my judgment was wholly untenable. His reason for so holding was that, as an appeal had been preferred, the decision of the previous Court had lost its finality. As I understand the judgment of the Court below, it must mean that it has no finality because it has lost its effect.

Although it is true that a judgment appealed from loses finality for the time being ; if the appeal fails or is not proceeded with, the judgment appealed from becomes final. That was the case in the matter which I have before me. But the question of whether, apart from the point relied upon by the Judge in the Court below, a judgment is res judicata is a somewhat difficult one. In order to decide that question it is necessary to state briefly what happened in that case apart from the facts which I have already related. A judgment had been pronounced by the trial Court on the merits. The Judge in appeal, who was the District Judge, had not considered the merits of the case at all, but had come to the conclusion that under S. 17, Bengal Ferries Act, which after its passing applied to this ferry as well as others taken over, the claim could be made only to the District Magistrate. His decision in that regard was obviously wrong for the reason that S. 17, upon which the District Judge relied, referred to the assessment of compensation in the first instance and had no relation to the question of recovery of compensation. But it was pointed out in 56 Cal 723 (1) that a decision is nonetheless res judicata even if in point of law that decision is wrong. But the important point in this regard is that what the Judge decided was a pure question of jurisdiction as to whether the action was maintainable in the civil Court or whether, as he held, the plaintiff's claim lay before the District Magistrate.

That brings me to the question whether a question of law can be said to be subject to the principle of res judicata. That matter amongst others was considered in the decision to which I have already referred. That was a Full Bench decision of the Calcutta High Court and amongst the points there decided was the one to which I have already made reference. Sir George Rankin, C. J., in discussing the various classes of cases which might be considered res judicata came to this conclusion ; questions of law are of all kinds and cannot be dealt with as though they were all the same. Questions of procedure, questions affecting jurisdiction, questions of limitation, may all be questions of law. In such questions the rights of parties are not the only matter for consideration. The Court and the public have an interest. When a plea of res judicata is raised with reference to such matters it is at least a question whether special considerations do not apply. It will be seen that this Full Bench judgment of the Calcutta High Court delivered by Rankin, C. J., the other four Judges agreeing, did not definitely decide this question but suggested that the matter was capable of other and special considerations. Now this matter was dealt with in a case which came from Australia. I refer to the case of (1926) A C 94 (2). That was a question between the Broken Hill Proprietary Company and the Municipal Council and related to a matter of rating. There had been a previous question between the same parties for previous years, and the substance of the question was in what manner under the statute was the rating to be calculated ? It was calculated in the one way in the action to which I have made reference ; and then when the matter came up on appeal before their Lordships of the Judicial Committee, it was contended that the decision ought to be considered as res judicata.

Their Lordships of the Judicial Committee made this statement referring to the previous case. The decision of the High Court related to a valuation and a liability to a tax in a previous year, and no doubt as regards that year the decision could not be disputed. The present case relates to a new question, namely, the valuation for a different year and the liability for that year. It is not eadem questio, and therefore the principle of res

1. Tarini Charan Bhattacharya v. Kedar Nath Halder, 1928 Cal 777=115 I C 593=48 C L J 227=56 Cal 723 (F B).

2. Broken Hill Proprietary Co. v. Broken Hill Municipal Council, (1926) A C 94=95 L J P C 33=134 L T 335.

judicata cannot apply. The point which was raised in the case to which I have just referred was so stronger in favour of the plea that the matter was res judicata, than the present one before me. In the question of jurisdiction not only the parties themselves but the Court and the public had an interest. In my judgment to hold that the decision of the District Judge between these parties in a previous case was res judicata would be wrong. There are obvious objections to that matter to which I need not refer. But amongst them I might mention the fact that as regards these parties, the Magistrate of the district had jurisdiction whereas for other persons claiming under the Act there would be an order to proceed in the civil Court. I would therefore hold that this matter was not res judicata. The other point made was that the Bengal Ferries Act not only governed the ferries taken over subsequent to the Act, but in a previous transaction of the same kind relating to ferries they were precluded from having more than the average of five years of the annual net profit; and in this case it was contended that the plaintiff had received a sum in excess of that amount.

In my view the Judge in the Court below was right in holding that that point had no substance. There was no evidence what the annual profits were; and the admission which had been referred to by the learned Munsif, an admission made by the pleader in the former suit that the minimum fixed by S. 17 had already exceeded, is a matter which in my judgment could not be taken in evidence. Disposal of these points would clear the way for the success of the plaintiff in this action but for a point which is raised by the learned Advocate appearing on behalf of the appellant, a point which was not raised in the notice of appeal nor in the Court below, and leave is asked now to raise it. The point is that the plaintiff named in the suit in any event is not entitled to succeed. The plaintiff named was Mr. G. C. Blake, Manager of the Court of Wards, and it is contended that it is incumbent for him to bring a suit on behalf of the estate. It is not suggested that he represents the proprietor; it is not suggested that he is the guardian or the next friend under S. 51, Court of Wards Act, 1879 (Act 9, B.C of 1879), because it is admitted that at this moment it is impossible to say who was the proprietor as there was dispute between the interested parties as to the proprietorship. Now S. 51 of the Act quite clearly lays down that a proprietor shall be described as a "Ward" of the Court, and the Manager shall be named the next friend. Nowhere can it be suggested is there any provision which abrogates the rule under the Civil Procedure Code, the fundamental rule for the administration of justice that a suit must be brought by the person having the cause of action and in his name.

The Government pleader relies on Ss. 13 and 14 of the Act for this purpose. S. 13 quite clearly does not deal with the matter. S. 14 merely allows the Court through the Manager to do certain acts. It would be impossible to hold that that section in any way abrogated the general rule that the person who has got the cause of action must bring the suit in his own name. The estate which Mr. Blake here represents is not a legal entity; he could not represent it. If it were a legal entity, the action would have to be brought in the name of the estate or of some person allowed by the Civil Procedure Code as being the representative of the estate. No such form of action is known to the law, and it is impossible to hold under any consideration that the Manager was entitled to bring the suit. He has got no cause of action nor has the estate. inasmuch as I have said already the estate is not a legal entity. The only person entitled to bring the suit is the proprietor. In those circumstances it seems to me that the point which is now taken must succeed and the action in its present form held to be incompetent. With these observations I would allow the appeal and dismiss the claim without costs. Leave to appeal under the Letters Patent is refused.

R.M./R.K. *Appeal allowed.*

A. I. R. 1936 Patna 200

MOHAMMAD NOOR AND AGARWALA, JJ.

Parbati Kuer—Defendant—Appellant.

v.

Baijnath Prasad Narain Singh and *another*— Plaintiffs and another—Defendant—Respondents.

Appeal No. 256 of 1930, Decided on 18th February 1935, from original decree of Sub-Judge, Muzaffarpur, D/- 12th September 1930.

(a) Hindu Law—Widow—Co-widows may convert joint estate inherited from husband into estate held in severalty—One of them may relinquish her right of survivorship in portion of estate held by other—In such case, in event of death of one widow, estate would go to heirs of deceased widow and not to surviving widow—Alienee from deceased widow is entitled to continue in possession till death of other widow — Succession will not open till surviving widow is dead.

Co-widows succeeding to the estate of their husband are entitled to divide their life tenancy and hold portions of the estate separately if they like and this arrangement will continue till their life. In other words they may convert the joint estate into estates held in severalty. One or more of them may relinquish her or their right of survivorship in that portion of the estate which is held by the other. In that case if one dies the estate in her possession will not revert to the other who has relinquished but will go to her heirs as if it was her stridhan ; and if she alienates any portion of the estate, the alienee will continue in possession of the estate till the death of the last survivor. The joint tenant, who has surrendered her right of survivorship, cannot question the succession or alienation. The inevitable result therefore is that succession will not open till the last survivor is dead.

[P 205 C 2 ; P 206 C 1]

Where therefore the reversioners of the husband claim possession of property, alleged to have been transferred by the daughter of one of the widows who come to such arrangement, they are not entitled to a decree for possession, but only to a declaration that the deed of transfer will not be binding upon the reversioners when the succession opens out on the death of the surviving widow : *Case law discussed.* [P 206 C 2]

(b) Hindu Law — Widow — Co-widows — Step-daughter dying issueless—Co-widow is entitled to succeed to her, being sapinda of her father.

According to Mitakshara, husband and wife are sapindas of each other. A co-widow is, in the event of her step-daughter dying issueless, entitled to succeed to her stridhan, as next-of-kin, i. e., sapinda of her father : 30 *Bom* 431 (*P C*), *Rel. on.* [P 206 C 2]

(c) Execution — Sale—Execution of certificate sale—Only right, title and interest of judgment-debtor is sold.

Nothing is sold in execution of a certificate sale except the right, title and interest of the judgment-debtor. [P 207 C 2]

(d) Hindu Law — Widow — Surrender — Widows can accelerate succession only if they surrender their life-estate absolutely—Surrender must be of entire estate and not in favour of particular individual.

The only way in which a widow or widows can accelerate succession is if she, or, if there are more than one, all of them, efface themselves and absolutely surrender their life estate. The surrender must be of the entire estate, and not in favour of any particular individual. There must be their civil deaths before the reversioners of their husband can come in.

[P 205 C 2]

(e) Hindu Law—Widow—Widow carrying on litigation to recover to have revenue sale of husband's property set aside—Suit dismissed on account of technical defect—Decree for costs and mesne profits against widow—Widow is not personally liable—Estate of husband in her possession is liable.

In carrying out litigation regarding the estate of her husband, a widow represents the estate and the decree obtained against her is binding upon the reversioners provided the litigation is honest and fairly conducted.

[P 209 C 2].

Where a widow brings a suit to recover a portion of her husband's estate which is lost on account of a revenue sale for arrears of revenue and she has a good ground to have the sale set aside, but loses the suit on account of a technical defect and a decree for costs and mesne profits is passed against her, the widow cannot be made personally liable for the costs and mesne profits, but the estate of her husband of which she is in possession is liable.

[P 209 C 2 ; P 210 C 1, 2].

(f) Hindu Law—Widow—Widow in possession of husband's estate—She has absolute right over income of estate—It is optional for her to keep property acquired from saving of income, separate or mix it up with estate.

The widow, who is in possession of her husband's estate has got an absolute right over the income of the estate, and if she acquires any property from the saving of that income, it is optional with her either to keep the property separate from the estate or mix it up with it.

[P 210 C 2]

Where a widow purchases property in the name of her daughter it is a clear indication that she intends to keep it as her separate property : 10 *Cal* 324 (*P C*) ; 1921 *All* 11 and 1927 *Cal* 868, *Foll.* [P 210 C 2]

S. M. Mullick and *Harnarain Prasad* —for Appellant.

Manohar Lal, *G. P. Singh* and *A. K. Mitter*—for Respondents.

Mohammad Noor, J.—The suit out of which this appeal arises relates to the properties of one Raghubans Narayan Singh who died in 1886, without any son, and was succeeded by his two widows, Deo Murat Kuer and Birita Kuer. Deo Murat Kuer had two daughters, Bhagwat Kuer and Asturan Kuer, both being issueless. Birita Kuer had no issue. Mt. Deo Murat Kuer is dead, but Birita Kuer is still alive. It is an admitted fact that the two widows came to some arrangement by which each took separate possession of a moiety of the estate of their husband with an understanding that each would have an absolute right unfettered by the other in the share which she got. In other words, instead of having a joint estate, they held it in severalty. According to the plain-

tiffs there was also an oral agreement between them that the one would not claim the right of survivorship in that portion of the estate which was held by the other. It seems that before her death Deo Murat Kuer, by a deed of gift, dated 19th April 1901, made a gift of some, if not of all the properties which she was in possession of, to her second daughter Asturan Kuer. This, as it appears, was done with the consent of the other daughter Mt. Bhagwat Kuer who was herself very rich through her husband. In this way Asturan Kuer came in possession of at least some of the properties of her father which were being separately held by her mother Deo Murat Kuer. Deo Murat died in 1916, and her co-widow does not seem to have claimed any of the properties in her possession on the ground of survivorship.

If there was any property which was not covered by the deed of gift, it was taken by her daughter Asturan Kuer. Asturan Kuer died on 16th December 1928, and a few days before her death, namely, on 12th December 1928, she executed a deed of absolute sale in respect of certain properties in favour of the appellant Dulhin Parbati Kuer. According to the plaintiffs this deed was for the benefit of her husband, defendant 1 Kumar Raghbe Surendra Sahi. This deed is the subject-matter of the present litigation. The plaintiffs, who are the two grandsons of Brij Bihari Singh, a brother of Brij Lal Singh, the father of Raghubans Narayan Singh, have instituted the present suit for recovery of possession of the properties covered by the deed of sale on the ground that they appertain to the estate of Raghubans Narayan Singh and that they (plaintiffs) succeeded to them on the death of Asturan Kuer as the next reversioners of Raghubans Narayan Singh. They have characterised the deed of sale as fabricated, illegal and void. The plaintiffs' case is that as by virtue of the mutual arrangement between the two widows of Raghubans Narayan Singh each gave up the right of survivorship in the share held by the other, on the death of one her share was to be dealt with as if the other did not exist and therefore on the death of Deo Murat Kuer her daughter, Asturan Kuer, continued in possession of her properties as an heiress of her father, the other daughter Bhagwat Kuer raising no objection. They claim that in respect of that property succession opened on the death of Asturan Kuer and that the plaintiffs as the next heirs to Raghubans Narayan Singh have succeeded to those properties. They, therefore, seek possession of them by setting aside the deed of absolute sale executed by Asturan Kuer. They pray in the alternative that if for any reason the Court be of opinion that possession could not be decreed to them on account of Birita Kuer being alive, then it be declared that the deed of absolute sale, dated 12th December 1918, executed by Asturan Kuer in favour of defendant 2, was illegal and void and was ineffectual against the reversionary heirs to the estate of Raghubans Narayan Singh and a declaratory decree to that effect be passed. The learned Subordinate Judge has decreed the suit, holding that on the death of Asturan Kuer the plaintiffs were entitled to the immediate possession of that part of the estate of Raghubans Narayan Singh which was being held by one of his widows Deo Murat Kuer. He has held the deed of sale to be genuine and executed for love and affection, that no cash consideration passed and that it was in fact a deed of gift. The claim for mesne profits prior to institution of the suit was dismissed on the ground that the plaintiffs did not claim any specific sum. Defendant 2 has preferred this appeal. There is a cross-objection on behalf of the plaintiff-respondents which is directed against the finding of the learned Subordinate Judge that the deed of absolute sale was a genuine document and against the dismissal of the claim for mesne profits for the period prior to institution of the suit.

Only two points have been urged before us in appeal. One is that the plaintiffs are not entitled to immediate possession of any portion of the estate of Raghubans Narayan Singh, as one of the widows, Birita Kuer, is sitll living, and that the succession to the estate of Raghubans Narayan Singh has not opened. The only decree which the plaintiffs can get is a declaration that the deed of absolute sale would not be binding upon the reversioners of Raghubans Narayan Singh when the succession opens. The second point is that a portion of one of the villages in suit, namely, three annas 11 gandas 2 kauris 2 karants of Khose-

pur, tauzi No. 11374/6 was not a part of the estate of Raghubans Narayan Singh and was the personal property of Asturan Kuer and the plaintiffs are not entitled to any relief in respect of it.

It is contended on behalf of the appellant that an arrangement between the two widows to hold the estate of their husband in severalty will not, on the death of one, allow the heir of the husband to get possession of the properties held by her as long as the other widow lives. The only effect, even of surrender of the right of survivorship by the other, will be that the alienations of one cannot on her death be questioned by the other and the alienee will hold the properties till the other dies or, if one dies without alienation, her share will go to her heirs as if it was her stridhan and the heirs will hold it till the other widow died. The heirs of the husband cannot claim the properties of one as long as the other widow is alive.

Mr. Mullick relies upon the case of 24 Cal 339 (1). The facts of the case were that one Radhakrishna Chuckerbutty died, leaving a widow and three daughters Subhadra, Bishakha and Ganganeshwari. Subhadra was married to defendant 1. The widow and the three daughters remained joint with Radhakrishna's brother who refused to part with the share of his deceased brother in favour of the three daughters. Later on the widow died; Bishakha, the plaintiffs' mother, sued Kali Shankar for her share in her father's lands, making the two daughters defendants. The suit was compromised. Each of the sisters got a third share in the lands that Kali Shankar gave up. Subhadra, who was in possession of one-third, died without issue. Bishakha also died, and Ganganeswhari became a childless widow. The plaintiff, who was son of Bishakha, sued for possession of Subhadra's share in the lands as heir of his maternal grandfather. Radhakrishna, defendant 1, who was husband of Subhadra, pleaded that, according to the terms of the compromise by which the three daughters got the lands, he was entitled to remain in possession of his wife's share as it was her separate estate. The first Court gave the plaintiff a decree, but on appeal the lower appellate Court reversed that decree, holding that Hindu joint tenants such as widows or daughters, were incompetent to convert, by mere acts of their own, joint estate into estates held in severalty, and that Ganganeshwari was consequently entitled to hold Subhadra's share. In second appeal the High Court (Banerjee and Rampini, JJ.) held that the lower appellate Court was wrong in holding that under the Hindu Law of the Bengal school (it is conceded that in this respect there is no difference between the Bengal school and the Mitakshara) when several daughters take a joint estate, they are incompetent to convert that joint estate into estates in severalty. But on the question of succession to the property left by Subhadra, their Lordships said as follows :

> How far they (that is the sisters) were competent to do so (that is to convert a joint estate into estates in severalty) and how far this arrangement would entitle the plaintiffs to succeed in the present suit are questions which remain to be considered. Whilst taking this view of the compromise, we must, on the other hand, say that it does not, in terms, amount to a relinquishment by each daughter of her right of survivorship, so as to make shares allotted to the other daughters pass on to the reversionary heirs on their death. The petitions of compromise nowhere say that ; but on the contrary, they distinctly provide that, upon the death of each daughter the properties taken by her, if not alienated by her in her lifetime, should go to her son, grandson, etc., that is to the heirs of her separate property which must mean stridhan, though the word stridhan is not used in the petitions. That being so, can it be said that though the compromise does not in terms entitle the plaintiffs to claim the estate left by Subhadra still the effect of the Hindu Law, which is to prevent the compromise from taking effect to its fullest extent, is to accelerate the succession of the plaintiffs who are the ultimate reversionary heirs at the present date in regard to the properties left by the deceased daughter? We are of opinion that this question must be answered in the negative.

Their Lordships held that the share of Subhadra would go to her heirs as if it was her stridhan, and not to the next reversioners of her father, that is, the plaintiff. Mr. Manohar Lal, who appears on behalf of the respondents, has contended that this case was decided on its own facts and is based on the terms of the compromise, because in the petition of compromise under which the three daughters took the property there was no mention that each relinquished her right of survivorship in the other's pro-

1. Kailash Chandra v. Kashi Chandra, (1897) 24 Cal 339.

perty. He contended that their Lordships by implication held that had there been in the petition of compromise any provision that the one relinquished her right of survivorship in the share of another, the position would have been quite different and the share would have gone to the reversioner of their father. I do not read in the judgment of their Lordships any such finding even by implication. They certainly laid stress upon the fact that the terms of the arrangement under which the three daughters took the estate did not allow the plaintiffs to come in. Relinquishment of right of survivorship also cannot accelerate the opening of succession as I shall presently show. The next case to be considered is 74 I C 58 (2). That was also a case of two daughters. There is, however, no difference between daughters and widows as both of them take a life estate. There the two daughters, governed by the Mitakshara school, divided their father's properties absolutely with a right to sale, etc., and stipulated that neither of them would have any right over the properties set apart for the other. One of the daughters alienated some of the items which had fallen to her share. After her death the sons of the other daughters sued as heirs of their grandfather for recovery of possession of the share from the alienees. It was held :

(1) That the document of partition was relinquishment of survivorship of the one in the share of the other;

(2) that, as heirs of the alienor, the plaintiffs had no locus standi to challenge her alienation ;

(3) that, as reversioners of the alienor's father, the plaintiffs could not maintain a claim for possession during the lifetime of the other co-tenant for life ;

(4) that the agreement between the co-tenants for life as to the enjoyment of the estate, to which the plaintiffs were not parties, could not have the effect of accelerating their right to possession.

Dealing with the nature of partition between the two daughters, Venkatasubba Rao, J., said :

> According to the Mitakshara School two or more daughters succeeding as heirs to their father take as joint tenants with rights of survivorship. It is well settled that they may effect a partition each daughter giving up her right of enjoyment over the properties allotted to the other daughter during the lifetime of the latter. The question then arises : can an arrangement be entered into by which each daughter may give up her interest not merely during the lifetime of the other daughter, but during the whole of the lifetime ? It is difficult to see why such an agreement cannot be entered into. *A* and *B* inheriting their father's estate partition the property. *B* agreeing that in regard to the property that falls to *A* she gives up not only her interest for the lifetime of *A* but also for her own lifetime in the event of her surviving *A*. Why should such an agreement not be valid ? If the arrangement amounted to a mere partition, the result is that *B* would give up her right in the property that fell to the share of *A* only for the lifetime of *A* and *B's* right to take by survivorship the share that fell to *A* would be unimpaired. But if, to an arrangement amounting to a partition was superadded the surrender by *B* of her right to take by survivorship, the effect would be to dispose of the entire interest of *B* in favour of *A*. For convenience I have, in the illustration. referred to *B's* disposal of her interest. It makes no difference whether we consider the case from the standpoint of *A* or *B*. The act of the nature referred to above on the part of either of the co-sharers amounts to an alienation of her interest in the property falling to the share of the other. Such an alienation is both on principle and authority perfectly valid and binding.

> As was pointed out in 16 I C 428 (3), if it is not denied that one of the joint tenants may part with her own life interest in favour of a stranger, it becomes difficult to imagine, why she may not part with it in favour of the other joint tenant. In the above case the question in regard to two co-widows was under consideration. But on this point there is no difference between the case of widows and daughters and the principle is equally applicable to the case on hand.

His Lordship then referred to the case of 22 Mad 522 (4), and observed:

> 22 Mad 522 (4) is a very useful authority in this connexion. A Hindu died leaving two widows who divided his property by a partition deed under which each took possession of her share with powers of alienation over the property comprised in it. Certain alienations were made by one widow who subsequently died. On the surviving widow claiming the whole of her husband's property, including the portion alienated, it was held that a widow could alienate for her life any estate which came to her as such and that she could, therefore, enter into such a deed as would preclude her from recovering during her life property which she had alienated to the full extent of such alienation, provided it did not extend beyond her life-interest.

---

2. Ammani Ammal v. Periaswami Udayan, 1924 Mad 75=74 I C 58=45 M L J 1.

3. Sadalal Ammal v. Gomati Ammal, (1912) 16 I C 428.

4. Ramakkal v. Ramasami Naicken, (1899) 22 Mad 522=9 M L J 101.

If the plaintiff's contention be accepted, it will follow that on the death of Deo Murat Kuer, if there had been no daughter, succession would have opened to the estate of Raghubans Narayan Singh to the extent of her share. In that case her alienation, if any, would have been void as against the reversioner. This is exactly against what was held in 22 Mad 522 (4). Mr. Manohar Lal has relied upon a single Judge decision of the Madras High Court in 123 I C 35 (5), for the proposition that one of the co-widows may give up her right of survivorship and then she will have no interest in the property of the other co-widow on her death. In my opinion this proposition is well established, but it does not follow that if, on the death of one widow, the other widow does not take her share by survivorship, it will go to the next reversioner of their husband.

In the above case the alienee of one of the widows successfully resisted the claim of the other and got possession of the property on the basis of an alienation by the former. The learned Judge held that by one widow relinquishing her right of survivorship the other had an absolute right to make a transfer of her divided share and that this could not be questioned by the former. Mr. Manohar Lal contended that when one of two widows relinquished her right of survivorship in favour of the other, partial succession would open on the death of the latter and her share would go to the next reversioner of their husband. No authority for this was placed before us and it seems that this proposition, if accepted, will lead to anomalous results. It will follow that succession to a man's estate may open in respect of different properties on different occasions. If there are several widows and a partition took place between them and each relinquished her right of survivorship in favour of others, succession will open on the death of each one of them and different reversioners may succeed to different properties at different times. The next reversioner at the time of the death of one widow may not be living when the other widow dies and other persons may be the next reversioners at that time. When we pointed this out to Mr. Manohar Lal he realized the inevitable result of his contention and argued that the next reversioner at the time of the death of one of the widows and his heirs will hold the property only till the last widow died, and then the entire property would go to the reversioner who is the next of kin at the time of the death of the last widow. This will mean that the heirs of a deceased male will take the property not as an absolute owner but for a temporary period and this will create an estate which is unknown in the Hindu Law. The reason for the succession of widows is based upon the fiction that the husband survives in the body of his wife. Brahaspati says:

> Of him whose wife is not deceased, half the body survives. How should another take the property while half the body of the owner lives.

As Mayne has pointed out, this metaphor may be faulty, as if the husband lives even the sons cannot succeed, but nevertheless the Hindu Law never contemplates that the heirs of the husband can come in and take the property as long as a single widow survives. The only way in which a widow or widows can accelerate succession is if she, or, if there are more than one, all of them efface themselves and absolutely surrender their life estate. The law in this respect has been very clearly laid down. The surrender must be of the entire estate, and not in favour of any particular individual. There must be their civil deaths before the reversioners of their husband can come in.

The result of the examination of the case-law on the subject seems to me to lay down the following proposition: If more than one female joint life tenants succeed to an estate, they may divide their life tenancy and hold portions of the estate separately if they like and this arrangement will continue till their life. In other words, they may convert the joint estate into estates held in severalty. One or more of them may relinquish her or their right of survivorship in that portion of the estate which is held by the other. In that case if one dies, the estate in her possession will not revert to the other who has relinquished but will go to her heirs as if it was her stridhan, and if she alienates any portion of the estate the alienee will continue in

---

5. Minakshi Ayi v. Subramanian Chettiar, 1930 Mad 175=123 I C 35.

possession of the estate till the death of the last survivor. The joint tenant who has surrendered her right of survivorship cannot question the succession or alienation. The inevitable result therefore is that succession will not open till the last survivor is dead. I am therefore of opinion that the plaintiffs have not succeeded to the estate of Raghubans Narayan Singh and they cannot succeed while Birita Kuer is alive, and that Mt. Asturan Kuer did not take the property as an heiress of her father but by virtue of the gift from her mother and if she succeeded to any property after her mother's death, she did so as an heiress of her deceased mother, as in case of relinquishment of her right of survivorship by Birita Kuer, the share in possession of Deo Murat Kuer became, for all practical purposes, her stridhan to be inherited by her heirs who were entitled to hold it as long as Birita was alive.

The evidence of Birita Kuer having given up her right of survivorship is however, not very satisfactory and had the decision of the case rested upon the fact of surrender, I would have had no hesitation in holding that the relinquishment has not been proved. The story depends entirely upon the evidence of two witnesses which is to the effect that each widow orally gave up her right of survivorship in the share allotted to the other. No doubt, inference of such relinquishment can be drawn from the fact that on the death of Deo Murat Kuer, Birita Kuer did not interfere with Asturan's possession of the property. Birita Kuer has been examined in this case. She says that she was contemplating a suit. This statement of hers is not satisfactory but it may be that she did not like to question the possession of Asturan Kuer out of love and affection for her and especially on account of the reason that Asturan was not looked after by her husband and had to fall back for her living on her mother and perhaps Birita Kuer did not like to deprive her of the means of her livelihood. On the whole, I am of opinion that the surrender of the right of survivorship by Birita Kuer has not been clearly established. The onus was upon the plaintiffs which they have not properly discharged. I do not, however, wish to pursue this matter further, as in my opinion, it makes no difference. I have come to the conclusion that in spite of the relinquishment of the right of survivorship, the plaintiffs have not succeeded to the properties.

The next point urged by Mr. Manohar Lal was that assuming that the property of Raghubans Narayan Singh which came into the possession of Deo Murat Kuer, became her stridhan on her death it was inherited by Asturan Kuer 'for her life and then it reverted to the next-of-kin of her father and in that view the plaintiffs had succeeded to the properties on Asturan Kuer's death. In my opinion, this is not so according to the Hindu Law, because Birita Kuer is a sapinda of her husband, and on the death of Asturan Kuer, when the property reverted to the next-of-kin (sapinda of her father), it devolved upon Asturan Kuer (Birita Kuer): see 30 Bom 431 (6). Mr. Manohar Lal contended that the decision there was based upon Vyavahara Mayukha which is of special application in Bombay But their Lordships of the Judicial Committee observed :

> If the case rested on the Mitakshara alone their Lordships are of opinion that the appellant would be entitled to succeed.

Then their Lordships quoted a passage from the Mitakshara, Ch. 2, S. 11, Placita 8, 9 and 11, of which placitum 11 is of importance, which runs thus:

> Of a woman dying without issue as before stated and who had become a wife by any of the four modes of marriage denominated Brahma, etc. . . . . the (whole) property, as before described, belongs in the first place to her husband. On failure of him it goes to his nearest kinsmen (sapindas) allied by funeral oblations. But in the other forms of marriage, called Asura etc. . . . the property of a childless woman goes to her parents, that is, to her father and mother.

Their Lordships then proceeded:

> There can be no reasonable doubt that according to the Mitakshara definition of sapinda husband and wife are sapindas to each other.

I am therefore of opinion that Birita Kuer has succeeded to the stridhan property of her step-daughter Asturan Kuer. The result of my finding is that the plaintiffs are not entitled to a decree for possession. They are however entitled to a declaration that the deed of gift executed by Asturan Kuer in favour of defendant 2, Dulhin Parbati Kuer, so far as it relates to the estate of Raghubans Narayan Singh, will not be binding upon the reversioners when the succession opens

6. Bai Kesserbai v. Hunsraj Morarji, (1906) 30 Bom 431=33 I A 176=8 Bom. L R 446.

on the death of Birita Kuer. It is however contended on behalf of the respondents that at any rate the plaintiffs are entitled to immediate possession in respect of 8 gandas odd share of Khosepur, which has been separately mentioned in the plaint. The history of this share is that 1 anna 12 gandas odd share of this village belonging to the estate of Raghubans Narayan Singh was sold for arrears of cess and purchased by the plaintiffs. Birita Kuer, one of widows, and Asturan Kuer who had succeeded to the other widow Deo Murat Kuer, instituted a suit for recovery of that share. This suit ended in a compromise and the plaintiffs reconveyed half of the share sold, namely 16 gandas odd to Birita Kuer and Asturan Kuer jointly under a sale deed, dated 14th July 1921 (Ex. 1-J). The plaintiff-respondents contend that under the terms of this deed, which conveyed only a life estate to Birita and Asturan, they are entitled to get possession of half of the vended property, namely 8 gandas odd, which was the share of Asturan Kuer in the vended property.

The learned Subordinate Judge seems to have accepted this contention as he considered the point to have been conceded on behalf of the defendant-appellants. The defendants however appealed against the whole decree and they do not concede that under the terms of the deed, as it stands, the plaintiffs are entitled to get these 8 gandas on the death of Asturan Kuer. I am not in a position to say what was the statement made by the Advocate on the basis of which the learned Subordinate Judge thought that the point was conceded. No note of it has been taken. As a matter of fact that written statement did make no concession and asked the entire suit to be dismissed. I have gone through the deed and in my opinion the contention of the plaintiffs has no foundation. The deed created a joint estate in favour of the two ladies Birita Kuer and Asturan Kuer, and it cannot be construed to mean that on the death of each one of them her share, which in fact is not defined in the deed, would revert to the vendor. The plain meaning of the deed seems to be that it was for their joint lives, and in case of the death of one, the other will continue to hold it till her death. This seems to me to be the correct interpretation on account of the fact that what was sold was the right, title and interest of the ladies in the estate of Raghubans Narayan Singh. Nothing is sold in execution of a certificate sale except the right, title and interest of the judgment-debtor. The ladies being the judgment-debtors, what was sold was their right, title and interest and the same was reconveyed to them by this deed with the effect that they regained what was lost to them on account of the certificate sale. I am therefore of opinion that the plaintiffs are not entitled to a decree for possession even in respect of this 8 gandas odd share.

The next point urged in the appeal is that the plaintiffs are entitled to no relief, not even to a declaration, in respect of 3 annas 11 gandas 2 kawris and 2 karants of village Khosepur, touzi No. 11374-6. It appears that this village belonged to Brij Lal Singh, (father of Raghubans Narayan Singh) and his brothers. Brij Lal Singh Jagannath Singh and Brij Bihari Singh (grandfather of the plaintiffs) had 4 annas 13 gandas 1 kauri and 1 karant making up a total of 14 annas. Another brother Jain Singh had the remaining 2 annas. It appears that the family had to fight a case about the boundary of Khosepur and the entire expense of the litigation was borne by Raghubans Narayan Singh and the three sons of Brij Behari Singh two of them being the fathers of plaintiffs 1 and 2, respectively, and they had to pay mesne profits also. In consideration of this, under some arrangement Jain Singh and Jagannath Singh gave up their respective shares in the village in favour of Raghubans Narayan and the sons of Brij Bihari Singh, and thus Raghubans Narayan Singh got 8 annas of the village and the other 8 annas became the property of the three sons of Brij Behari Singh. In consequence of this arrangement on the death of Raghubans Narayan Singh, the heirs of Jain Singh, who held 2 annas share of the village, executed a sale-deed of that share in favour of the two widows of Raghubans Narayan Singh and the fathers of plaintiffs 1 and 2 (Ex. 1.) The share of Jagannath Singh also remained in possession of Raghubans Narayan Singh and the sons of Brij Bihari, and after the death of the former his share came in possession of his two widows. All these facts are clearly mentioned in paras. 12 and 13 of the plaint showing that 8 annas of the village was the property of Raghubans.

Narayan Singh and therefore on his death each of the widows got 4 annas of it. These facts are not specifically denied in the written statement of the defendants.

It is however said that by the sale deed (Ex. 1), dated 15th June 1893, which the heirs of Jain Singh executed in favour of the two widows, the consideration of which was some money due to Raghubans Narayan Singh from Jain Singh, the widows got an absolute right in half of the share covered by the deed as the money belonged to them absolutely. Regarding the half share of Jagannath, which was in possession of Raghubans Narayan Singh it was urged on behalf of defendants that the widows came in possession of it by adverse possession and therefore got absolute right in it also. The fact that 8 annas of the village belonged to Raghubans Narayan Singh was not seriously disputed by the appellant before us, and I see no reason to differ from the finding of the learned Subordinate Judge in this respect. Mr. S. M. Mullick however urged that out of the four annas, which came to be possessed by Deo Murat Kuer, 3 annas 11 gandas odd was sold up and ceased to be the estate of Raghubans Narayan Singh. It was purchased by Asturan Kuer in her own rights and she was an absolute owner of it. Mr. Mullick relied upon two sale deeds, one from Sagar Mal, dated 4th March 1910 (Ex. B) which is for 3 annas 1 ganda odd, and the other from Ajodhya Prasad in favour of Ramgobind Pathak and Asturan Kuer, dated 19th April 1906 (Ex. C). Ramgobind was apparently benamidar for the other widow Birita Kuer.

I shall take up the second deed first. It seems that Ajodhya Prasad had purchased 1 anna share in execution of a certificate against Ram Prasad Narayan Singh and Kishundeo Narayan Singh for a sum of Rs. 40 and sold it for Rs. 68 to Asturan Kuer and Ramgobind. The fact seems to me to be that the property was sold in execution of a certificate against persons who had no interest in the property. Surajdeo was the son of Jain Singh who had already transferred his interest to the two widows and to the plaintiffs' fathers. Therefore Ajodhya Prasad having realised his position sold the properties to those to whom they really belonged, Birita taking it in the name of Ramgovind and Deo Murat in the name of her daughter Asturan. The sale deed is of no effect, and when this was pointed out to Mr. Sushil Madhab Mullick he did not press his case in respect of this 10 gandas share. He however pressed it in respect of the remaining 3 annas 1 ganda odd share, claimed under a sale deed executed by Sagar Mal who had purchased it in execution sale under the following circumstances :

It appears that one Bishunpur Akha, etc., in Pargana Saresa in the District of Darbhanga, which belonged to the estate of Raghubans Narayan Singh and his cosharers, was sold for arrears of revenue and was purchased by one Sagar Mal. The two widows, along with other cosharers of the village including Harihar Prasad Singh, father of plaintiff 1, and Kishori Saran Prasad Singh, plaintiff 2, instituted a suit for setting aside that sale. The suit was decreed by the first Court, but was dismissed with costs by the High Court on the ground that the illegality on which the sale was questioned was not mentioned in the grounds of appeal before the Commissioner. Sagar Mal got a decree for costs and mesne profits. In execution of that decree he got sold and purchased 6 annas 2 gandas odd share belonging to the two widows, the share of each widow being 3 annas 1 ganda odd, and then Sagar Mal sold half of the share, namely 3 annas odd under Ex. B, dated 4th March 1910 to Asturan Kuer. Sagar Mal himself seems to have purchased the property on 22nd April 1902. It is contended on behalf of the appellant that by virtue of the sale in execution of the decree against the two widows the 6 annas odd share ceased to be a part of the estate of the deceased Raghubans Narayan Singh and that Asturan Kuer who purchased it got an absolute right in it. Mr. Mullick has contended that even if it be assumed, of which there is no evidence, that the purchase by Asturan Kuer was benami for Deo Murat Kuer herself, she had an absolute right in that property which passed on her death to her daughter Asturan Kuer. This leads us to the consideration of the nature of the decree in execution of which the property was sold and purchased by Sagar Mal and the right which was acquired in it by Asturan Kuer or by Deo Murat Kuer if Asturan Kuer was a benamidar for her.

That there was a decree of Sagar Mal is admitted by the plaintiff in his plaint. From the plaint and the judgment of the High Court in the revenue sale case which are exhibits in the suit, it is clear that the two widows along with the father of one plaintiff and another plaintiff himself and other co-sharers of the village had instituted a suit for setting aside a revenue sale of the family property and getting back its possession and that the suit though decreed by the trial Court was dismissed with costs by the High Court. The plaintiffs in their plaint say that Sagar Mal had a money decree in execution of which he purchased this property. There is nothing to show that there was any decree of Sagar Mal against the two widows other than the decree in connexion with the setting aside of the revenue sale. No doubt, the defendant has not been able to produce a copy of the sale certificate or of the execution proceeding as the record has been destroyed ; but oral evidence has been given to show that Sagar Mal had a decree of about Rs. 14,000 against the two widows. The defendant's witness No. 7 Sheodeni Pathak deposes as follows :

> Raghubans Narain and the plaintiffs's ancestors had properties in paragana Saraisa. It was sold for arrears of revenue and Sagar Mall and Unkar Mull purchased it. There was a suit by Harihar Prasad and the widows which they lost in High Court; Sagar Mal and Unkar Mull got a decree for Rs. 12,000 as costs and mesne profits on restitution. There was no other suit between the widows and Sagar Mal. Sagar Mal caused Khosepur to be sold and purchased it himself. He returned the shares to the respective maliks. Asturan Kuer also purchased. Each purchased according to his respective share. Ajodhya Prasad also purchased share for arrears of embankment cess. Asturan Kuer and Ram Govind Pathak purchased the share half and half.

I leave aside the purchase of Ajodhya Prasad, which I have already dealt with. It is clear from the evidence of this witness on which there has been no cross-examination that the only decree of Sagar Mal against the two widows was for costs and mesne profits in respect of the property which was sold for the arrears of revenue and that it was in execution of that decree that Sagar Mal purchased 6 annas odd of Khosepur belonging to the two widows and then he reconveyed it to them according to their respective shares, the share of Deo Murat Kuer having been conveyed to Asturan Kuer. That the suit was a bona fide suit to get back a portion of the estate of Raghubans Narayan Singh, which was lost by virtue of the revenue sale, cannot be disputed. One of the plaintiffs of this suit and the father of another plaintiff were also the plaintiffs in that suit. The suit was fought up to the High Court. It is also clear that in execution of the decree for costs and mesne profits in respect of that property Sagar Mal caused Khosepur to be sold. Mr. Manohar Lal contended that there was nothing to show that what was sold was the estate of Raghubans Narayan Singh and not only the life interest of the two widows. In my opinion, what was sold in execution of that decree depends upon the nature of the decree itself. Two questions therefore arise. One is, was the estate of Raghubans Narayan Singh in Khosepur sold in execution of the decree; or in other words, was the decree against the two widows a decree against them personally or a decree against them as representing the estate of Raghubans Narayan Singh, and the second is, did it become again a part of the estate of Raghubans Narayan Singh when Asturan Kuer or Deo Murat Kuer purchased it ?

It is settled law that in carrying out litigation regarding the estate of her husband, a widow represents the estate and the decree obtained against her is binding upon the reversioners, provided that the litigation is honest and is fairly conducted. Mayne (Edn. 9, p. 950) referring to the position of a judgment obtained against a widow, says :

> The rule of res judicata as indicated in S. 11, Civil P. C., is not strictly applicable to such cases, but the principle itself has been held to apply so as to bind reversioners by decision in litigation fairly and honestly conducted, given for or against Hindu females who represent the estate in such litigation. The question in each case will be whether the estate was properly represented by her. She might have been labouring under a personal disability or an estoppel. But unless a decision itself was given on a ground personal to herself it will not any the least be binding on the reversioners.

In the case before us the widows along with their other co-sharers brought the suit to regain a portion of their husband's estate which was lost on account of the revenue sale. It appears from the judgment of the High Court that she had a good ground to have the sale set aside but lost the suit on account of technical defect. In my opinion the decree obtained by Sagar Mal for costs and mesne

profits was a decree which could have been realised from the estate of Raghubans Narayan Singh. In 6 Cal 479 (7), where a Hindu widow had instituted a suit to recover some property of her husband, which was dismissed with costs, it was held that as the widow did not seek to recover any interest personal to her and that she contracted the judgment-debt in the effort to recover her husband's estate to which her husband's heir would have succeeded the decree for costs was binding upon the estate of her husband and the decree-holders were on her death entitled to execute the decree against the legal representatives of her husband. In 1 I C 62 (8), where a Hindu widow sought to set aside a sale of her husband's property, and the plaint, for want of jurisdiction in the Court where the suit was instituted, was returned for presentation to proper Court, and costs were awarded against the widow, it was held that the costs could be realised from the estate of the husband, and, when the decree was executed and property sold, the sale was not only of the limited interest of the widow but of the entire estate.

In 2 I C 654 (9), where the widow had taken possession of property as a part of her husband's estate and she was ejected therefrom, it was held that the decree for mesne profits was on the widow's death binding on the reversioner. A similar view was taken in 7 C W N 678 (10). In 48 I C 553 (11) the Judicial Committee of the Privy Council held that a decree against the widow in a suit in which she sought to set aside the adoption by her of a son on the ground that she had no authority from her husband was binding on the reversioner notwithstanding the personal estoppel which bound the widow. Mr. Manohar Lal, on the other hand, relied upon the case of **16** I C 205 (12), where a widow did not give up possession of a darpatni after it was sold and a decree for mesne profits was passed against her. It was held that it was a personal decree for her tortious act, and not as representing the estate of her husband. This case, however, is not applicable to the present one. Here, the widow, when the sale was set aside by the trial Court, got back possession of the property under a decree which was set aside by the High Court. The property of which she took possession was her husband's property. It cannot be said that in regaining under a decree of the Court possession of her husband's property which was lost, she was committing any personal tortious act. Mr. Manohar Lal also relied upon the case of 18 W R 121 (13). That case also, in my opinion, has no application. There the question was whether a debt incurred by a widow for litigation to recover the property of her husband was on the widow's death binding upon the reversioners of the husband. It was held that it was not. In the case before us the widow carried on litigation apparently, without incurring any debt, from the income of the estate. She was made liable for costs and mesne profits. Under the circumstances I think she could not be personally liable for the mesne profits.

The next question for consideration is the effect of the sale of the property by Sagar Mal. If it was really purchased by Asturan Kuer herself no question arises. The property became her stridhan. Assuming, however, that the property was purchased not by Asturan Kuer but by Deo Murat Kuer herself and she took it in the name of her daughter, the question is whether it became the personal property of Deo Murat Kuer. It is settled law that the widow has got an absolute right over the income of the estate, and if she acquires any property, from the saving of that income, it is optional with her either to keep the property separate from the estate or mix it up with it. The proposition seems to have been fully discussed by their Lordships of the Judicial Committee in the case of 10 Cal 324 (14) and this proposition is not disputed. In this case if she purchased the property she did so in the name of her daughter thereby clearly indicating that she was going to

7. Ramkishore Chuckerbutty v. Kallykanto Chuckerbutty, (1881) 6 Cal 479=8 C L R 1.
8. Braja Nath Pal v. Jogeswar Bagchi, (1909) 1 I C 62.
9. Lalji Sahaya Singh v. Kurki Jha, (1909) 2 I C 654.
10. Dinomoni Chaudhrain v. Elahidad Khan, (1903) 7 C W N 678.
11. Risal Singh v. Balwant Singh, 1918 P C 87 =48 I C 553=45 I A 168=40 All 593 (P C).
12. Nafar Chandra Pal v. Kamini Kumar Lahiri, (1912) 16 I C 205.
13. Roy Mukhan Lal v. Stewart, (1872) 18 W R 121.
14. Ishri Dutt Kuer v. Hansbutti Koerain, (1884) 10 Cal 324=10 I A 150=4 Sar 459 (P C).

keep it as a separate property. It cannot be argued that the widow Deo Murat Kuer got the property fraudulently sold and purchased it herself to make it her own personal property. The decree was a bona fide one and re-sale by Sagar Mal was about eight years after the auction-sale at which he had purchased. Perhaps Sagar Mal did not think it worth his while to keep the property.

Apart from this, in this particular case, it seems that a very large part of the consideration money payable to Sagar Mal was paid by mortgaging this very property. Asturan Kuer purchased the property from Sagar Mal on 4th March 1910 and mortgaged the share on 20th March 1910, Ex. B (1). In 61 I C 3 (15), a widow in possession of her husband's estate acquired certain property through the exercise of the right of pre-emption. The price was paid by raising money by the mortgage of the pre-empted property. It was held that in the absence of evidence of a contrary intention of the widow the property did not form part of her husband's estate. In 104 I C 284 (16), a female life estate-holder (mother) had purchased a property from the surplus income of the estate in the benami name of another. There it was held that the onus of proving that it was not treated by her as her separate property was upon him who alleged it to be so. In the case before us there is no evidence of such intention; rather the circumstances are against its being made a part of the estate. I am therefore of opinion that 3 annas 1 ganda was the personal property of Asturan Kuer as it had ceased to be the estate of Raghubans Narayan Singh on account of the sale at which Sagar Mal purchased it; and even if it was purchased by Deo Murat Kuer, she did not include it in the estate and kept it separate and that it was inherited by Asturan Kuer. The result is that the appeal mainly succeeds and is partly allowed. The plaintiffs' suit in respect of the possession of the property and mesne profits will be dismissed. They will get a declaration that the deed of sale which the lower Court held to be a gift, dated 12th December 1928, executed by Babui Asturan Kuer in favour of defendant 2 will not be binding upon the reversionary heirs of Raghubans Narayan Singh, except in so far as it relates to 3 annas 1 ganda 2 kowris 2 karants of Khosepur out of 3 annas 11 gandas 2 kowris 2 karants, tauzi No. 11374-6. The plaintiffs' suit in respect of this share will be entirely dismissed. The cross-appeal which relates to mesne profits is dismissed. Coming to the question of costs, though the plaintiffs have succeeded in obtaining a decree of declaration, the defendant has successfully resisted their claim for possession. Under the circumstances the parties should bear their own costs in the lower Court. The appeal has however in the main succeeded and the appellant will get her costs in this Court, the respondents bearing their own costs.

Agarwala, J.—I agree.

R.M./R.K. *Order accordingly.*

15. Sriram Jankiji Birajman Mandir v. Jagdamba Prasad, 1921 All 11=61 I C 3=43 All 374=19 A L J 129 (F B).

16. Nirmala Sundari Devi v. Deva Narayan Das, 1927 Cal 868=104 I C 284=55 Cal 269.

A. I. R. 1936 Patna 211

WORT AND DHAVLE, JJ.

Janaki Nath Ray and *others*—Plaintiffs—Appellants.

v.

Asad Reza—Defendant—Respondent.

Appeal No. 28 of 1934, Decided on 25th January 1935, from decree of Sub-Judge, Purnea, D/- 14th February 1934.

(a) Mortgage — English mortgage—Provision in mortgage deed for management by mortgagee for ensuring interest—Provision that management should be as agent of mortgagor—Provisions held not inconsistent with English mortgage.

In a mortgage, the mortgagee by an agreement with the mortgagor, made provision for the management of the mortgaged properties and thus ensuring the payment of interest to him. The agreement also expressly provided that such management of the properties and collection of rents should be as agent for the mortgagor and not of the mortgagee:

Held: that there was nothing inconsistent with the English mortgage in the provisions: 1921 *P C* 118, *Rel. on.* [P 214 C 1]

(b) Mortgage — Construction—Clause providing repayment on particular date—Clause giving mortgagor options for part-payment and extensions of time—Latter clause held grace allowed to mortgagor, hence not affecting previous clause.

By a clause in a mortgage deed the mortgagor undertook to repay the mortgage moneys on a particular day. There was another clause which gave the mortgagor certain options as regards part-payment and extension of time for the repayment of principal sums :

Held: that the latter clause was grace allowed to the mortgagor and such grace which the mortgagee would grant to the mortgagor in circumstances in no way affected previous clause of repayment by a particular date. [P 214 C 2]

(c) Mortgage—English mortgage—Mortgagee not getting in possession — Mortgagor can recover possession from third party and recover rent and profits—Power of attorney by him to party for collecting rent and profits is consistent with mortgage.

Though an essential of an English mortgage is the transfer absolutely of the mortgage property to the mortgagee, so long as the mortgagee does not exercise his right to get into possession, the mortgagor is entitled to recover possession from a third party and to recover rents and profits of the property, and a power of attorney granted by mortgagor entitling that person in the grantor's name to collect the rents and profits cannot be said to be inconsistent with an English mortgage: *Pugh* v. *Heath*, (1882) 7 *A C* 235, *Foll.* [P 216 C 2]

(d) Mortgage — Anomalous mortgage—No delivery of possession by mortgage deed—Mortgagee not entitled to retain possession till mortgage money repaid—Agreement not inconsistent with English mortgage.

Where in a mortgage no delivery of possession was made to the mortgagee by the mortgage deed, neither was the retention of possession allowed to the mortgagee till the whole of the mortgage money was repaid and a separate agreement entered into by the mortgagor and the mortgagee, was in no way inconsistent with an English mortgage:

Held: that the mortgage was not partly English and partly usufructuary and therefore was not an anomalous mortgage. [P 216 C 2]

P. R. Das, *S. M. Mullick*, *S. N. Bose* and *S. K. Basu*—for Appellants.

Sultan Ahmad, *K. Husnain*, *Mohammad Hasan Jan*, *S. A. Khan and A. A. K. Warsi*—for Respondent.

Wort, J.—This is an appeal by the plaintiff in a mortgage action. The Subordinate Judge has dismissed the action on the ground that the mortgage was an anomalous mortgage, that there was no agreement for sale contained therein and that consequently the plaintiff was not entitled to a decree for sale of the property, nor was he entitled to a decree on the personal covenant as according to the conclusion at which the learned Judge has arrived, the plaintiff-mortgagee was in possession and that S. 68 (2), T. P. Act, as it at present stands, applied. A number of other questions were decided by the Subordinate Judge, but some of them do not arise in the appeal. On the same date on which the mortgage was executed, a power-of-attorney in favour of the mortgagee was also executed by the mortgagor under which, so far as regards one part of the property, the mortgagee, either by himself or a substitute, was entitled to collect the rents and profits and set them off against the interest, and any balance thereafter remaining against the principal. There was a provision that the mortgagee was to account only for that which he had actually received. This latter provision the learned Judge has characterised as unconscionable, and the same view has been taken of the agreement entered into by the parties after the mortgage moneys had become due, under which in consideration of the mortgagee not enforcing his mortgage the mortgagor was to pay an increased rate of interest being 9 per centum per annum. This as I say has also been characterised by the learned Judge as unconscionable and as a penalty and therefore not recoverable.

But in this appeal Sir Sultan Ahmed who appears on behalf of the respondent agrees that he cannot support the Subordinate Judge's judgment on this point nor as regards what the Subordinate Judge describes as a penalty. We have therefore to consider only the question of whether the mortgagee is entitled to a decree for sale or on the personal covenant, and whether in the circumstances of the case it can be rightly held that he is a mortgagee in possession with the liabilities of a mortgagee in that position. The first point involves the question of the construction of the mortgage bond and the power-of-attorney. It is said by the respondent that, read together, these documents constitute an anomalous mortgage being a combination of an English and a usufructuary mortgage. The mortgage-deed was dated 28th August 1907, for a sum of Rs. 3,70,000, the due date being 31st August 1912, with interest at the rate of 8 per centum per annum with half-yearly rests. The bond was in the form used in the Presidency towns based on English conveyancing precedents. The power-of-attorney was, as I have said, executed on the same date. On 23rd May 1921, after mortgage moneys had become due, and on the mortgagee, making a demand for payment thereof, the agreement to which reference has already been made was entered into under which the mortgagor agreed to pay interest and compound interest at the rate of nine per centum per annum instead of at the rate of eight per centum per annum as in the indenture provided. Apart from the statement of its existence we are not concerned with this agreement. The terms of the mortgage bond are im-

portant, the first of which is to this effect:

Whereas the said mortgagor being heavily involved in debts and with a view to save his properties from being sold in execution of his creditors hath applied to the said mortgagees to lend and advance to him the sum of rupees three lacs and seventy thousand which they, the said mortgagees, have agreed to do upon having the repayment thereof with interest thereon secured in manner following and upon the said mortgagor executing an irrevocable power-of-attorney in favour of the said mortgagees authorising them or either of them during the subsistence of this mortgage and until the whole of money hereby secured are fully paid up and liquidated to realise the several rents amounting to Rs. 2,966-1-0 annually that will henceforth, that is from the month of Kartick 1314 B. S., become due from the several putnidars of the said mortgaged properties whose names are mentioned in the schedule annexed to such power-of-attorney which is to bear even date with these presents and to apply the same pro tanto first towards liquidation of the half-yearly instalment of interest that will become due to the said mortgagees and the balance, if any, towards the principal for the time being due under these presents.

It proceeds to

grant, convey and transfer unto the said mortgagees all those several zamindaries, etc., etc., and the reversion and reversions, remainder and remainders, rents, issues and profits, etc., etc., of lands, messuages, tenements, hereditaments, etc.

And then the habendum clause:

To hold the same and all and singular and other the premises hereby granted and conveyed or otherwise assured and expressed and intended so to be unto and to the use of the said mortgagees for ever subject nevertheless to such proviso for redemption.

There is further a clause under which the mortgagor undertakes to

pay all costs, charges and expenses which the said mortgagee shall or any (of them) be put to or incur in getting in and recovering payment of the moneys and premises hereby secured including the costs of and incidental to these presents and the costs, charges and expenses of deputing men to go to Purnea or recovery of the moneys aforesaid without any deduction or abatement whatsoever.

There is also a personal covenant to repay. The deed also contains a covenant as to title. There is an agreement to allow the mortgagor to redeem within the period of one year from the date of the deed on payment of the principal sum together with interest and there is a further covenant to allow part payment in these terms,

as also to make part payment of the principal money hereby secured after the expiration of one year from date of any sum not less than rupees one thousand at a time provided all interest due at the time is first satisfied and upon such payments being made interest shall .... on the amount so paid provided further and is hereby lastly agreed and declared by and between the parties hereto that in case the said mortgagor pays to the said mortgagees sum of rupees one lac towards part payment of the principal moneys hereby secured provided all interest due at the time of such payment is first paid then the said mortgagees shall allow the said mortgagor a further period of three years over and above the period of five years hereby fixed for repayment of the moneys hereby secured, but subject to the terms and conditions hereinbefore reserved for repayment of the moneys hereby secured.

In pursuance of the agreement contained in the first part of the mortgage-deed the mortgagor executed a power-of-attorney of the same date, under which the mortgagees were authorized in the name and on behalf of the mortgagor to realise the putni and mokarrari rents, cesses and interest and other dues

due to me in respect of the several zamindaries aforesaid from the several putnidars or tenants or tenure-holders mentioned in the schedule hereto annexed.

The sums so collected were to be set off as against interest, any balance going towards the principal,

without being in any way held accountable as mortgagees in possession and being only accountable for moneys actually received by them and for nothing else.

There was a provision that the mortgagees were

entitled to ask, demand, sue for, recover and receive of any from the tenants mentioned in the schedule .... or any other person or persons who for the time being shall be liable to pay the several patni and mokarrari rents and cesses, etc.

There was the provision that actions might be started by the mortgagee:

for me and in my name and on my behalf to sign and verify plaints, written statements, applications, petitions, etc.

The clause dealing with disposal of the moneys so collected is important and is in these terms:

And I authorise my said attorneys or attorney to apply and dispose of the money which shall from time to time so come to their or his hands by virtue of any of the powers herein contained in the manner following: with and out of the said moneys in the first place to pay and satisfy all the costs, charges and expenses which shall from time to time be incurred or sustained by my said attorneys or attorney in exercise or execution of any of the powers and authorities herein contained including the reasonable salary of an agent to be appointed in Purnea and the travelling charges and other incidental expenses, such charges and expenses being at the absolute discretion of the said attorney or attorneys and to apply the balance pro tanto towards payment and liquidation of the interest

which shall from time to time become due to any said attorneys on the Indenture of mortgage aforesaid and to apply the balance (if any) towards payment pro tanto of the said principal sum, etc.

There is also a provision that each mortgagee might act separately and apart from the other, and then an important clause occurs upon which an argument has been addressed to the Court:

And for the further, better and more effectual doing, effecting, executing and performing of the several matters and things aforesaid I hereby give and grant unto my said attorneys and each of them full power and authority from time to time to appoint one or more substitute or substitutes to do, execute and perform all or any such matters and things as aforesaid and to appoint another or others in his or their place or places and all and whatever my said attorney or either of them or their or his substitute or substitutes shall do or cause to be done in or about the premises I do hereby for myself, my heirs, executors and administrators covenant with the said mortgagees (named) their executors and administrators to allow, ratify and confirm, etc.

At this point it might be said that the yearly interest on the mortgage amounted to the sum of Rs. 29,600, the income of the property, the collection of rents of which was allowed by the power-of-attorney, was Rs. 29,666-1-0. Apart therefore from any costs of collection, the balance left over after the interest was satisfied was approximately Rs. 66.

The main argument in the case related to the question of whether this was an English mortgage or an anomalous mortgage. It is said by Sir Sultan Ahmad in the first place that as under the mortgage deed the mortgage moneys were advanced and the mortgage executed in consideration of the power-of-attorney being executed by the mortgagor, and the fact that the mortgage deed and the power-of-attorney were to be read together, the form of the mortgage was entirely inconsistent with the nature of an English mortgage in that it granted powers of management over some of the mortgaged properties of such a character as in effect to put the mortgagees in possession. But there is nothing inconsistent with an English mortgage in the mortgagee making provision for the management of the property and thus ensuring the payment of the interest, nor in the fact that the agreement expressly provides that such management of the properties and collection of rents should be as agent for the mortgagor and not of the mortgagee : see 47 I A 265 (1) to which reference is made later in this judgment for another purpose.

It is not disputed in this case that the mortgagor transferred the property absolutely to the mortgagees. There is a personal covenant to repay the mortgage moneys as also a covenant to retransfer the property on the repayment of the mortgage money. It is argued however that as there is the clause giving the mortgagor certain options as regards part-payment and extension of time for repayment of the principal sums, it is not a deed wherein the mortgagor binds himself "to repay the mortgage money on a certain date" within the meaning of S. 58 (e), T. P. Act. Dealing with this argument, it seems to me quite clear that the grace which the mortgagees would grant to the mortgagor in certain circumstances in no way affects the clause which is in the mortgage deed under which the mortgagor undertook to repay mortgage moneys on 31st August 1912. It is also argued—an argument which in my judgment has no more force than the one to which I have referred—that the clause postponing the date of redemption also contravenes the definition in Cl. (e), S. 58. Whatever else may be said regarding the mortgage deed and the power-of-attorney, the mortgage deed itself most certainly complies with the definition of an English mortgage contained in Cl. (e), S. 58 in the sense that it contains the three necessary constituents therein provided.

The main argument however is directed towards the clauses which it is said place the mortgagees in the position of mortgagees in possession. This has a bearing on both the questions, being the only questions before us : that is to say, it is argued that being in possession—under the conditions provided for in the mortgage and the power-of-attorney, the mortgage was a usufructuary mortgage, and being partly an English mortgage and partly a usufructuary mortgage, the mortgage is what S. 58 (g) describes as an anomalous mortgage. The sub-section replaces the old S. 98. The respondent's alternative argument is that assuming that it is an English mortgage, the appellant-mortgagees are in a position of mort-

1. Mati Lal Das v. Eastern Mortgage and Agency Co. Ltd., 1921 P C 118=61 I C 486 = 47 I A 65 (P C).

gagees in possession and are liable to account as such, not being entitled to contract themselves out of the statutory liablility in that respect. The appellants' argument on this point depends to some extent on the question of fact. According to them one N. K. Sen was appointed a substitute under the latter clauses of the power-of-attorney. It is said by the respondent that N. K. Sen was not a substitute within the meaning of the power-of-attorney but was an agent of the mortgagees under an earlier clause of the power.

It is argued that no proof was given of any appointment under the clause entitling the mortgages to appoint a substitute or substitutes. On the part of the appellants it is contended that the action proceeded in the Court below on the assumption that the allegations contained in para. 5 of the plaint were true. There was no specific denial of para 5 in the written statement ; paras. 11, 12, 15 and 17 thereof are relied upon by the respondent in support of his contention. The averments in the written statement in my judgment are insufficient to put in issue the question of whether Nishi Kanta Sen was a substitute or not; and this is borne out by what happened subsequently. The paragraphs to which I have referred in the written statement are equivocal. It is true that the defendant asserts that the plaintiffs appointed Nishi Kanta Sen as their agent in Purnea and later it is stated that the plaintiffs were liable for the acts and omissions of their agent; but when the case came before the learned Subordinate Judge for the settlement of issues, no issue was settled on this point and it is said (as I have already stated) that the trial proceeded on the assumption that as a fact the plaintiffs purported to appoint a substitute under the later clauses of the power-of-attorney. The most that can be said for the respondent is that he treated his own pleading and so did the Judge, as a question of what inference in law could be drawn from the facts.

The other matters to which reference is made by the respondent on this point do not appear to assist him. There was a letter from the plaintiffs to the defendant, dated 29th May 1923, in which the question of payment of mortgage moneys was referred to and the last paragraph of that letter referred to their agent Babu Tarak Chandra Das "to allow inspection of account-books and other papers relating to the putni rents collected on your behalf," the letters relied upon by the defendant showing not that Nishi Kanta Sen was the agent of the plaintiffs, but that rents were being collected by an agent in the defendant's behalf. The last part of the sentence, however, is a complete repudiation of this suggestion as the appellants there state "putni rents collected on your behalf" (namely, the defendant-respondent). Nothing it seems to me can be got from the letter which assists either side with regard to this matter.

It would appear from some reference made in the case that the appointment of Mr. N. K. Sen was by a power-of-attorney by the appellants; but this has never been called for and in the circumstances relating to the pleadings to which I have referred, nothing can be assumed against the plaintiff-appellants in this regard. It would, therefore, appear, and this is not denied that the plaintiff-mortgagees did not act under the earlier part of the power-of-attorney in the sense that they collected rents themselves or by their agent in Purnea. On the execution of the mortgage-deed and the power-of-attorney they proceeded to appoint a substitute under the later clause, and this they contend was in substance placing a Receiver in possession on the conditions contained in the deed, that being that the collections should be made on behalf of the mortgagor; in other words, the person collecting was the agent of the mortgagor and not of the mortgagees. On this contention, to some extent, depended the argument that the agreement was obtained by undue influence. This argument was supported by the Subordinate Judge in the Court below; but the argument, as I have said, has been abandoned by the respondent, he agreeing that he cannot support the judgment of the Subordinate Judge in this respect. (The substitute collected rents not of the whole of the property, but of only one portion, the rents in respect of which were approximately equal to the yearly interest.)

The first substantial matter therefore, is whether in the circumstances it can be said that this amounts to a usufructuary mortgage. In my judgment the matter is beyond doubt. The position is not

consistent with that of a usufructuary mortgage as defined by Cl. (d) of S. 58, Transfer of Property Act. The clause provides that the mortgagor delivers possession of the mortgaged property and authorizes him (the mortgagee) to retain such possession until the payment of the mortgage moneys. Possession is not delivered in this case of the whole of the mortgaged property or any part for that matter; but it does appear that what the section contemplates in any event is that the whole of the mortgaged property should be delivered and retained until the mortgage-debt is paid off. Sir Sultan Ahmed with some reluctance concedes the point that if possession of the nature which was delivered to the mortgagees in this case had been given subsequent to the mortgage-deed and not under a document (the power-of-attorney) which was to be read with the mortgage-deed, then his argument could not be supported. But as it is, it is based very largely, if not entirely, upon the fact that the power-of-attorney and the mortgage-deed were one and the same in this respect and that, therefore, it is tantamount to a delivery of possession under the mortgage-deed itself. A further argument by the respondent was that under the power-of-attorney the rights controlling the management of the properties were in the mortgagees. One of the arguments upon which Sir Sultan Ahmed laid the greatest stress was that the grant of the power-of-attorney was entirely inconsistent with the circumstances of an English mortgage. The argument appears to be that an essential of an English mortgage is the transfer absolutely of the property so that nothing is left in the mortgagor which gives him any right to deal with the property in any way, and that therefore if this were in fact an English mortgage and to be construed as such, there would be nothing left in the mortgagor over which powers of management could be granted ; in other words, by the deed itself all the interest in and powers of management over the mortgaged property were already in the mortgagees. This argument in my judgment is fallacious. It could not be suggested that the interest which the mortgagee under an English mortgage in India has is greater than is conferred by a mortgage of a similar character in England. In (1881) 6 Q B 345 (2), Lord Selborne has pointed out that so long as a mortgagee does not exercise his right to get into possession, the mortgagor has a right to collect the rents and profits of the mortgaged property. "His possession was rightful and not by wrong." In the absence of the exercise of the mortgagee's right he is entitled "to sue for possession and for recovery of rents and profits in his own name:"

> In equity the conveyance of the legal estate to a mortgagee was regarded as nothing more than a security for a debt. During the subsistence of the equity of redemption the debt, together with this benefit of the security, passed to the executor by a will of the personal estate (of the mortgagee), and the legal title to the land did not pass by a general devise of all the mortgagee's real estate . . . . . because it was not regarded in equity as any part of that estate . . . . 'the interest in the land must be somewhere and cannot be in abeyance, but it is not in the mortgagee, and therefore must remain in the mortgagor.'

These observations although made in a case in which the question of limitation was the point to be decided, are in point and are a complete answer to the argument. The decision to which I have referred was upheld by the House of Lords reported in (1882) 7 A C 235 (3). If therefore so long as the mortgagee did not get into possession, the mortgagor is entitled to recover possession from a third party and to recover rents and profits, the power-of-attorney granted by him entitling that person in the grantor's name to collect the rent and profits cannot be said to be inconsistent with what is known in India as an English mortgage. For the reasons which I have stated, namely, that the deed did not deliver possession to the mortgagee and that the mortgagee was not entitled to retain possession till the payment of the whole of the mortgage moneys and that the agreement between the parties was not inconsistent with an English mortgage, it seems to me that the decision of the learned Subordinate Judge that this was an anomalous mortgage being partly English and partly usufructuary cannot be supported.

In that view of the matter the only remaining question is whether, as the learned Subordinate Judge has decided, the mortgagees were liable to account

2. Heath v. Pugh, (1881) 6 Q B 345.
3. Pugh v. Heath, (1882) 7 A C 235=51 L J Q B 367=30 W R 553=46 L T 321.

not only for what they have actually received but what the defendant-respondent or what N. K. Sen, the substitute, has received and not accounted for. This raises two questions. The first is whether the mortgagees were in possession, and secondly, whether in any case N. K. Sen could be considered the agent of the mortgagees. The second point I have already decided in coming to the conclusion that N. K. Sen was the substitute and therefore in the position of the mortgagees themselves had they exercised their rights to collect the rents and profits by an agent in Purnea. His position was that of agent for the mortgagor. With regard to this matter the case of 47 I A 265 (1), was referred to. In that case the company were the mortgagees of certain properties to secure a payment of the sum of Rs. 2,50,000 and in another case to secure the sum of Rs. 1,20,000. Two different properties were mortgaged under two different deeds. It is true that in those deeds there was a provision that the mortgages were to be construed as English mortgages. The important clause in connexion with the point raised in this case and contained in those mortgages were :

Until the mortgagees shall enter into and take possession of the mortgaged premises such mortgaged premises shall be managed entirely and without any interference whatever by the mortgagor by two persons (named).

Incidentally these persons were connected with the mortgagee company. The managers were given the fullest possible power for the proper management and improvement of the mortgaged premises,

including power to appoint and dismiss all servants and to make settlements with raiyats and farmers, to give leases and to institute and conduct and defend suits and other legal proceedings.

This clause, if anything, was somewhat wider than that contained in the deed under our consideration. There was a provision that out of the rents and profits collected the manager would pay Government revenue

and all Government and municipal cesses, rates, rents for sikmi and putni tenures, to superior landlord and all other charges payable in respect of the mortgaged premises.

Then interest was to be liquidated; and then, in the third place, the proper costs and charges for management were to be paid. There was a clause also that the mortgagees without prejudice to their rights might in certain events appoint a receiver. One argument in that case (as in this case) was that the terms of the mortgage was unconscionable and unenforceable in equity. Their Lordships point out that there was nothing to suggest or support this contention from the facts proved. The mortgagor understood the agreement and therefore there was nothing to support the view that this part of the mortgage deed was unenforceable. The matter does not arise in the present case for the reasons which I have already stated. But it was contended also in the Privy Council that the two persons named as managers and who, as I have said and repeat, were connected with the mortgagee company, were agents of the company and by these agents the mortgagees were in possession and were liable to account as mortgagees in possession. Their Lordships held that:

The company never was in possession, nor was it liable for any default or any waste or management or any negligence. The company was careful not to act in any way as a mortgagee in possession. The company had a perfect right before lending its money to insist upon the mortgagor appointing managers in whom the company had confidence.

As already stated, there were two mortgages in this case. The argument referred to related to the mortgage on 21st September 1890, the other being dated 7th November 1890. It is impossible to draw any distinction between the case before the Judicial Committee and the case which is before us. Whatever might have been said if the mortgagees themselves had exercised their rights under the power of attorney apart from the appointment of substitutes, the appointment of N. K. Sen as a substitute clearly had not the effect in law of making the mortgagees mortgagees in possession. There is nothing in law to prevent, in the circumstances of the kind with which we are dealing, the mortgagees insisting upon the management of the property or that part of the property in the sense in which it has been agreed upon between the parties in this case; and there is equally no reason why in those circumstances there should not be an agreement as there was in the case cited: the person there managing the property and collecting the rents and profits should manage it on behalf of the mortgagor and as his agent. Reference was made to the deci-

sion in 2 M I A 487 (4), during the course of the argument. In this case a mortgage of a certain property by some of the partners for the benefit of the firm was executed and under the mortgage the mortgagee placed a clerk (partner) in possession to collect the rents and profits. It was held that so long as the rents and profits were paid over to the mortgagee, the partner was the agent of the mortgagee and, as such, was in possession by the mortgagee so long as the payments continued.

In that case however we have none of the circumstances of the present and it seems to me that it has no application to the point we are deciding. In my judgment therefore the mortgagees here cannot be held to be mortgagees in possession and to account as such and there is therefore no question as to their contracting out of the statutory liability to account as mortgagees in possession. That decision would also dispose of the finding of the Subordinate Judge that the plaintiffs were not entitled to a decree on personal covenant. Incidentally one of the reasons which the learned Judge has given for his decision on this point is that no such claim was made in the plaint. In the circumstances of the case the question of whether the plaintiffs made a claim or not is immaterial, it being an English and not an anomalous mortgage. The plaintiffs are entitled to a decree for sale of the property under S. 69, T. P. Act. An account will be prepared on the footing that the sums actually received by the mortgagees will be set off against the interest in the first place and as against the principal in the second. As the decision of the Court below regarding the penal character of the provisions of the agreement of 23rd May 1921 is reversed the mortgagees are entitled to interest at the rate provided by the mortgage until 23rd May 1921 and thereafter at the enhanced rate provided by the agreement of that date. The appellants prayed for the appointment of a Receiver. A Receiver was appointed by an interim order of the Court. That order is now discharged and the Receiver will be discharged on the acceptance by the Subordinate Judge of the Receiver's accounts. In the circumstances of the case I think that it is just and proper that a Receiver should be appointed, but the appointment will be made by the Subordinate Judge. In taking the account such sums as have been advanced by the mortgagees under the various interim orders of this Court will be added to the mortgage debt with interest. The appeal is allowed with costs throughout.

Dhavle, J.—I agree that the appeal should be allowed, and that the plaintiffs should have a decree for sale with costs of both Courts, the accounting being done on the basis of actual receipts. On the face of it the bond in suit contains all the three ingredients of an English mortgage as defined in S. 58 (e), T. P. Act: (1) The mortgagor expressly covenants to pay the mortgage debt on 31st August 1912; (2) He transfers the mortgaged property absolutely to the mortgagees by employing the words "grant, convey and transfer" followed by the common-form conveyancer's wealth of detail what is compendiously described in the covenant for title as "an absolute and indefeasible estate of inheritance in possession;" and (3) there is the proviso for redemption that upon payment of the mortgage money as agreed, the mortgagees will "re-convey and reassure" the mortgaged property to the mortgagor.

The respondent however succeeded in inducing the lower Court to regard the mortgage as anomalous, and as a consequence to refuse the prayer of the mortgagees for a sale as upon an English mortgage, on the footing that there was no absolute transfer of the mortgaged property because under the mortgage bond and the power-of-attorney the mortgagees were to make collections from a portion of the mortgaged properties as agents of the defendant mortgagor with a right to grant rent receipts, and to bring suits for recovery of rent against the patnidars, in the name of the defendant as owner, and apply the moneys to the satisfaction of the interest, etc., due to them.

Sir Sultan Ahmed for the respondent has endeavoured to support the view of the lower Court not only on this but also on several minor grounds. He has urged that the bond does not really stipulate "a certain date" for payment within the definition in S. 58 (e) because it contains provisions which make it optional for the mortgagor to redeem the mortgage on full

4. Jugjeevun Das Keeka Shah v. Ramdas Brijbookun Das, (1837-41) 2 M I A 487=6 W R P C 10=1 Suther 109 (P C).

payment within one year, or after the expiry of one year to make part payments of the principal money in any sums not less than Rs. 1,000 at a time, and further require the mortgagees, in case the mortgagor pays one lakh of rupees out of the principal, to allow in three years over and above the period of five years fixed by the bond for repayment of the moneys secured. The option to pay earlier than the date fixed or to make part payment is however merely an option given to the mortgagor, and does not bind him to pay on any date other than 31st August 1912. The extension of time, in case one lakh is paid out of the principal money, is again only a concession to the mortgagor and depends on his carrying out a condition which he is not bound to fulfil; it cannot therefore be regarded as fixing an alternative date on which he binds himself to pay the mortgage money.

These provisions do not, thus, really detract from the stipulation that the mortgagor is to repay the mortgage debt on 31st August 1912 and do not make the mortgage anomalous within the meaning of S. 98, T. P. Act, as it stood at the time of the transaction. It has also been suggested that the character of the mortgage is affected by the fact that what the mortgagor binds himself to pay on 31st August 1912 is the principal money only. But the mortgagor also covenants to pay the interest duly (i. e. as it falls due half-yearly), and the definition requires a "certain date" for repayment of the mortgage money (an expression meaning the principal and interest) only in order that it should be known with certainty when the mortgagor may redeem or the mortgagee proceed to foreclosure or sale, an object which is not defeated by providing for earlier payments of interest. Sir Sultan Ahmed has also urged that as the mortgage bond requires the mortgagor to pay, in addition to the mortgage debt and interest thereon, further advances and sums paid by the mortgagees for the protection or preservation of the mortgaged premises, and Government revenue rents, taxes, etc., and costs, charges and expenses, this has the effect of making the mortgage anomalous. These additions however are practically all of them additions which the mortgagees would be entitled to make even without an agreement to that effect; the definition in S. 58 (a) includes money to be advanced as well as money advanced, and the mortgagees, if in possession, could make the additions specified in Cls. (b) and (c), S. 72, and if not in possession could do much the same under the general law, as has been held in several cases, while costs, charges and expenses are allowable under O. 34, Civil P. C. Even if it were otherwise, these additions would, as my learned brother pointed out during the argument merely constitute clogs on the equity of redemption, they would clearly not affect the character of the mortgage as an English mortgage within the definition.

The substantial question in the appeal is thus reduced to the effect of the power-of-attorney as to which a two-fold argument has been presented to us on behalf of respondent 1, that it is inconsistent with an English mortgage and renders the mortgage in suit anomalous, and (2) that notwithstanding the recital in the power-of-attorney that the attorney, were not in any way to be held accountable as mortgagees in possession but were to be accountable only for moneys actually received by them and for nothing else, the appellants are liable to account as mortgagees in possession. The mortgage bond itself places the execution of the power-of-attorney by the side of the furnishing of the mortgage security as conditions upon which the mortgagees had agreed to advance the money. The power of-attorney purports to have been executed:

> with a view to ensure punctual payment of interest on the said sum of Rupees three lakhs seventy thousand which comes up to Rupees fourteen thousand and eight hundred every six months.

It appoints the mortgagees jointly and severally to be the mortgagor's

> true and lawful attorney or attorneys irrevocable .... so long as the money secured by the said indenture (i. e., the mortgage bond) or any part thereof remains due and unpaid, to ....recover ....patni ....rents .... And upon non-payment of the same (i. e., by the patnidars) ...to commence, carry on, and prosecute any ...suit ....for the recovery of the said rent..... for me (i. e., the mortgagor) and in my name and on my behalf.....

It then authorises the said attorneys

> with and out of the said moneys in the first place to pay and satisfy all the costs, charges and expenses which shall from time to time be incurred... by my attorneys or attorney in exercise....of any of the powers....herein contained, including the reasonable salary of an agent to be appointed in Purnea...such charges and expenses being at the absolute discre-

tion of the said attorney or attorneys, and to apply the balance pro tanto towards payment and liquidation of the interest which shall from time to time become due to my said attorneys on the indenture of mortgage aforesaid, and to apply the balance (if any) towards payment pro tanto of the said principal sum of Rupees three lakhs and seventy thousand.

And it concludes by giving the attorneys jointly and severally

'full power and authority from time to time to appoint one or more substitute or substitutes' 'for the better and more effectual' doing effecting, executing and performing of the several matters and things aforesaid,' 'to do, execute and perform all or any such matters and things' .....

Sir Sultan Ahmed has urged that the power-of-attorney was an integral part of transaction. This may be conceded. He has next urged that the power had the effect of putting the mortgagees in possession of the patni properties, and that as the rents and profits of the patnis were to be applied to the payment of interest and principal, the mortgage is in reality an usufructuary mortgage. Assuming for the moment that the power must be regarded as putting the mortgagees in possession of the patni properties does the mortgage become usufructuary in addition to being an English mortgage? The essence of an usufructuary mortgage under the definition in S. 58 (d) is the delivery of possession of the mortgaged property by the mortgagor to the mortgagee, with authority to the latter to retain such possession until payment of the mortgage money; the mortgagee cannot either foreclose or sell, but is limited to holding possession of the property, and applying the usufruct in the manner agreed upon, until he is paid off. The usufructuary mortgagee has thus no remedy beyond the property delivered to him, and this implies that a mortgage like the present in which the mortgagor certainly did not deliver possession of the entire mortgaged property to the mortgagees while the mortgagees clearly hold a security for their money upon properties not all of which are covered by the power-of-attorney, is not an usufructuary mortgage. The contention was therefore rightly given up. But a mortgage may be anomalous without being made up of two or more of the four types defined in S. 58, and Sir Sultan Ahmed has also argued that the mortgage in suit cannot be regarded as an English mortgage because the power-of-attorney which is an integral part of the mortgage, treats the rents and profits of the patni properties which the mortgagees were empowered to recover as rents and profits due to the mortgagor. This, it was said, shows that there was only an ostensible transfer of the mortgaged property to the mortgagees, whereas an English mortgage unquestionably requires an absolute transfer. The argument further was that not being an English mortgage within the definition in S. 58 (e) of the Act the mortgage must be treated as anomalous and that there being no express stipulation for a sale, the appellants were rightly refused that relief.

It must however be remembered that notwithstanding the absolute transfer (which is subject to redemption) the transaction is only a mortgage and that S. 76 of the Act which lays down the liabilities of a mortgagee in possession and makes him liable to account on the footing of wilful default, applies as to all mortgagees generally including an English mortgagee, while the exception under S. 77 has no application to the present case. It is in order to avoid this liability to account on the footing of wilful default that mortgagees entitled to go into possession hesitate to do so. An English mortgagee is no doubt entitled to take possession of the mortgaged property, unless there is (as there is not in the present case) a covenant for quiet enjoyment by the mortgagor. But he is not as such required to go into possession and until he does so, the mortgagor continues in rightful possession on his own account. This is not disputed, nor is it disputed that a mortgagor so in possession could authorize some one else by a power-of-attorney to collect rents on his behalf during such possession. But it is urged he cannot do so to an English mortgagee, and the reason advanced for this contention is that as the entire legal estate passes under an English mortgage, there is nothing on which a power-of-attorney given by the mortgagor to the mortgagee to realize rents on his behalf could operate and that if the mortgagee chooses to take possession, he must do so on his own account as it is not open to him by any agreement with the mortgagor to get rid of the liability to account as mortgagee in possession. In my opinion, this contention ought not to be accepted. The English mortgagee, though he un-

doubtedly has the right to go into possession, is undisputedly at liberty to leave the mortgagor in possession so as not to incur the liabilities of a mortgagee in possession.

In spite of the absolute transfer of the mortgaged property required under the definition of an English mortgage, the mortgagor has an interest left in the property and this interest is not limited to the right to redeem but extends to the receipt of the rents and profits of the mortgaged property (until the mortgagee chooses to go into possession and thus renders himself liable to account to the mortgagor not only for such rents and profits as he actually receives but also for those which but for his own mismanagement or neglect he might have received). The mortgagor thus has rights in respect of the rents and profits of the mortgaged property even as against the English mortgagee, and it does not appear why the regulation of such rights by an agreement between the parties should be regarded as inconsistent with the definition of an English mortgage. Even if actual possession (as distinguished from the right to take possession) went with the absolute transfer to the English mortgagee and this is contra-indicated by the fact that a covenant for quiet enjoyment by the mortgagor, or for entry by the mortgagee in stated contingencies, is not uncommon in English mortgages—the rents and profits of the property would not be the mortgagee's rents and profits absolutely, as they would have to be accounted for on the footing of wilful default. As between the parties they would thus, notwithstanding the absolute transfer of the definition, stand on the footing of rents and profits due not to the mortgagee but to the mortgagor though placed at the disposal of the mortgagee on the mortgagor's account. Even if, as is urged for the respondent the power-of-attorney cannot save the mortgagees from liability to account as mortgagee in possession, it does not by any means follow that this will affect the operation of the three ingredients of the definition which are found in the mortgage in suit and which prima facie make it an English mortgage.

The liability to account on a footing of wilful default attaches to all mortgagees in possession as such, and is no part of the definition of an English mortgage any more than is the mortgagee's actual possession itself. Putting aside for a moment the fact that possession under the power-of-attorney, such as it may be, does not purport to be possession by the mortgagees as such, and assuming that the contrary is found, Sir Sultan Ahmed has not been able to point to anything in the Transfer of Property Act precluding a sale at the instance of an English mortgagee merely because he may be in possession of a part or even the whole of the mortgaged property whether with or without freedom from liability to account as mortgagee in possession. Nor is it possible to read the mortgage bond and the power-of-attorney as providing that the mortgagees were to look only to the possible excess of the patni rents realized over the interest for the repayment of the principal money advanced by them. The mortgage bond expressly provides that it shall not be compulsory for the mortgagees to realize rents from the patnidars. Even if, moreover, the rents were fully realized—a contingency of rather rare occurrence in zamindari management—there would only be a minute excess of less than one-fifth per cent. of the principal money, and the provision that this excess or balance if any was to be applied to the payment pro tanto of the principal was on the face of it merely formal.

If this provision about the possible application of the balance to the principal be regarded in any other light, the hypothecation of the property would lose all meaning. But the hypothecation of the property is so much of the essence of the transaction that it is the first of the two conditions upon which the creditor agrees to advance the loan. In 47 I A 265 (1) a mortgage was given effect to as an English mortgage within the definition (as agreed between the parties) though the bond provided inter alia that the mortgaged properties should be managed exclusively without any interference by the mortgagors, by two named persons who were to have power to appoint and dismiss servants and make settlements and leases and who could be dismissed only for misconduct proved to the satisfaction of the mortgagees. Provisions of this kind can thus not be regarded as repugnant to the notion of an English mortgage as defined in S. 58 of the Act, though it is true that in the case

just referred to, unlike the present case the mortgage bond expressly stated that it should be read and construed as an English mortgage. Such stipulations were so common in mortgages in England that from before the enactment of the Transfer of Property Act in this country, it was implied by statute in every mortgage in default of provision to the contrary that the mortgagee was to have power to appoint a Receiver who was to be an agent of the mortgagor and to revoke such appointment. This Receiver had considerable powers of management, and his duties were to receive the income of the mortgaged property, keep down the interest due to the mortgagee and hold the surplus, if any, for the mortgagor. The appointment thus gave the mortgagee the advantages of possession without the drawback of accountability on the footing of wilful default. The power-of-attorney in the present case places the appellants in much the same position as these receivers except as regards the extent of the liability to account and the power to appoint substitutes—elements which do not affect the essential character of the mortgage as an English mortgage. For all these reasons it seems to me that there is nothing in the power-of-attorney to detract from the effect of the three provisions which make the mortgage an English mortgage, and to disentitle the appellants to sale as upon such a mortgage.

It has also been argued for the appellants that even if the mortgage be regarded as anomalous, they would still be entitled to a decree for sale in view of the covenant to pay coupled with the hypothecation of the property. The learned Subordinate Judge who regarded the mortgage as anomalous, proceeded to hold that the mortgagees were not entitled to a sale because there is no express provision in the bond giving them such a right. This view was rested on the authority of two decisions, 28 C W N 532 (5) and 1919 P C 121 (6). It seems to me that these cases do not support the view of the lower Court. In the former of these cases the mortgage bond was read as entitling the mortgagee to sue for sale if the mortgagor failed to pay the mortgage debt within 8 years, and to sue for the money if during the term the mortgagor created any disturbance of the possession which he was to deliver to the mortgagee. The mortgagor did not deliver possession and the mortgagee sued for sale before the expiry of the term and it was held that though the express provision in the bond entitled him to sue for the money, a relief very much like that under S. 68, this did not imply as a consequence that he was entitled to a sale under S. 67. The decision turned on the construction of the bond as giving a right to sell only after the expiry of the term. But, as Rankin, J. observed:

> It may be that the true construction of a document of mortgage taken by itself would amount to very much the same thing as is effected by S. 67;

and it seems to me impossible to construe the bond before us (having regard to the hypothecation of the property) in any other way than as authorizing a sale of the mortgaged property on the mortgagor's failure to pay as agreed. In the second of the two cases referred to by the lower Court it appeared that the parties did not contemplate sale in any event. Neither of the cases is thus any authority for the proposition that no sale can be allowed on an anomalous mortgage unless it is expressly provided for. The rights and liabilities of the parties to such a mortgage are undoubtedly determined by their contract as evidenced in the mortgage bond (provided no question of local usage arises), but the provisions of the bond may easily import a sale, and it seems to me that they do have that effect in the present case. The appellants are, therefore, entitled to a decree for sale.

I now come to the respondent's contention which was also accepted by the lower Court, that notwithstanding the express provision to the contrary in the power-of-attorney, the appellants are liable to account as mortgagees in possession. The learned Subordinate Judge has held that the liability of the mortgagees to account for the rents and profits cannot, inspite of the terms of the contract between the parties, be limited to the sums actually received by them because (inter alia) the relevant clauses in the mortgage bond and the power-of-attorney are unconscionable and vitiated

5. Gajadhar Agarwala v. Shibananda, 1924 Cal 592=81 I C 768=39 C L J 269=28 C W N 532.

6. Madho Rao v. Gulam Mohiuddin, 1919 P C 121=56 I C 717=15 N L R 134 (P C).

by undue influence. Mr. Das for the appellants has had no difficulty in showing on the evidence that notwithstanding the defendant's pressing need the plaintiffs were not in a position to dominate his will that the parties dealt with each other at arms' length and that there was nothing per se unconscionable in the mortgagees limiting their liability to account to "moneys actually received by them and . . . . nothing else" nor in the other provisions to which the learned Subordinate Judge has referred. Sir Sultan Ahmed for the respondent has not endeavoured to support the view of the lower Court regarding the unconscionable character of the arrangements between the parties or regarding the exercise of undue influence by the appellants. He has, however, contended that the power-of-attorney was a mere device to get rid of the appellant's liability to account under S. 76 of the Act as mortgagees in possession and that it cannot be allowed to do so because the liability so to account cannot be got rid of by agreement. As the properties covered by the power-of-attorney were in the occupation of patnidars, Sir Sultan Ahmed urges that the attorneys were really empowered to do all that the mortgagor himself could have done and no less, and that, therefore, if the appellants dealt with these properties, they are under S. 76 of the Act liable to account as mortgagees in possession, a liability which it has been held in several decisions cannot (unlike the liability under Cl. (c) or (d) of the section) be excluded by a contract to the contrary. He has also referred to (1911) 1 K B 806 (7) in which a Receiver appointed by debenture-holders for satisfying the debentures out of the mortgagor's assets was held to be their agent and not the agent of the mortgagor. I may say at once that this case is of no assistance to the respondent; the power-of-attorney before us does not enable the attorneys to realise the security, and the possible application of a very small portion of the rents and profits towards the liquidation of the principal, on which stress was laid by Sir Sultan Ahmed, does not affect the position of the attorneys as mere attorneys. The power-of-attorney enables the mortgagees either to recover rents from the patnidars and for that purpose to employ an agent of their own in Purnea, if necessary, or to appoint a substitute to recover these rents, and apply them substantially for keeping down the interest. The lower Court has found that the plaintiffs

> continued as agents of the defendant although they had the work of collection carried on by Rai Bahadur Nisikant Sen and others,

and that they are, therefore, not absolved from liability to render accounts by S. 194, Contract Act, but are under that liability not only under S. 76, T. P. Act, but also under S. 213, Contract Act. The appellants have, on the contrary, contended that it should have been held that the patni properties covered by the power-of-attorney, which it is common ground were in fact managed by Rai Bahadur Nisikant Sen of Purnea (and his brother-in-law Babu Tarak Nath Das Gupta of the same place), were managed by him as a substitute for the mortgagor. In para. 5 of the plaint they stated that they had appointed the Rai Bahadur a substitute in terms of the power-of-attorney and that he had worked as such till his death. The respondent in his written statement spoke of the Rai Bahadur as the agent of the mortgagees themselves, but did not specifically deny the allegation that he had been appointed a substitute under the power-of-attorney. No issue was framed on the point, and apparently the matter was left to be decided on arguments especially from the documents. The learned Subordinate Judge has referred to the mortgagor's repeated demands for accounts and to two letters from or on behalf of the appellants, in one of which (Ex. A, dated 29th May 1923) the respondent was informed that they had directed their agent Babu Tarak Chandra Das "to allow you inspection of account books and other papers relating to the patni rents collected on your behalf," and in the other (not printed), dated 1st September 1924, Rai Bahadur Nisikant Sen was instructed to give full inspection of the accounts to the respondent, after reciting the fact that he had been appointed with the consent of both parties to collect the patni rents, a power-of-attorney being accordingly given to him by the mortgagees, and regretting that inspection of the complete accounts should not have been given to the respondent.

---

7. Deyes v. Wood, (1911) 1 K B 806=80 L J K B 553=104 L T 404.

It does not seem to me that these letters show at all conclusively that the Purnea men were in fact the appellant's agent rather than substitutes appointed by them in pursuance of the power-of-attorney though the word "substitute" is not used. The power-of-attorney said to have been given to the Rai Bahadur by the mortgagees was not called for by the respondent. If the Rai Bahadur were in fact merely an agent of the mortgagees, the question would arise whether the lower Court was not right in the view that it took regarding the liability of the appellants to account on the footing of wilful default notwithstanding the facts that such possession as they took (through the agent) was to be taken in their capacity not of mortgagees but of attorneys, and did not extend to the whole of the mortgaged property, and that the mortgage bond expressly provides that it shall not be compulsory for the mortgagees to realise the several patni rents from the patnidars mentioned in the power-of-attorney, but that if any such patni rent is not realised

> it shall be lawful for the . . . . mortgagees . . . . to give to the . . . . mortgagor a registered notice of such default or neglect (of the patnidars) whereupon their liability to account for such rent shall cease.

Prima facie the appellants did not intend to go into possession directly or otherwise. In dealing with the plaintiff's contention that they were absolved under S. 194, Contract Act, from accounting for the rents and profits as mortgagees in possession, the learned Subordinate Judge observes that the section would only apply if the agent empowered to nominate a substitute "goes out of the field. leaving the business of the agency in the hands of the person nominated." As he overruled the contention, it would appear that in his view the mortgagees kept the management in their own hands notwithstanding the appointment of the Rai Bahadur and the other agents. In my opinion, no support is found for this view in the letters to which the learned Subordinate Judge has referred and which I have already summarised. The power-of-attorney entitled them to receive rents from the agent or substitute. He then goes on to say that :

> There is nothing in the bond in suit and power-of-attorney from which it can be inferred that the defendant authorised the plaintiffs to nominate another person to act for the defendant in the matter of collection of rents, etc., from the mortgaged property, nor can the grant of such a power be inferred because in that case the very purpose of placing the mortgaged property in charge of the plaintiffs, namely the punctual payment of interest from the collections, could be easily frustrated by defendant's directing the said Rai Bahadur Nisikant Sen and Babu Taraknath Das Gupta as his agents to make over the collections to him and not to the plaintiffs.

It seems to me that this observation is erroneous in both parts. I have already quoted from the power-of-attorney the provision regarding the power to appoint a substitute, which is entirely distinct from the earlier provision under which it was open to the attorneys to appoint an agent in Purnea under themselves and charge a reasonable salary for him in the accounts. Nor can it be rightly said that the appointment of a substitute by the attorneys would fail of its purpose if he were to be a substitute for and on behalf of the mortgagor, for the power-of-attorney in favour of the mortgagees was to be revocable during the subsistence of the mortgage and the mortgagees as attorneys had

> full power and authority from time to time to appoint one or more substitute or substitutes to do, execute and perform all or any such matters and things as aforesaid and to appoint another or others in his or their place or places, and all whatever . . . . substitute or substitutes shall do or cause to be done in or about the premises the mortgagor covenanted to allow, ratify and confirm.

The appellants clearly had power to appoint Rai Bahadur Nisikant Sen as a substitute, and as long as the power-of attorney stood, it would not have been open to the mortgagor to frustrate the object of punctual payment of the interest by directing the substitute, as his own agent, to make over the collections not to the mortgagees but to him. All the grounds given by the lower Court for holding as it has done in this point fail. It seems to me therefore that the case must be dealt with on the footing that Rai Bahadur Nisikant Sen managed the patni portion of the mortgaged properties in the capacity not of the Purnea agent of the appellants (whether as mortgagees or as mortgagor's attorneys) but of a substitute appointed by them under the respondent's power-of-attorney. The appellants cannot therefore be said to have been in possession of this part of the mortgaged properties at all, and are not liable to account for the rents and profits under S. 76, T. P. Act. The respondent will have his remedy against the substi-

tute under S. 194, Contract Act, but with that we are not concerned in the present case. That the appellants must give credit to the mortgagor for sums actually received by them from the substitute is, of course, plain and is not contested by the appellants; but the view of the lower Court that in a properly framed suit they

> would have been entitled to a money decree for the principal sum with simple interest at 8 per cent per annum . . . . less the net amount that would have been left to them after calculating the rent, cess and interest they should have collected, and deducting therefrom the legitimate expenses admissible to them

must be overruled. The appellants cannot be called upon to account for the rents and profits of the patni properties on the footing of wilful default. The learned Subordinate Judge finds that the agreement obtained by the appellants in 1921 from the mortgagor to pay interest at the enhanced rate of 9 per cent per annum (the original rate having been 8 per cent only) cannot be enforced because the enhancement is, in his view, "penal and illegal." Mr. Das for the appellants has had no difficulty in showing that the fresh contract to pay interest at an enhanced rate in future was supported by good consideration in the shape of the forbearance to sue on the original mortgage contract and that it is neither penal nor illegal. Sir Sultan Ahmed has not attempted to support the view of the lower Court on this point. It also appears that the lower Court erred in holding that the plaintiffs would be entitled to simple interest, the mortgage bond, no less than the agreement of 1921, entitled them to compound interest. The appellants are plainly entitled to compound interest at 8 per cent per annum with six-monthly rests under the mortgage bond and to compound interest at 9 per cent per annum, again with half-yearly rests, from 23rd May 1921, the date of the agreement in question.

The prayers in the plaint included a prayer for the appointment of a Receiver to take charge of the mortgaged properties, to collect the rents and profits thereof and to deposit the same in Court. The mortgage bond makes it lawful for the mortgagees, in case they sue for the recovery of the money, to appoint a Receiver with all the powers conferred on a Receiver under S. 503, Civil P. C. We understand that an interim Receiver was appointed during the pendency of this appeal. Mr. Das has urged and is right that the conditions of that appointment cannot, with justice to the appellants, be continued after the disposal of the appeal. The appointment itself will come to an end on the disposal of this appeal. It seems to me that in these circumstances, the appellants ought to be granted their prayer for the appointment of a Receiver. Such sums as have been advanced by the mortgagees under the interim orders of this Court will be added to his credit in the account now to be prepared.

S.R. *Order accordingly.*

A. I. R. 1936 Patna 225

VARMA AND SAUNDERS, JJ.

Madhusudnan Das—Appellant.

v.

Mathurananda Das—Respondent.

Appeal No. 1 of 1934, Decided on 3rd October 1934, from appellate order of Dist. Judge, Cuttack, D/- 18th November 1933.

Co-operative Societies Act (1912), S. 43—Rules under, R. 12 — Disputed liability of member to repay money to society is dispute touching business of society.

The disputed liability of a member to repay money due to the society is a dispute touching the business of the society and, being a dispute between one member and the remaining members, it is covered by Cl. 1 of R. 12, which provides for such disputes between the members inter se. Hence the Registrar has jurisdiction to make the award against member who has borrowed money. [P 226 C 1]

S. C. Bose—for Appellant.

B. N. Das—for Respondent.

Saunders, J. — The appellant is a member of the Shyamsunderpur Co-operative Society. This society borrowed money from the Co-operative Central Bank of Kendrapara and lent that money to the appellant. An award was obtained by the Central Bank against the society, whereupon the society made a reference to the Registrar of Co-operative Societies, who gave an award against the appellant for the sum of money which he had borrowed. When the award was put into execution in the civil Court the appellant objected that it had been made by the Registrar without jurisdiction. This objection was overruled both by the execution Court and by the District Judge on an appeal from the order of the former Court. The question whether the Registrar had jurisdiction to

make the award or not depends upon the interpretation of R. 12 of the rules made under the Co-operative Societies Act. The relevant portion of the rule is as follows :

(1) In the case of a dispute touching the business of the society between members or past members of the society or persons claiming through a member or past member or between a member or past member or person so claiming and the Committee or any officer, a reference in writing shall be made by any party to the Registrar . . . . . (4) After hearing the parties to the dispute and examining such witness and documentary evidence as may be produced, the Registrar . . . . . shall give a decision or award in writing. (5) Such decision or award shall, on application to the civil Court having local jurisdiction, be enforceable as a decree of such Court.

There seems to me to be no reason to doubt that the disputed liability of a member to repay money due to the society is a dispute touching the business of the society and, being a dispute between one member and the remaining members, it is covered by Cl. 1 of the rule which provides for such disputes between the members inter se. In my opinion the order of the Registrar was not without jurisdiction and I would accordingly dismiss the appeal with costs.

Varma, J.—I agree.

K.S./R.K. *Appeal dismissed.*

A. I. R. 1936 Patna 226

DHAVLE AND AGARWALA, JJ.

Gopalji Jha and *others*—Defendants—Appellants.

v.

Gajendra Narayan Singh and *others*—Plaintiffs and others—Defendants—Respondents.

Appeal No. 33 of 1935, Decided on 8th January 1936, from original order of Sub-Judge, Darbhanga, D/- 11th December 1934.

(a) Bengal Estates Partition Act (5 of 1897), S. 5 (4)—Tenancy — Partition—Different proprietors severally possessing shares—There is undivided share of estate—Several shares should be allotted first—Then there should be division of joint estate.

Where the proprietors are in several possession of specific mauzas corresponding to their shares and also have undivided shares in the rest of the estate, the portion of the parent estate in the several possession of each proprietor should first be allotted to him, and then his share on division of the joint portion, without any allowance for any increase or decrease in the assets of the several portion since it is assigned to him for separate enjoyment: 14 *I C* 225, *Foll.* [P 227 C 2; P 228 C 1]

(b) Bengal Estates Partition Act (5 of 1897), S. 77—Revenue Court having jurisdiction for partition proceedings—Mere error in exercising jurisdiction does not render proceedings void, nor does it entitle civil Court to correct it.

If by reason of its local situation and pecuniary authority, or by reason of the subject-matter, or the position of the parties, the Revenue Court has power under the statute to entertain the partition proceeding, then not every error in the exercise of that jurisdiction will invalidate the proceeding and render it null and void or entitle the civil Court to correct it: 1924 *Pat* 187, *Foll.*; 1919 *Cal* 215, *Dissent.* [P 228 C 1]

(c) Bengal Estates Partition Act (5 of 1897), S. 77—Partition—Civil Courts are reluctant to interfere with jurisdiction of Revenue Court—When interference is invoked facts of each case should be scrutinized — Civil Courts not empowered to issue injunction to Batwara Courts—Power of civil Courts is limited in matters coming under S. 77.

Civil Courts should be very slow to interfere with the jurisdiction which is exercised by a Revenue Court upon powers conferred by the Estates Partition Act. When such interference is invoked, the facts must be scrutinised with particular care. Civil Court has no power to issue injunctions to the Batwara Court. It falls to the Revenue Officers, during a Batwara, to consider and decide for themselves whether or not S. 77 applies to a case and in such matters the jurisdiction of the civil Court is limited. [P 230 C 1]

R. K. Jha and *R. Choudhury*—for Appellants.

S. M. Mullick, *B. P. Sinha* and *N. K. Prasad II*—for Respondents.

Dhavle, J.—This is an appeal against an interim injunction restraining defendants 1st party from proceeding with the Collectorate batwara of mahal Parhat Keotgawan, tauzi No. 10066 in the District of Darbhanga. Plaintiff's share in the estate is 8 annas, defendants 1st party owning 4 annas and defendants 2nd party the remaining 4 annas. In October 1922, the plaintiffs applied to the Collector of Darbhanga for a partition of the estate. The application was opposed by defendants 1st party on the ground of a previous partition, but the objection was disallowed and a proceeding under S. 29, Bengal Estates Partition Act, 1897, recorded in July 1923.

There were prolonged disputes at the raibandi stage, and when the matter came up before Mr. Heycock, Member of the Board of Revenue, in November 1929, there was a compromise, which however led to further disputes at the next stage, so much so that in the pattibandi appeal M. Dain, then Member of the Board of Revenue, passed an order

that the parties were to remain in possession of 5 out of the 7 mauzas that constituted the estate exactly as they had been doing under certain private arrangements since 1889 and that the other 2 mauzas, which only represent a little over 1 per cent of the estate, were to be divided among the parties according to their shares. This was in December 1933, and after unsuccessfully endeavouring to obtain a review of the order of the Board the plaintiffs sued in September 1934, for various declarations and for a permanent injunction restraining the defendants from taking any step in the batwara case for allotment of pattis in accordance with the order of the Board of Revenue. They also applied for an interim injunction of the ground that a pattibandi on the basis of the order in question would cause them great and irreparable loss and wrongful damage. The learned Subordinate Judge allowed the injunction. Defendants 1st party have accordingly preferred this appeal and also an application in revision in case it is found that no appeal lies. As it has not however been contended before us on behalf of the plaintiffs that no appeal lies it is unnecessary to refer further to the revisional application.

There was and is no dispute between the shares of the parties. The disputed raibandi, as Mr. Dain calls it in para. 4 of his order, comes to a little over Rupees 30,000 if Itahar, the largest mauza of the estate, around which these disputes have centred, be valued at Rs. 9,700, as was originally done by the partition Deputy Collector. This valuation of Itahar was reduced by the Collector on appeal; on a further appeal there was a remand by the Commissioner, and another partition Deputy Collector reduced the valuation to Rs. 5,056, which was raised by another Collector to Rs. 8,053 but again reduced by another Commissioner to Rs. 7,814 before the matter went up to Mr. Heycock in 1929 and was compromised. In the view that Mr. Dain took, it became unnecessary for the final revenue authority to fix the valuation of the mauza, but I have referred to the matter because the plaint endeavours to make out a case of losts to the plaintiffs on the ground that the order of the Board would give them assets amounting to Rs. 14,407 out of a total valuation of over Rs. 30,000. Reduce the valuation of Itahar to the figure (Rs. 7,814), adopted by the highest revenue authority that has yet looked into the matter, and the valuation of the entire estate amounts to less than double the assets that would come to the plaintiffs (and Itahar is not among them) under the order of the Board for their 8 annas share in the estate.

It has been contended on behalf of the appellants that no suit lies for setting aside the pattibandi order of the Board of Revenue. Prima facie that would appear to be so, but it has been urged on behalf of the plaintiffs that the order of the Board affects the extent of their interest in the estate and that, therefore the civil Court has jurisdiction to entertain the matter. The question arises in this way. There were private arrangements made in 1889 by all the proprietors among themselves, and in accordance with them the plaintiffs' predecessors came into exclusive possession of three whole mauzas besides 100 bighas in a fourth mauza, the balance of which was similarly given to the predecessors of defendants 2nd party while mauza Itahar, which was purchased by defendants 1st party in 1911, was given exclusively to their predecessors in title. The Board has found that defendants 1st party have "improved their property, both by drainage and irrigation, and also by the discreditable method of driving raiyats off the land."

The arrangements of 1889 were not embodied in any registered documents; they were to remain in force for 15 years but had not been put an end to when the plaintiffs applied for the batwara after the expiry of another 18 years or so. It is private partitions of this incomplete kind that lead to divergences between assets actually held and the shares recorded in the Collector's Land Registration Department, and various methods of dealing with these divergences have commended themselves to various members of the Board of Revenue, as was shown in detail by Mr. Hubback in the Chamanpur case of 1932. (see Mr. Janak Kishor's Selected Decisions of the Board of Revenue Vol. 4, p. 224). Mr. Dain while recognising that the meaning of the law is not completely beyond doubt, adopted Mr. Hubback's view that in a case like the present, where the proprietors were, as he held, in several possession of specific mauzas corresponding to their shares and also had undivided shares in the rest

of the estate, the portion of the parent estate in the several possession of each proprietor should first be allotted to him, and then his share on division of the joint portion, without any allowance for any increase or decrease in the assets of the several portion since it was assigned to him for separate enjoyment. The appellants have brought it to our notice that this view of S. 5 (4), Estates Partition Act, was taken in 14 I C 225 (1). Mr. Mullick, who appears for the plaintiffs, has contended that the present is a case not within sub-s. 4, but within sub-s. 1 of S. 5 of the Act, and that the Board had no jurisdiction to treat the private arrangement among the proprietors as a permanent arrangement making over possession of the proprietay interest, which latter alone will justify the application of S. 77 of the Act, compendiously summarised in the margin as "Lands of which each proprietor is in possession to be allotted to him."

In support of the contention that the Board's order, so far as it is based on S. 77 of the Act, may be challenged by a suit for a declaration that it is ultra vires, Mr. Mullick has cited 49 I C 965 (2), a case in which it was held, notwithstanding S. 119 of the Act, that an order made by a Deputy Collector under S. 83 of the Act, was without jurisdiction. But the view taken in this Court in 2 Pat 403 (3), and several subsequent decisions is that if the Revenue Court has assumed jurisdiction correctly, that is to say that if by reason of its local situation and pecuniary authority, or by reason of the subject-matter, or the position of the parties, the Revenue Court had power under the statute to entertain the partition proceeding, then not every error in the exercise of that jurisdiction will invalidate the proceeding and render it null and void, or entitle the civil Court to correct it. In 2 Pat 403 (3), Mullick, J., (with whom Ross, J., agreed) therefore held that the mere fact that a Deputy Collector had, in effecting a partition, wrongly proceeded under Cl. 5 instead of under Cl. 3 of S. 5, Estates Partition Act, would not entitle the Civil Court to entertain a suit for a declaration that the proceedings of the Deputy Collector were without jurisdiction, and that such a suit would be clearly barred by S. 119 of the Act. It was urged in that case, as has been urged in this case also, that a question of title or interest in the parent estate was involved and that therefore the suit did lie; the contention was rejected. The learned Subordinate Judge has taken the view that the plaintiffs' title, which admittedly extends to eight annas of the estate, would be affected if their share was confined to specific mauzas ; 16 annas in three villages (besides some other very small properties) would, according to him, not be the same thing as eight annas in all the seven villages. But he has failed to notice that if this were the correct view of the matter, every pattibandi order made by the batwara authorities could support a suit in the civil Court, notwithstanding the definite bar imposed by S. 119 of the Act. We are, of course, not called upon at the present moment to decide whether the suit is or is not incompetent, but we have still to consider the probability or otherwise of the plaintiffs being entitled to any relief in the suit. Most of the declarations prayed for in the plaint seem to be untenable, such as that the partition proceedings are not equitable or valid, that defendants are not entitled to Itahar and one-quarter of the two undivided mauzas, that the Board's order is wrong and that the batwara proceedings should be so carried on that the assets will be proportional to the shares to say nothing of the concluding claim that if it be impossible to make this last declaration, a decree be passed to the effect that an additional share be allotted to the plaintiffs in Itahar after the partition proceedings. It may, however be possible, as suggested by Mr. Mullick, to recast the suit ; and in view of the divergences of opinion as regards the practical working of sub-s. 4 of S. 5, it is impossible on present materials to say that there may not be a serious question to be tried at the hearing of the suit.

That however is not sufficient to justify the issue of an interim injunction. S. 25 of the Act, provides that no suit instituted in a civil Court after the lapse of four months after the Collector has drawn up a proceeding under S. 29, by any per-

---

1. Kalanand Singh v. Kamalanand Singh, (1913) 14 I C 225.
2. Jitendra Gopal Roy v. Matangini, 1919 Cal 215 =49 I C 965.
3. Radhakanto v. Mathura Mohan, 1924 Pat 187 =87 I C 274=2 Pat 403.

son claiming any right or title in or to a parent estate, shall avail to affect or stay the progress of any proceedings which may have been taken under the Act for the partition of the estate. The lower Court holds that this section has no application to the case because the question raised by the plaintiffs relates to the extent of their interest and title. This reasoning is far from clear; the learned Subordinate Judge apparently took it that the defendants' contention was that the section barred the suit altogether. That contention, if it was really advanced, was rightly overruled, but the lower Court apparently overlooked the argument provided by the section against the issue of an interim injunction restraining the defendants from proceeding with the batwara. The essence of the present suit is relief on the footing that the plaintiffs have an eight annas share in the estate (which is undisputed) and that the pattibandi directed by the Board of Revenue will give them less than this share.

Mr. Mullick has argued that the suits contemplated in S. 25 are suits brought by those persons only whose claim of some right or title in or to a parent estate has not been accepted by the Collector under S. 23 of the Act. This, even if accepted as correct, does not help to show that the Civil Court acts properly in lightly interfering with the progress of the proceedings before the Revenue authorities by restraining the parties. Assuming, moreover, that S. 25 has no application to the present suit, it is difficult, if a suit of the kind contemplated in the section will not, when instituted more than four months after the proceeding under S. 29, avail to stay the progress of the batwara proceedings, to see why a suit brought by a party who considers himself aggrieved by a pattibandi order referable to S. 77 of the Act should be enabled to hold up the batwara proceedings. The ground on which the plaintiffs ask for an interim stay, namely that they would otherwise suffer great and irreparable loss and wrongful damage, is plainly not made out by referring (as the learned Subordinate Judge has done) to the fresh allotment that may have to be made, and the question of pattibandi that may have to be re-opened in the event of plaintiffs' success; for, that would happen in every such suit, and the loss apprehended, far from being irreparable, could be easily compensated by saddling the other side with the extra cost.

The learned Subordinate Judge was apparently impressed by the circumstance that the appellants would be no worse off for the injunction, but it is impossible in the exercise of judicial discretion to grant an interim injunction merely on that ground, and the lower Court has erred in failing to notice that the valuation of Itahar for revenue purposes is really a matter for the revenue authorities, and that on the figure adopted by Mr. Middleton (when the matter came up before the Commissioner for the second time) which has not yet been set aside by any higher revenue authority, the plaintiffs cannot make out even a prima facie case of loss, while even on the higher figure originally taken by the Deputy Collector the revenue authorities do not apparently consider that the revenue would be endangered. Whether S. 77, which has apparently been applied by the Board, does or does not apply to the case will require much more consideration than it has received from the lower Court. The Board of Revenue itself expressly recognised that "the meaning of the law is not completely beyond doubt" and the learned Subordinate Judge ought, before holding on a bare reading of S. 77 that it had no application, to have considered inter alia the effect of the private arrangements that have continued for years after the expiry of the alleged leases, along with the plaintiffs' failure before the Partition Officer to make any attempt to prove the realization from the other parties of the amount of Rs. 300 a year that might negative the claim of the other parties that notwithstanding the wording of the leases (which were unregistered) the parties simply took the proprietary interest in specific mauzas.

The learned Subordinate Judge was aware that the Civil Court has no power to issue injunctions to the Batwara Court, and yet he has not hesitated in effect to stay the proceedings in that Court by restraining the appellants from taking any further steps there. On the facts of the present case so far as they are before us, this seems an entirely unwarranted, though indirect, interference with the working of the Revenue

Court. It was pointed out in 8 P L T 477 (4) that:

The Civil Court should be very slow to interfere with the jurisdiction which is exercised by a Revenue Court upon powers conferred by the Estates Partition Act.

When such interference is invoked, the facts must be scrutinized with particular care. If this had been done, the learned Subordinate Judge could scarcely have failed to notice that the alleged defect of assets may have no real existence and that what the plaintiffs are assailing may be no more than a mode of division—the ground on which he distinguished the ruling in 2 Pat 403 (3). This is all the more surprising because he must have known that it fell to the Revenue officers, during the batwara, to consider and decide for themselves whether or not S. 77 applied to the case, and that in such matters the jurisdiction of the Civil Court is limited. The Board of Revenue felt constrained to observe that the waste of money and time spent by the parties (with the usual tactics, over the partition case was a grave public scandal, and this by itself should have sufficed to impress on the lower Court the necessity of great care and caution in scrutinizing the facts before allowing an injunction. The case was quite unlike 85 I C 551 (5), in which this Court acted against the defendants in personam because unless an injunction were granted, it was doubtful whether the plaintiffs, if successful, would have any remedy at all. I would set aside the order of the lower Court with costs. Hearing fee, five gold mohurs.

Agarwala, J.—I agree.

B.D./R.K. *Order accordingly.*

4. Rajkeshwar Singh v. Shyam Bihari Singh, 1927 Pat 286=103 I C 313=8 P L T 477.
5. Amar Kumar v. Coventry, 1925 Pat 710=85 I C 551=6 P L T 524.

A. I. R. 1936 Patna 230

FAZL ALI, J.

Chitan Singh—Appellant.

v.

Gosaindas Manjhi and *others*—Respondents.

Appeal No. 393 of 1935, Decided on 19th December 1935, from appellate decree of Sub-Judge, Purulia, D/- 22nd November 1932.

Practice—Relief — Suit by landlord for ejectment—Defendants recorded as raiyats—Plaintiff challenging entry, suing for declaration of his rights to property and for ejecting defendants—Decree by Court should be confined to relief asked for—It should not grant declaration that defendants are tenants, in respect of land in dispute.

Certain land was recorded as belonging to the plaintiff and the defendants were recorded as raiyats, holding the land on payment of annual rent to the plaintiff. The plaintiff challenged the correctness of the entries and instituted a suit, praying that on the declaration of his maurusi right to the disputed property, the defendants be ejected from the land and entry in Record of Rights be declared to be wrong and it be corrected:

Held: that the decree of the Court should be confined to relief asked for by the plaintiff in the plaint and should not grant a declaration that the defendants were tenants in respect of the disputed land. [P 231 C 1]

Upendra Nath Banerji—for Appellant.

S. C. Mazumdar—for Respondents.

Judgment.—The subject-matter of this litigation is plot No. 1676 which stands recorded under khewat No. 14 belonging to the plaintiff and of which defendants 1 to 5 are recorded to be raiyats. The settlement entry further shows that defendants 1 to 5 held this land on payment to the plaintiff of an annual rent of Rs. 1-4-0. The plaintiff however challenges the correctness of the entry. His case is that defendants 1 to 5 are not tenants of the land, that the land was formerly in his khas possession but he has been wrongfully dispossessed by the defendants. The reliefs which he claimed in the suit were these: (1) on a declaration of the maurasi right of the plaintiff to the disputed property, the defendants may be ejected from the land; and (2) that it be declared that the entry in the Record of Rights is wrong and the same may be corrected. Defendants 2 to 5 did not appear to contest the suit but defendant 1 did contest it. His case was that the disputed land did not appertain to the plaintiff's mukarrari, but appertained to his own tenure which he held under the superior landlord and that he had been paying rent for this land as well as for the other lands appertaining to his tenure to the superior landlord. The trial Court found that the survey entry (the correctness of which was impugned by both the parties) was wrong and held that the disputed land was not included in the plaintiff's tenure, but it appertained to the tenure of defendant 1 only. He further held that the plaintiff having no cause of action for the suit was

not entitled to any relief and he accordingly dismissed the plaintiff's suit. The plaintiff then appealed from this decision and the appeal was allowed in part. The appellate Court held that the entry in the Record of Rights was correct and that the land appertained to the plaintiff's tenure and the defendants were not liable to be ejected. The learned Subordinate Judge who heard the appeal concluded his judgment with these words :

> The result is that the suit is decreed in part with costs. The plaintiffs' claim for khas possessions is disallowed. The plaintiffs' tenure right in respect of the disputed land is declared and that defendants 1 to 5 are further declared to be tenants under the plaintiffs in respect of the disputed land on payment of rent of Rupees 1-4-0 per year as recorded in the Settlement Record of Rights.

In this second appeal which has been preferred by defendant 1, his main contention is that no declaration should have been made by the lower appellate Court in favour of defendants 2 to 5 who had not contested the suit of the plaintiff and who had not appealed against the decision of the trial Court. It is pointed out in this connexion that in the plaint the plaintiffs have nowhere asked for a declaration that defendants 1 to 5 are tenants in respect of the disputed land. It is contended on behalf of defendant 1 that there should be no adjudication of the rights inter se of defendants 1 to 5, and it is pointed out that the decree of the Subordinate Judge as it stands may be taken to amount to such an adjudication. It appears to me that the decree should be confined to the reliefs which were asked for by the plaintiffs in the plaint and that the decree should simply state: (1) that the disputed land appertains to the tenure of the plaintiff ; (2) that the defendants are not liable to be ejected, and (3) that no case has been made out by the plaintiffs to rebut the presumption of correctness of the Record of Rights; in other words, the plaintiff's suit must be dismissed except as to the prayer for the declaration that the disputed lands appertain to his tenure. The decree of the lower appellate Court will therefore be modified accordingly, and subject to the modification the appeal will be dismissed. The parties will bear their own costs in this Court.

R.M./R.K. *Appeal dismissed.*

---

* A. I. R. 1936 Patna 231

MOHAMMAD NOOR AND DHAVLE, JJ.

Mathura Singh and *others*—Defendants—Appellants.

v.

Rama Rudra Prashad Sinha and *others*—Plaintiffs—Respondents.

Appeal No. 106 of 1931, Decided on 26th April 1935, from decision of Sub-Judge, Shahabad, D/- 24th February 1931.

(a) Co-sharer—Mortgage by one to another—Mortgage redeemed—Mortgagee co-sharer claiming raiyati rights in lands as against mortgagor co-sharer—Mortgagor co-sharer held could bring suit for joint possession and mesne profits.

One of the cosharer landlords who was the mortgagee of the share of another cosharer did not deliver possession to the mortgagor cosharer of his share which was duly redeemed but asserted therein raiyati rights for himself and adversely to the cosharer mortgagor. The mortgagor cosharer who had redeemed his mortgage filed a suit for joint possession of his share and for mesne profits:

Held: that under the circumstances a suit for joint possession and mesne profits was perfectly maintainable: 18 *Cal* 10 (*P C*) and 1924 *P C* 144, *Disting.* [P 234 C 2; P 235 C 1]

*** (b) Court of Wards — Ward compared with minor—Principles of justice and equity applicable to minor are equally applicable to ward of Court—Ex parte decree against ward—Gross neglect by manager—Ward is entitled to same relief had he been a minor.**

A decree passed against minor can be avoided on the ground of gross negligence of the next friend or guardian ad litem. The principle of the English law, which has been applied in India on the ground of justice, equity and good conscience to afford protection to infants can be extended to disqualified proprietors whose estates are managed by the Court of Wards. There is no difference between the two cases. A ward of the Court is as much helpless as a minor; rather the former is in a worse position. In the case of a minor if one guardian is neglecting his duty, any other person interested in the minor can come forward and have the guardian removed. But in the case of a disqualified proprietor under the Court of Wards, nobody else except the manager appointed by the Court can institute a suit on his behalf or defend one against him. The gross neglect by the manager, which resulted in the ex parte decree against the ward, therefore entitles the ward to get the same relief against that decree as the ward would have got if he had been a minor: 6 *C L J* 448; 1922 *Mad* 273; 1926 *All* 36 and 1932 *All* 293, *Ref.* [P 236 C 2; P 237 C 1, 2]

(c) Minor—Decree against—Gross negligence amounts to fraud and affects representation of minor—Decree cannot be obtained against minor unless properly represented — If obtained, can be collaterally challenged.

Gross negligence amounts to fraud and affects the proper representation of the minor and thus takes away the jurisdiction of the Court to pass a decree, as a Court cannot pass a decree against a minor unless he is represented by a guardian. An ex parte decree obtained against a ward or minor being obtained by fraud and without proper representation can be collaterally challenged: 22 *Cal* 8, *Reviewed*; 25 *Bom* 337 (*P C*), *Expl.*; 12 *Cal* 69, *Disapproved*. [P 238 C 1; P 240 C 1]

(d) Minor—Decree against — Suit to set aside on ground of gross negligence of guardian—Art. 120 and not Art 95, Limitation Act, applies—Time commences when negligence becomes known.—*Obiter.*

Obiter—Per *Mohammad Noor, J.*—A suit to set aside a decree on the ground of gross negligence by the guardian of a ward is governed by Art. 120, Limitation Act, and not by Art. 95. Time for such suit commences to run when the Court of Wards becomes aware of the negligence of the guardian. [P 240 C 1; P 241 C 1]

Per *Dhavle, J.*—There is an obvious difference between avoiding a decree and being entitled to ignore it, i. e., to treat it as a nullity. In the former case the question of limitation arises. No article of the Limitation Act specially deals with the negligence of a guardian or Manager. Therefore, the residuary article, Art. 120, which prescribes a period of six years from the time when the right to sue accrues applies: 1921 *P C* 22 and 1932 *All* 293, *Ref.* [P 243 C 1]

S. M. Mullick, B. P. Sinha and *Hari Nandan Singh*—for Appellants.

Sultan Ahmad, G. P. Das, P. Misra, C. P. Sinha, Sarjoo Prasad, Murari Prasad and *Mahabir Prasad*—for Respondents.

Mohammad Noor, J.—This is an appeal against a decision of a Subordinate Judge of Shahabad giving the plaintiff-respondents a decree for joint possession of one-third share in 142.03 acres of land situated in village Dharupur in the district of Shahabad and for mesne profits. The plaintiffs, who are wards of the Court, are proprietors of one-third share of village Dharupur. The defendants are the landlords of the remaining two-thirds being proprietors of one-third and mukarraridars of another one-third. The plaintiffs' share was in the zarpeshgi lease of the defendants' family for a period of 25 years which expired in 1306 fasli, but as the zarpeshgi money was not paid up the defendants continued in possession of the share. Thereafter under a deed, dated 6th June 1906, the plaintiffs' share was given in usufructuary mortgage to the defendants for a period of 10 years from 1313 to 1322. The plaintiffs redeemed the mortgage by depositing the money in Court on 17th July 1926, and got possession of the village. Now the plaintiffs' case is that in spite of the mortgage having been redeemed the defendants did not give the plaintiffs possession of their one-third share of the bakasht lands of the village described in Sch. A (164.79 acres or 254 bighas 18 dhurs) and Sch. A (1) (65.56 acres) of the plaint. They therefore sought recovery of joint possession of these lands and also a declaration that an ex parte decree obtained by the defendants against them in respect of Sch. A lands be declared collusive, fraudulent, illegal, null and void and not binding upon them. They further asked for a decree for Rs. 2,441-10-8 for damages alleged to have been caused by the defendants to the mortgaged property during the term of the usufructuary mortgage and also for a decree for Rs. 5,618-0-1 as mesne profits in respect of the lands in suit.

During the course of the settlement operations the defendants were found in direct possession of 164.79 acres of land (mentioned in Sch. A of the plaint) which they claimed to be their raiyati lands with occupancy rights therein. The Settlement Officers however recorded these lands as "bakasht landlord mukarraridar and zarpeshgidar." It may be noted that the word "bakasht" malik or thicadar was used by the Settlement Officers to indicate lands in direct possession of the malik or tenure-holder which are not their zirait lands as defined in S. 120, Bengal Tenancy Act, (vide-Guide and Glossary to the Survey and Settlement Operations in the Patna and Bhagalpur Divisions, p. 14). The defendants thereupon instituted a title suit (No. 242 of 1912) against the plaintiffs for declaration of their occupancy rights in these lands. The suit was defended by the manager of the Court of Wards who was managing the plaintiffs' estate, the plaintiffs being then the wards of the Court as they are even now. After the suit had remained pending for some time it was decreed ex parte on 3rd November 1913. There was an attempt by the plaintiffs through the same manager to have the ex parte decree set aside and a petition to that effect was filed on 11th December 1913, which was dismissed for default on 17th January 1914. The plaintiffs have challenged this decree in their plaint alleging that it was obtained by fraud and collusion between the defendants (who were plaintiffs

in that suit) and the then Manager of the Court of Wards, or that at any rate the suit was decreed ex parte on account of gross neglect of the manager. They have asked that this decree be declared null, void and inoperative.

The lands covered by Sch. A (1) of the plaint were during the settlement operations in possession of certain raiyats. The defendants claimed them also to be their raiyati lands with occupancy rights therein and alleged that the raiyats found in possession thereof were their temporary under-raiyats. The settlement officers disallowed the defendants' claim and recorded the persons found in possession of these lands as raiyats. Later on the defendants obtained from these persons surrender of their rights in their favour and have been in direct possession of these lands since then. The plaintiffs' case is that these were the lands of the raiyats which on account of their surrender or abandonment came in direct possession of the landlords and on the redemption of the mortgage of their one-third share of the village they are entitled to have their share in them. The defence was that the lands in suit were the raiyati lands of the defendants, and not the bakasht lands of the landlord and therefore the plaintiffs were not entitled to get any share in them. There was also a plea that the plaintiffs' suit in respect of Sch. A lands was barred by res judicata in consequence of the ex parte decree stated above. Limitation was also pleaded in defence of the suit.

The learned Subordinate Judge overruled the pleas of res judicata and limitation. He has found that there was no fraud or collusion between the defendants, who were plaintiffs in the former suit, and the manager but that there was a gross negligence on the part of the manager and therefore the decree was not res judicata. He gave the plaintiffs a modified decree for joint possession in respect of 103·01 acres out of the lands mentioned in Sch. A and 39·02 acres out of the lands mentioned in Sch. A (1) of the plaint. He has held that the defendants were not able to prove their raiyati rights in respect of these lands. He dismissed the suit in respect of the remaining lands of Schs. A and A (1), having found that the defendants were raiyats in respect of these lands from before they became landlords of the village. He also dismissed the suit in respect of compensation and damages but gave a decree for mesne profits, and ordered the parties to bear their own costs. The defendants have preferred this appeal, while the plaintiffs have preferred cross-objections in respect of the area for which their suit was dismissed and also against the dismissal of their claim for damages and compensation. The plaintiff-respondents have not pressed before us their case of fraud and collusion between the defendants and the then manager of their estate in connexion with the ex parte decree.

Before I come to deal with the points taken in appeal I would like to state some facts which are not disputed. The defendants are not the old landlords of the village. Their first connexion with the village as such commenced in the year 1287 (1880) when their family along with one Nakchhedi Pathak took a zarpeshgi lease of the village. Thereafter they became proprietors of one-third of the village under two deeds of sale, dated 17th September 1892, and 1st December 1892, and later on, they acquired mukarrari of the other one-third of the village under a deed, dated 27th February 1894. They however continued in possession of the entire village partly as proprietors (one-third), partly as mukarraidars (one-third), and partly as mortgagees (one-third), up to the year 1926, when as stated above the one-third share of the plaintiffs was redeemed from their usufructuary mortgage. On behalf of the appellants the following points were urged before us :

(1) That the learned Subordinate Judge ought to have held on the evidence on record that the defendants were able to establish their raiyati rights in respect of not only the lands for which the plaintiffs' suit was dismissed but also in respect of the remaining lands for which the suit was decreed.

(2) That the plaintiffs were not entitled to a decree for joint possession. The defendants being cosharer landlords, their interest in the village being two-thirds, they are entitled to remain in possession of the lands till the village is partitioned. The only decree which could be passed was a declaration of the plaintiffs' title to the extent of one-third share in respect of such lands which were

not found to be the raiyati lands of the defendants.

(3) That the learned Subordinate Judge has erred in passing a decree for mesne profits. The plaintiffs were only entitled for compensation for use and occupation by the defendants of the one-third share in the land.

(4) That so far as the lands covered by Sch. A are concerned, the plaintiffs' suit was barred by res judicata. There was no negligence on the part of the manager and even if there was any, the plaintiffs were not entitled to get rid of the decree on that ground. It was also urged in the alternative that assuming that there was gross negligence on the part of the manager of the plaintiffs' estate which resulted in the ex parte decree, the decree was not void but voidable and the plaintiffs could not succeed unless they got the decree set aside and their prayer for declaration that the decree was null and void was barred by limitation.

The respondents supported the decree of the learned Subordinate Judge so far as it is in their favour, and further contended that on the evidence on record he ought to have decreed the plaintiffs' suit in its entirety, holding that the defendants failed to establish their raiyati rights in respect of any portion of the land in suit. They have also asked for a decree for damages and compensation.

(1) I first take up the question of fact, namely, whether the defendants were able to establish their raiyati rights in respect of the lands covered by Schs. A and A (1) of the plaint, and if so, to what extent. (His Lordship after discussing the evidence came to the conclusion that the defendants were raiyats, and held that the decree of the Subordinate Judge so far as it dismissed the plaintiffs' suit in respect of those lands of Schs. A and A (1), which were identified with the lands found in possession of the defendants' family in the year 1871, was perfectly correct. His Lordship after further discussing the evidence, continued the judgment.) About the remaining lands, the defendants' case has been that they got them by purchase. This they have not been able to prove, and in respect of them the plaintiffs are entitled to a decree on facts, subject to the question of res judicata in respect of the lands of Sch. A which I shall take later on.

(2) and (3). The next two points urged are that the defendants, being co-sharer landlords of the village, were entitled to cultivate the joint lands subject to payment of compensation to the plaintiffs. Therefore for the lands of Sch. A or A (1), in which the plaintiffs may be held to have a share and in which the defendants failed to establish their occupancy rights, the plaintiffs were not entitled to a decree for joint possession or for mesne profits. The plaintiffs were only entitled to a declaration of their share in those lands and for compensation from the defendants on account of the lands being in their exclusive use.

Mr. Sushil Madhab Mullick relied upon two decisions of the Judicial Committee, i. e., 18 Cal 10 (1) and 51 I A 293 (2). In the former case the land was held by two persons in common, one of whom was in actual occupation of a part, cultivating it as if it had been his separate property. The other attempted to enter upon the same land in order to carry on operations thereon inconsistent with the work already being carried on by the former, who resisted and prevented this attempted entry. Their Lordships held that:

> The resistance being made by the co-sharer in occupation simply with the object of protecting himself in the profitable use of the land, in good husbandry, and not in denial of the other's title, such resistance was no ground for proceedings on the part of the other to obtain a decree for joint possession, or for damages; nor would granting an injunction be the proper remedy.

In the latter case, it was held that:

> Where lands in India were held in common, each co-sharer was entitled subject to paying compensation to the other co-sharers to cultivate any part of them not being cultivated by the other co-sharers. The other co-sharers are not thereby ousted so as to be entitled to mesne profits; their remedy if they object is to obtain a partition with compensation.

In my opinion, the facts of these cases were quite different. The right of the co-sharers was not denied nor was the fact that one co-sharer was cultivating the land 'a denial of the other's right.' In the present case the possession by the defendants of those lands, which have not been proved to be their raiyati lands, was in the assertion of a right as a

---

1. Watson & Co. v. Ramchund Dutt, (1891) 18 Cal 10=17 I A 110=5 Sar 535 (P C).
2. The Midnapur Zamindari Co. v. Naresh Narayan Roy, 1924 P C 144=80 I C 827=51 I A 293=51 Cal 631 (P C).

raiyat and was consequently adverse to the plaintiffs. The plaintiffs were therefore bound to sue for joint possession; otherwise, if such a suit was not brought within time, their right would have become barred by limitation. In the circumstances of the case, the decree of the learned Subordinate Judge is correct, and the plaintiffs are entitled, on the establishment of their title to a one-third share of the lands, to a decree for joint possession with the defendants; and for the same reason I hold that the decree for mesne profits has also been rightly passed. (4) The most important point raised is whether the suit in respect of lands of Sch. A is barred by res judicata in consequence of the ex parte decree passed on 3rd November 1913. This decree was challenged by the plaintiffs on the ground that it was obtained by fraud and collusion between the defendants and the officers of the Court of Wards, or, at any rate, was inoperative as it was passed on account of the gross negligence of the manager of the Court of Wards. The learned Subordinate Judge has found that there was no fraud or collusion, and that finding has not been assailed before us. As a matter of fact, there is no evidence to show that the defendants were guilty of any fraudulent act in obtaining that decree, or that there was any collusion between them and any officer of the Court of Wards. In the plaint itself, except a vague allegation of fraud no details were given. Whether gross neglect of a guardian amounts to fraud is a different question, and I shall consider it later.

The learned Subordinate Judge has, however, found that there was gross negligence on the part of the officers of the Court of Wards and that therefore the decree was not res judicata. This finding has been challenged before us by the appellants. First of all, it is urged that there was no gross negligence. Secondly, that a ward of the Court is not on the same footing as a minor and cannot get rid of a decree on the ground of the negligence of the officers of the Court in conducting or defending a suit. Thirdly, that the decree is at any rate not a nullity and is effective unless set aside by review or by suit, and that the prayer for setting it aside is barred by limitation. The considerations which arise are these: was there any gross negligence on the part of the officers of the Court of Wards which led to the passing of the ex parte decree? What is the effect of the gross negligence if there was any? Can the decree be challenged collaterally, or has it to be set aside before the plaintiffs can get any relief, and whether the prayer for setting it aside is barred by limitation? I take these points in the order in which I stated them. It appears from the order-sheet of the suit (Ex. 10) that it was instituted on 13th August 1912. The written statement on behalf of the defendants was filed on 14th December 1912. The steps taken on their behalf were all dilatory. On 15th September 1913 the defendants applied for warrants of arrest against their witnesses which were ordered to be issued on payment of process fee and filing of forms, and 3rd November 1913 was fixed for hearing. Warrants were not issued on account of the defendants' failure to file forms.

The application praying for an adjournment of the case filed on 3rd November 1913 was disallowed. Later on, the pleader, who was appearing on behalf of the defendants, informed the Court that he had no further instructions beyond applying for time. The Court then proceeded to hear the case ex parte and decreed it on the same day. On 11th December 1913 an application to set aside the ex parte decree under O. 9, R. 13, Civil P. C., was filed. Notices were issued, fixing 3rd January, 1914 for the hearing of the application. On that day the defendants applied for time and the case was adjourned to 17th January 1914, when the application was dismissed for non-appearance of the defendants. The facts above stated clearly show that there were great laches in looking after the case of the defendants and, in my opinion, the learned Subordinate Judge is right in holding that the suit was decided ex-parte on account of the gross negligence of the Officers of the Court of Wards.

Mr. Mullick on behalf of the appellants contended that the mere fact that the manager of the Court of Wards who was acting as a guardian ad litem of the defendants, allowed the suit to be decreed ex parte and then allowed the application for setting aside that decree to be dismissed for default did not amount to gross negligence. He relied upon the

decision of 6 C L J 448 (3) where it was held that it was not every kind of negligence nor any amount of negligence which would render proceedings, otherwise regular and proper, liable to be opened up; it must be such negligence as leads to the loss of a right, which, if the suit had been conducted or resisted with due care, must have been successfully asserted. He also relied upon the cases of 45 Mad 425 (4) and 48 All 44 (5), which lay down that simply an omission by the guardian to appear at the trial would not amount to gross negligence if there was no ground of defence to put forward on behalf of the minors and further that the facts of each case have to be considered and the omission in one case may amount to gross negligence, while it will not in the other.

I shall have to refer to the Madras case later as it has also laid down that a suit lies to set aside a decree on the ground of gross negligence of the guardian of a minor. The learned Advocate further relied upon the case of 46 C L J 287 (6) where it was held that before a decree obtained against a minor can be set aside the fraud of the guardian must be proved. In my opinion, however, in the case before us the omission of the guardian to defend the suit amounted to gross negligence. Mr. Mullick contended that the plaintiffs of that suit, who are defendants in the present one, had filed the irrigation khesra and map and as the manager saw that there was no defence to make he allowed an exparte decree to be passed. I am unable to accept this contention. First of all, as I have shown above, the irrigation khesra and map do not show all the lands covered by Sch. A to be the raiyati holdings of the defendants. If there was no good defence to make in respect of the entire Sch. A, there was certainly good defence in respect of some lands covered by that schedule. The record of rights was in favour of the defendants of that suit. The lands were recorded as bakasht of the landlords and it was for the plaintiffs of that suit to establish their occupancy right in them. The only evidence apart from oral evidence available to them was the map and the khesra of the irrigation department and they, as I have shown, do not cover the entire schedule. Then again, if the manager thought that the suit was undefendable, there was no use of making a show of defence asking for warrants against the witnesses and then abandoning the suit to be decreed ex-parte, and thereafter to apply for setting aside the decree and allowing the application to be dismissed for default.

The next question for consideration is the effect of the ex parte decree in consequence of the gross negligence of the guardian of the ward. There is no doubt that a decree passed against minor can be avoided on the ground of gross negligence of the next friend or guardian ad litem. In 22 Cal 8 (7) it was held that gross negligence on the part of the next friend in the conduct of a suit brought on behalf of a person under a disability prevents the effect of the bar contained in S. 103, Civil P. C., (O. 9, R. 9 of the present Code) to the institution of a fresh suit by such person when the disability has ceased. A Full Bench of the Allahabad High Court in 54 All 646 (8), held that the right of a minor to avoid a decree passed against him on the ground of negligence of his guardian ad litem is a substantive right, well recognized in the English law, and equally applicable in India as it is not founded upon any peculiarities of the English law but upon the broad principles of justice, equity and good conscience.

A suit for the enforcement of such a right of the minor either to ignore or to challenge the propriety of the order passed against him is undoubtedly one of a civil nature. The cases relied upon by Mr. Mullick also hold that a minor can avoid a decree passed against him on account of the gross negligence of his guardian. The ex parte decree in the present case however is not against a minor but against a man who was of age but a disqualified proprietor whose estate was under the Court of Wards. The decree

3. Parmeshwari Pershad Narayan Singh v. Sheo Dutt Rai, (1907) 6 C L J 448.
4. Chunduru Punnayyah v. Rajam Viranna, 1922 Mad 273=70 I C 668=45 Mad 425=42 M L J 429.
5. Brij Raj v. Ram Sarup, 1926 All 36=90 I C 749=48 All 44=23 A L J 901.
6. Bepin Chandra Das v. Menajaddi, 1927 Cal 865=105 I C 199=46 C L J 287.
7. Lalla Sheo Churn Lal v. Ramnandan Dobey, (1895) 22 Cal 8.
8. Siraj Fatma v. Mahmud Ali, 1932 All 293=138 I C 465=54 All 646=1932 A L J 437 (FB).

is against Ram Bibhuti, the father of the present plaintiff, and his three minor sons through the manager of the estate. The minor sons as named in the decree are (1) Kedar Nath, (2) Kamla Prasad. The name of the third was not given. The names of the two sons given do not correspond to the name of any one of the plaintiffs who are the sons of Ram Bhabhuti Prasad. No explanation of the discrepancy is available on the record. No objection seems to have been taken in the previous suit that Ram Bhabhuti Prasad had no sons named Kedar Nath and Kamla Prasad. The appellants' explanation given to us is that the two names were pet names of the plaintiffs, Ram Rudra Prasad and Ram Ganeshadhis Prasad and defendant 3 of whom no name was given was the plaintiff Ram Akhandleshwar Prasad. The respondents do not accept this. I shall proceed on the assumption that the decree was against the plaintiffs' father only, his sons being then minors. The decree if otherwise good is no doubt binding upon the plaintiffs. It was enough if Ram Bibhuti Prasad who alone was recorded in the Record of Rights was sued. He fully represented the estate : 8 P L T 462 (9).

The question therefore arises whether the principle of the English law, which has been applied in India on the ground of justice, equity and good conscience to afford protection to infants can be extended to disqualified proprietors whose estates are managed by the Court of Wards. I see no reason to differentiate between the two cases. A ward of the Court is as much helpless as a minor ; rather the former is in a worse position. In the case of a minor if one guardian is neglecting his duty, any other person interested in the minor can come forward and have the guardian removed. But in the case of a disqualified proprietor under the Court of Wards nobody else except the manager appointed by the Court can institute a suit on his behalf or defend one against him. Mr. Mullick has however contended that there is a difference between a minor and a ward of the Court. He relied upon the case of 46 Cal 694 (10), for the proposition that limitation begins to run against a man notwithstanding the fact that his estate was under the Court of Wards and he is not entitled to a fresh period of limitation after the estate has been released. He also relied upon 20 C W N 852 (11) where it was held that the release of an estate from the Court of Wards did not give a fresh start to limitation if the man was not a minor, and S. 7, Lim. Act, did not apply to him.

Another case relied upon by him is a decision of the Privy Council in 48 I A 27 (12), where it was held that the manager of the Court of Wards as a guardian of the ward can compromise a suit without the permission of the Court. No doubt, it is true that privileges of a minor cannot be extended to a ward of the Court when they are based upon statutory provisions which limit them to the minors. The law of limitation is statute law, and its provisions cannot by analogy be extended to those to whom it has not been extended by the statute itself. But here we are not applying the statute law but the principle of justice, equity and good conscience; and the equitable considerations which enable the Courts to give relief to a minor, who had suffered loss on account of the neglect of his guardian, should in my opinion be also extended to a ward of the Court who for all practical purposes is in the same position as a minor. I am therefore of opinion that the gross neglect by the manager, which resulted in the ex parte decree, entitles the plaintiffs of the suit to get the same relief against that decree as they would have got if the defendant in the previous suit had been a minor. The next consideration is whether the decree can be collaterally challenged, or it has to be formally set aside before the plaintiff can get a relief in this case. S. 44, Evidence Act, provides that:

> Any party to a suit or other proceeding may show that any judgment, order, or decree, which is relevant under S. 40, S. 41 or S. 42, and which has been proved by the adverse party, was delivered by a Court not competent

9. Lingangowda Dod Basangowda Patil v. Basangowda Bistangowda Patil, 1927 P C 56=101 I C 44=54 I A 122=51 Bom 450=8 P L T 462 (PC).

10. Mani Singh Mandhata v. Nawab Bahadur of Murshidabad, 1918 P C 180=50 I C 202=46 I A 60=46 Cal 694 (PC).

11. Umakanta Sen v. Hira Lal, 1917 Cal 745=34 I C 86=20 C W N 852.

12. Nakimo Dewani v. Pemba Dichen, 1921 P C 22=59 I C 911=48 I A 27=48 Cal 469 (PC).

to deliver it, or was obtained by fraud or collusion.

The ex parte decree in this case is relevant under S. 40 of the Act which enacts that:

The existence of any judgment, order, or decree, which by law, prevents any Court from taking cognizance of a suit, or holding a trial, is a relevant fact, when the question is whether such Court ought to take cognizance of such suit, or to hold such trial.

It is clear therefore that if a decree is obtained by fraud or passed without jurisdiction, the party against whom the decree is sought to be used can in the suit itself show that the decree cannot operate as res judicata as it was obtained by fraud. The question is whether the decree passed on account of the gross negligence of the guardian can be so challenged. Gross negligence amounts to fraud and affects the proper representation of the minor and thus takes away the jurisdiction of the Court to pass a decree, as a Court cannot pass a decree against a minor unless he is represented by a guardian. In 22 Cal 8 (7), already referred to, their Lordships observed:

The statutory bar in S. 103 cannot have a greater effect than that provided by S. 13, or, in other words, an infant cannot be in a worse case where his next friend or guardian fraudulently or negligently omits to appear than where he appears, and fraudulently or negligently submits to a decree or otherwise prejudices the interest of the infants. The question therefore reduces itself to the question whether negligence of a next friend prevents the operation of the law of res judicata. According to the law, as administered in England, gross negligence as well as fraud prevents the operation of the bar.

They then quoted from Macpherson on Infants as follows:

An infant plaintiff, though thus favoured in the course of the suit, is as much bound by a decree and by all the proceedings in a cause as a person of full age, and cannot, nor can his representatives open the proceedings, unless upon new matter, or on the ground of gross laches, or of fraud and collusion, which will annul the proceedings of the Courts of justice as much as any other transactions.

Then they quoted from Simpson on the Law of Infants:

A decree may also be impeached where there has been gross negligence by the next friend in the conduct of the infant's case, or new matter discovered since the date of the decree.

They further quoted the observation of Sir R. Malins, V. C., in 18 Eq. 573 (13) (576), which ran thus:

The question which I have to decide is whether this infant, on whose behalf a decree was taken by consent in 1867, is to suffer by any negligence or want of knowledge on the part of her then next friend. I am clearly of opinion she cannot be called upon to endure that inconvenience . . . The proposition that an infant of tender years may have her whole fortune wrecked by the neglect of her friend is so monstrous that I cannot pay attention to it. She is entitled to have a next friend who is diligent and who will protect her interests.

They then proceeded:

From this it is clear that, according to the law as administered in England, the gross negligence of his next friend would entitle an infant to obtain the avoidance of proceedings undertaken on his behalf. We can see no reason why in this country an infant should be in a worse position. In cases outside Calcutta we are bound, in the absence of statutory provision, to apply rules of equity and good conscience. These rules cannot be more restricted than the rules of equity administered in England.

As their Lordships have pointed out, S. 103 (now O. 9, R. 9) is analogous to S. 11 of the present Code (res judicata). In one case if the plaintiff is absent and the defendant appears and the suit is dismissed for default of the plaintiffs, no fresh suit can be instituted. Under S. 11 if an issue has been tried in the presence of the parties by a Court of competent jurisdiction, it cannot be tried again. Both bar the trial of an issue again. Their Lordships held that the plaintiff could ignore the bar and proceed with a fresh suit. On the same principle, in my opinion, the plaintiffs in this case can ignore the former ex parte decree and seek relief which they have sought. It is to be noticed that the principle underlying this decision and the authorities relied upon seems to be that gross negligence of the guardian or next friend stands on the same footing as fraud. In the case of 10 Cal 357 (14) it was held that when the next friend of a minor fraudulently withdraws a suit without permission to bring a fresh suit, one of the modes of avoiding the bar was for the minor to bring a fresh suit and ignore the previous proceeding. This was a case of fraud, and referring to this case the learned Judges of the Calcutta High Court in 22 Cal 8 (7) at p. 13 observed:

As fraud and negligence are, in our opinion, on the same footing, the plaintiff has the same relief in each case.

In 54 All 646 (8), already referred to, Sulaiman, J., when dealing with the decree passed against a minor on account of the gross neglect of his guardian observed (p. 664):

13. In re Hoghton, (1884) 18 Eq 573.

14. Eshan Chundra Safooi v. Nundamoni Dassee, (1884) 10 Cal 357.

It seems to me that it is also possible to avoid the effect of the provisions of S. 11, Civil P. C., by holding that the minor ceased to be a party to the suit when his guardian ad litem was grossly negligent. Of course, there can be no bar of res judicata where a party in the subsequent suit was not, properly speaking, a party to the previous suit.

At p. 666 their Lordships referring to a decision of the Judicial Committee in 30 Cal 1021 (15) where it was held that the minor was bound by a decree obtained against him if his interests had been duly protected and he was effectively represented by his mother, even though there was an absence of an order appointing her as his guardian, said :

It therefore follows that the real basis of the binding character of a decree against a minor is the fact of his having been represented by a proper person, and not the mere existence of any formal order appointing a guardian for him. Even when there is such an order, if the guardian does not properly represent him, the decree would not be binding. On the other hand, even if there be any defect in the formal appointment of a guardian, the decree would be binding upon him if he is sufficiently represented and his interests are well protected.

The learned Judge at p. 657 of the report seems to be in agreement with the view of the Calcutta High Court that fraud and gross negligence stand on the same footing. In 45 Mad 425 (4) already referred to, the plaintiff instituted a suit to avoid a decree on the ground of gross negligence on the part of the guardian ad litem. The Madras High Court held that the decree was liable to be set aside on that ground. The learned Judges referred to the case of 27 M L J 486 (16) where Sankaran Nair and Spencer, JJ., had held that a minor was not bound by a decree passed against him where his guardian showed gross negligence as by not setting up a good defence of which he must have been aware, and observed as follows :

Neglect by a guardian to plead past payment or to object to a personal decree being passed against minors was held in 3 C L R 17 (17) to be gross misconduct amounting to fraud.

In the Madras case referred to above a decree against a minor was put forward as res judicata. The Court held that it was not, as the guaradin of the minor was guilty of gross negligence and the minor was not bound by the decree. In the Calcutta case referred to there was gross misconduct of the guardian, but there was a finding of fraud as well and it was held that a suit to set aside the decree and the sale thereunder was maintainable. Mr. Mullick referred us to the case of 25 Bom 337 (18) for the proposition that a judicial sale was not a nullity and could not be treated as invalid, notwithstanding even material irregularity, for the jurisdiction of the Court to execute had been complete throughout and was not lost on account of error. This case, in my opinion, has no application. Here the plaintiffs are urging that the ex parte decree relied upon by the defendants is not res judicata on the ground of gross negligence of the guardian which amounted to fraud. It is not a question of irregularity or irregular exercise of jurisdiction. He also relied upon the case of 24 Bom 547 (19). There the plaintiff against whom a decree was obtained during his minority brought a fresh suit and when the previous decree was pleaded as res judicata he set up neglect of his guardian. The suit was dismissed not on the ground that it was not maintainable but on the ground that the plaintiff failed to establish negligence. Their Lordships referring to the case of 22 Cal 8 (7) and the case of 19 Bom 571 (20) said :

It is only where fraud and negligence is proved on the part of the guardian of the minor that the right to bring a suit to set aside the previous decision can be claimed by the minor or his administrator.

It is clear from this decision also that the principle was accepted, though it was not applied to that case as the plaintiff did not prove negligence. In the case of 19 Bom 571 (20), referred to above, the principle of the decision reported in 22 Cal 8 (7) seems to have been accepted. Mr. Mullick has further relied upon some observations in 12 Cal 69 (21) for the proposition that a decree against a minor is as much binding upon him as if he was of full age and it seems to have been pointed out that if the minor sought to set aside

15. Walian v. Banke Behari, (1903) 30 Cal 1021= 30 I A 182=8 Sar 512 (P C).
16. Subbanna v. Narasamma, 1915 Mad 384= 26 I C 16=27 M L J 486.
17. Girish Chunder Mookerjee v. Miller, (1879) 3 C L R 17.
18. Malkarjun v. Narhari, (1901) 25 Bom 337= 27 I A 216=7 Sar 739 (P C).
19. Hanmantapa v. Jivu Bai, (1900) 24 Bom 547=2 Bom L R 478.
20. Cursandas Natha v. Ladkavahu, (1895) 19 Bom 571.
21. Raghubir Dayal Sahu v. Bhikyalal Misser, (1886) 12 Cal 69.

the decree his remedy was by a separate suit and can only succeed upon proof of fraud or collusion. This case seems to have also laid down that if the minor wants to question the decree on the ground of negligence of his guardian, his remedy is by way of review. The case seems to me to stand by itself. The consensus of opinion seems to be that a suit lies to set aside a decree passed against a minor on account of the negligence of his guardian and that the decree is not binding upon the minor. My conclusions therefore are that the ex parte decree against the plaintiffs' father was passed on account of the gross negligence of the manager and that the plaintiffs' father at that time being a ward of the Court the decree stands on the same footing as a decree obtained against a minor passed on account of gross negligence of his guardian. Gross negligence of the guardian amounts to fraud, and furthermore when the guardian neglects to look after the interest of the minor, the minor is not properly represented in the suit and a decree thus passed is without the minor defendant being properly represented. The decree is not therefore a bar to the plaintiff's present suit and can be collaterally challenged.

In view of what I have said above, it is not necessary to consider the question of limitation. Assuming however that the plaintiffs are not entitled to challenge the decree collaterally, the question arises whether the plaintiffs' prayer to declare the decree null and void is barred by limitation. The plea of limitation was not raised by the defendants in the written statement nor before the lower Court at the time of the hearing of the suit. It was for the first time raised in the grounds of appeal in this Court. Now having held that the suit to set aside a decree on the ground of gross negligence of the guardian is maintainable, the period of limitation applicable will be six years under Art. 120, Limitation Act, from the date when the right to sue accrued. It is clear to me that Art. 95, which refers to suit for setting aside a decree obtained by fraud, is not applicable.

The question therefore is, when did the cause of action accrue in the present case? Was it on the date when the decree was passed, or on any subsequent date? In 1931 Bom 500 (22) where a decree was passed against a minor on the basis of an award when the suit was referred to arbitration without the sanction of the Court, it was held that under Art. 120, Lim. Act, the period did not commence to run from the date of the decree. A minor was in possession of the land and there was nothing to show that he had any knowledge at all of the existence of the decree until a date when the notice was issued on him to show cause why the decree should not be enforced. The learned Judges relied upon the observations of their Lordships of the Privy Council on Art. 120, Lim. Act, in 11 Lah 657 (23), which was to the effect that there may be no right to sue unless there was an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit was instituted. In 120 I C 880 (24) it was held that in a suit falling under Art. 120, Lim. Act, the cause of action was not merely the passing of an adverse decree against the plaintiff, but in addition to it the fact that such a decree was passed by reason of the gross misconduct or gross negligence of his guardian ad litem, and limitation did not begin to run the moment the decree was passed, but only when the gross negligence of the guardian which alone would entitle the plaintiff to have the decree set aside became known to him. Their Lordships held that when relief was sought on the ground of fraud, misconduct, mistake, etc., the limitation begins to commence from the time when fraud, misconduct or mistake became known to the plaintiff.

They referred to Arts. 90, 91, 92, 95, 96 and 114, Lim. Act, and said that Art. 120 being an omnibus one, the general expression was necessitated by the variety of suits coming within its purview in some of which there would be fraud, misconduct or mistake as part of the cause of action. They held that it was in consonance with the scheme of the Act as indicated by such specific articles referred to above dealing with

22. Sadashivappa v. Sangappa, 1931 Bom 500=134 I C 1221=33 Bom L R 1033.
23. Bolo v. Koklan, 1930 P C 270 = 127 I C 737 =57 I A 325=11 Lah 657 (PC).
24. M. Basavayya v. Bapanna Rao, 1930 Mad 173=120 I C 880=58 M L J 349.

suits based on a cause of action constituting fraud, misconduct, etc., that the right to sue should be deemed to accrue under Art. 120 from the time of the plaintiff's knowledge of the same in respect of suits based upon similar grounds coming under that article. There are two more Madras cases which also lay down that in a case where Art. 120 applies the period begins to run from the date of knowledge of the cause of action : one is 38 Mad 67 (25). The other case, which seems to be somewhat analogous to the present one, is 38 Mad 903 (26), where it was held that where a trespasser dispossessed a mortgagee in possession and continued in possession asserting a title adverse to the mortgagor also, such dispossession would be adverse to the mortgagor from the time the mortgagor had knowledge of the assertion (though he may not then have been entitled according to the terms of the mortgage to recover possession from the mortgagee). The onus was on the trespasser to prove not only that he asserted the right adverse to the mortgagor but also that the latter knew it. In the case before us unfortunately the plaint does not state when the plaintiff came to know of this ex parte decree.

The plaintiffs are still under the Court of Wards and the knowledge necessary for the institution of the suit will be the knowledge of the Court of Wards. Having held that there was gross negligence on the part of the manager, there is nothing to show that the Court of Wards came to know of the decree and the gross negligence of the then manager before the mortgage was redeemed, and when the defendants refused to give possession of the land which is the subject matter of the suit. The decree was a purely declaratory one. Though it declared a title in the plaintiffs of that suit it was not executed against any property. The trend of the plaint seems to me to indicate that the plaintiffs came to know of if after the redemption of the mortgage in 1926 and as such the suit is not barred by limitation. The defendant did not raise the question of limitation. Had they done so, it would have been open to the plaintiffs to make a specific allegation about the date of their knowledge and prove it. No doubt the defendant appellants were entitled to raise the question of limitation even at the stage of the appeal, but the decision of this question depended upon the fact when the Court of Wards came to know of the decree, etc., which required evidence. Under the circumstances of this case I am of opinion that it must be held that the Court of Wards had no knowledge of it prior to the redemption of the mortgage in 1926.

Mr. Mullick appearing on behalf of the respondents has relied upon the cases of 38 Mad 1064 (27) and 33 Mad 31 (28). These two cases do not seem to have approached the question from the point of view which was taken by the Privy Council and the two cases already referred to—one from Bombay and another from Madras—and ignore the fact that in a case when relief is sought on the ground of misconduct, etc., the plaintiff without any fault of his own may be kept quite in the dark about the accrual of the cause of action. The case may not come under S. 18, Lim. Act, but nevertheless the plaintiff is entitled to urge that the cause of action did not accrue to him until he came to know of the cause of action. I am therefore of opinion that the prayer for a declaration that the ex parte decree is void is not barred by limitation.

The respondents have not pressed their cross-objection in respect of compensation and damages. The result is that the cross-objection of the respondents is dismissed with costs. The appeal is partly allowed. The decree of the Subordinate Judge so far as it dismisses the plaintiffs' suit in respect of certain lands is confirmed. The decree in favour of the plaintiffs is modified. The plaintiffs' suit in respect of

Plot No.		Area.	
408	...	5.63	Schedule A
410	...	.40	
		6.03	
409	...	1.11.	Schedule A (1),

and also in respect 40.27 acres of land

25. Mammali v. Acharatte Parakat Maligapurayil Cheria Kunhipakki Haji, 1916 Mad 743 =17 I C 337=38 Mad 67=23 M L J 607.

26. Periya Aiya Ambalam v. Shunmugasundaram, 1914 Mad 334=22 I C 615=38 Mad 903=26 M L J 140 (F B).

27. Prasanna Venkata Chella Reddiar v. Collector of Trichinopoly, 1914 Mad 703=24 I C 369=26 M L J 537=38 Mad 1064.

28. Ottappurakkal Thazhate Soopi v. Cherichil Pallikkal Uppathumma, (1910) 33 Mad 31= 5 I C 698.

of Sch. A and 9.93 acres of land of Sch. A (1), the plot numbers of which have been given in the previous part of this judgment and in respect of which I have held that the defendants have established their occupancy right as they had got those lands on exchange from other raiyats, is also dismissed. The plaintiffs will get joint possession and mesne profits as ordered by the lower Court in respect of the lands which are finally decreed in their favour. The order of the lower Court in respect of the costs of that Court will stand. The lower Court had given the plaintiffs a decree in respect of 142.03 acres of land out of which the suit has been dismissed in respect of 57.34 acres. Each party will get from the other costs of the appeal proportionate to its success. The appellants will, however, get the full costs incurred by them in the preparation of the paper-book.

Dhavle, J.—I agree. The plaintiffs' case that the defendants' ancestors had no raiyati land in the village is definitely disproved by the jamabandi of 1273 Fasli put in for the plaintiffs themselves. The irrigation khasra of 1871 shows that the defendants' ancestors were in possession of 185 acres, and the plaintiffs have not been able to offer any plausible suggestion how the defendants' ancestors could have been found in possession of this area of land except as raiyats. The learned Subordinate Judge was plainly right in holding that the presumption of correctness attaching to the Record of Rights was rebutted and in dismissing the plaintiffs' claim in respect of such plots as could be identified from the irrigation map read with the irrigation khasra to have been in the possession of the defendants' ancestors long before they became mortgagees or proprietors (in part) of the mauza. That the lower Court has made an error of record in respect of the area of 7.14 acres lying in plots 408 to 410 is clear and has not been disputed before us. The learned Subordinate Judge in rejecting the defendants' story of exchange of raiyati lands could not take into account the bearing on the oral evidence adduced for the defendants of the fact that the witnesses who support the defendants' story are now in possession of lands identifiable in fact with lands shown by the irrigation papers to have been in possession of defendants' ancestors in 1871. This was because in his view they were not identifiable in fact; but defendants have established the contrary. Here also the plaintiffs have not been able to offer any plausible suggestion against the obvious inference in favour of the defendants' story. In the circumstances the inference is irresistible, and the defendants prepared a list of items so identifiable which was supplied to the plaintiffs. The accuracy of this list has not been challenged by the plaintiffs, and it follows that the defendants must succeed in respect of an additional area of 40.27 acres out of Sch. A and of 9.93 acres out of Sch. A (1).

The learned Subordinate Judge has found that the decree obtained by the defendants in the suit of 1912 was vitiated by the gross negligence of the then Manager of plaintiff's estate. This finding of fact is supported by ample evidence, and it is clear that it was such negligence as led to the loss of a right which, if the Manager had defended the suit with due care, must have been successfully asserted. It is well settled that a minor can avoid a decree obtained against him on the ground of the gross negligence of his guardian or next friend, and that such negligence prevents the operation of the bar of res judicata. The rule is based not on statute but on justice, equity and good conscience, and will apparently enable the minor even to ignore the decree on the ground that such negligence of the Manager or next friend implies that he was not properly represented in the suit and therefore ceased to be a party in fact. This is referred to in the exhaustive judgment of Sulaiman, J., in 54 All 646 (8), and is put by Sen, J., in the same case in the following words :

> Where in a suit or proceeding the minor is represented by a guardian ad litem but the latter does not function as such, and through inexcusable negligence fails to carry out the duties which justice demands or necessity compels, the minor for all practical purposes is unrepresented in the suit. A decree or order obtained against a minor who is not properly represented in the action cannot be pleaded as a bar to a suit instituted by the minor relating to the same subject matter. (See pp. 688 and 689 of the report.)

A ward of Court is under a definite disability in the matter of litigation, and vis-a-vis the civil Court is even more helpless than a minor. Under S. 51 of our Court of Wards Act, 1879 the Manager of a ward's property, or if there is no

Manager, the Collector of the district shall be named as next friend or guardian for the suit and shall in such suit represent such ward; and no other person shall be ordered to sue or be sued as next friend or be named as guardian for the suit by any civil Court in which such suit may be pending. S. 52 of the Act leaves it to the Court of Wards to nominate or substitute any other person to be next friend or guardian for any such suit, and requires the civil Court to give effect to such substitution. It is also settled [see 48 I A 27 (12)] that a guardian appointed under the Court of Wards of 1879, has power to compromise a suit on behalf of the ward and that the validity of a compromise entered into by such guardian does not depend on examination and approval by the trying Court. A ward may have his remedies against the Manager and has the advantage of the Manager being subject to the control of the Court of Wards; but when the Manager is grossly negligent, the ward is entirely helpless vis-a-vis third parties. It seems to me therefore that the grounds on which a minor is held entitled to avoid or ignore a decree by reason of the gross negligence of his guardian or next friend apply with even greater force to the case of a ward of Court.

There is an obvious difference between avoiding a decree and being entitled to ignore it, i. e. to treat it as a nullity. In the former case the question of limitation arises and as a matter of fact the plaintiffs have asked for a declaration that the old decree is not binding. No article of the Limitation Act specially deals with the negligence of a guardian or a Manager. We must, therefore, fall back upon the residuary article, Art. 120, which prescribes a period of six years from the time "when the right to sue accrues." It cannot be said in the present case that the right to sue for a declaration that the decree in the suit of 1912 is not binding on the plaintiffs on account of the gross negligence of the then Manager of their estate under the Court of Wards accrued as soon as that decree was passed. There could, of course, be no right to sue for such a declaration before that decree was passed; but the right to sue is based at least as much on the plaintiffs coming to know of the Manager's negligence in letting that decree be passed as on the passing of the decree itself. This involves a question of fact which was not raised below. The learned Subordinate Judge, in discussing issue 5, begins with the statement:

> At the time of the argument on defendants' side, the question of limitation has been raised only in respect of plaintiffs' claim for damages for the removal of trees.

If the plea of limitation had been raised with reference to the plaintiffs' right to sue for a declaration that the decree of 1913 was not binding on them, evidence would have been available as to the date when they (or rather the Court of Wards which had taken their estate under its charge) came to know of the negligence of the then Manager. The decree of 1913 made no change in the actual possession as the defendants were entitled to and did remain in possession as before till the redemption of their mortgage in 1926. It may therefore be fairly assumed that the old Manager's negligence came to light when after the redemption of the mortgage the defendants declined to let the plaintiffs come into possession of their share and thus infringed the plaintiffs' right to the property. The present suit was filed in September 1929 well within the period of six years from the date of redemption.

B.D./R.K. *Order accordingly.*

A. I. R. 1936 Patna 243

AGARWALA AND ROWLAND, JJ.

Radha Mohan Missir and *others*—Appellants.

v.

Kamaldhari Missir and *others*—Respondents.

Appeal No. 628 of 1930, Decided on 30th January 1936, from appellate decree of Sub-Judge, Arrah, D/- 18th April 1935.

(a) Evidence Act (1872), S. 102—Meaning of—Party on whom burden lies not discharging it—It must fail.

Section 102 means that when the burden of proof lies on a party, that party must fail if he does not discharge the burden by giving evidence. [P 244 C 1, 2]

(b) Second Appeal—Finding of fact—Omission to consider piece of evidence does not alter character of finding.

Mere omission to consider a piece of evidence will not alter the character of a finding of fact. [P 244 C 2]

Gaindhari Singh, *K. Dayal* and *Baldeo Sahay*—for Appellants.

Mahabir Prasad and *B. P. Varma*—for Respondents.

Rowland, J.—In this second appeal there was a remand under O. 41, R. 25

for findings as to whether anything was due to the defendant on account of interest, and if so how much. In the order of remand it was pointed out that the burden of proof was on the defendant on both issues. The Subordinate Judge has returned his finding that the defendant is entitled to interest at Rs. 17-12 a year from 1275 to 1321 F. S. as against which the plaintiff is entitled to credit for the period following the year 1321 F. S. to the extent of the excess of Rs. 72-9 per annum estimated income over the interest, on the zerpeshgi money and the Government demand. Both sides have presented objections against these findings. In argument, however it was undisputed that the defendants are entitled to reckon the annual income of the property at the thica rent at which it was let out during the years 1275-1279 and 1308-1321 as proved by documentary evidence, that is to say at Rs. 39. The plaintiff is aggrieved by the finding that for the years 1280-1307 the defendant is entitled to reckon the income of the property at the same rate while both parties are dissatisfied with the estimate of outturn at Rs. 72-9 for the period from 1322 onwards. As regards the period from 1280 to 1307 the Subordinate Judge has stated :

> There is no definite evidence as to the income of the property during the period from 1280-1307 F. S.

Later however he says that :

> In view of the satisfactory evidence regarding the antecedent and subsequent period and in the absence of any satisfactory evidence on the side of the plaintiff regarding the income of the property during the intervening period,

he thinks it safe to accept the defendant's evidence that the property remained in possession of the thicadar throughout. For the respondent it is said that this is a finding of fact. But the plaintiff's contention is that there was no evidence on which the Subordinate Judge could come to this finding. The Subordinate Judge himself has said that there is "no definite evidence" and again that there is "no satisfactory evidence," and he appears to have lost sight of the clear direction in the order of remand that the burden of proof was on the defendants. Under S. 102, Evidence Act, the burden of proof in any proceeding lies on that person who would fail if no evidence were given. This means that when the burden of proof lies on a party that party must fail if he does not discharge the burden by giving evidence. We have referred to the evidence and find that there is no evidence that the property remained in possession of thicadar during the period under consideration. There are statements of two witnesses who were not alive until within the last 5 or 7 years of the period we are considering, and who admit that their knowledge is hearsay. That is no evidence at all. Therefore the only possible finding is that the defendants have not proved that they are entitled to charge anything on account of interest for the period from 1280-1307 F. S For that period it must be held that the income of the property was sufficient to satisfy all the interest accruing from year to year on the zerpeshgi money.

As to the other period from 1322 onwards it is pointed out for the plaintiff that the learned Subordinate Judge has not considered the report of the commissioner in which the normal outturn is estimated at a rate which works out at Rs. 250 per annum. It is also contended that on the evidence for the defendants themselves the outturn has been estimated to be 2½ to 4 maunds per bigha which would work out to about Rs. 140 per annum at Gazette rates assuming 2½ maunds per bigha to have been the outturn in every year. Therefore it is said that the estimate should not be lower than that arrived at on the admission of the defendants. Against this the respondents contend that the finding is a finding of fact ; that the defendants have not admitted that there was an outturn of 2½ to 4 maunds in every year only in good years and have said that the crop failed in some years ; therefore there is no admission of the defendants as to any average outturn. It is not possible in the circumstances to say that the Subordinate Judge ought to have fixed a higher rate of outturn on the admission of defendants.

As regards the commissioner's report, mere omission to consider a particular piece of evidence will not alter the character of a finding of fact, and I think we have to accept the estimate of the outturn at Rs. 72-9-0 as a finding of fact, even if it is one which, if appeal lay on the facts, we should consider unsatisfactory for failure to take into account the commissioner's report. The defendants have also objected to the finding of the

Subordinate Judge that they are not entitled to add to the mortgage money a sum of Rs. 240 said to have been paid by them on account of cess accruing from them. This question has been examined by the Subordinate Judge who has found that the amount Rs. 9-8-0 which the zerpeshgidar was to pay on account of Government demand includes the revenue and cess and has found that the defendants could not prove that more than this was payable as revenue and cess on account of the property. This finding is a clear finding of fact which we have to accept.

In the result the order should be, in my opinion that on an account being taken the defendant is entitled to add to the zerpeshgi money Rs. 17-12-0 on account of interest for each of the years 1275-1279 and 1308-1321 ; that the defendant is not entitled to add anything on account of interest for the period from 1280 to 1307 ; and that the plaintiff is entitled to credit in the years 1322 and onwards for the excess of Rs. 72-9-0 per annum over the amount necessary to meet interest and Government dues each year. The claim in the plaint was to redeem at a lump sum of Rs. 300 ; therefore the result will be that if on this calculation the amount found due to the defendants is less than Rs. 300 the decree will nevertheless be passed for redemption at Rs. 300 If, on the other hand, the amount found due to defendants is in excess of Rs. 300 the decree will be for redemption at the amount so ascertained. As the plaintiff has substantially succeeded he should have his costs throughout.

Agarwala, J.—I agree.

R.M./R.K. *Order accordingly.*

---

* A. I. R. 1936 Patna 245

DHAVLE AND AGARWALA, JJ.

Mt. Sukni Chamain — Accused — Appellant.

v.

Emperor—Opposite Party.

Death Ref. No. 54 and Criminal Appeal No. 310 of 1935, Decided on 10th January 1936, from order of Sess. Judge, Muzaffarpur, D/- 12th December 1935.

(a) Penal Code (1860), S. 302—Absence of motive on part of accused—It does not necessarily mean that witnesses are telling lies or that confession by accused is false.

The absence of motive on the part of the accused charged under S. 302 is not a sufficient reason for coming to the conclusion that the witnesses in the case are telling lies when they have no reason to do so, or that the confession by the accused is false. [P 247 C 1]

*** (b) Penal Code (1860), Ss. 84, 302—Accused, alleged to have committed murder by reason of being possessed by evil spirit—S. 84 does not apply— It is not case of unsoundness of mind.**

Section 84 of Penal Code does not apply to a case where an accused charged with murder alleges that she committed it by reason of being possessed by evil spirit and in pursuance of the bidding of the spirit, on pain of being herself killed by that spirit, as it cannot be said to be a case of unsoundness of mind rendering accused incapable of knowing the nature of the act or that what she was doing was wrong or contrary to law. [P 247 C 2]

(c) Penal Code (1860), S. 302—Sentence—Accused murdering husband with brutality and not making even pretence of grief—No intelligent motive present for committing offence — Accused making full confession stating that she committed offence under influence of evil spirit—Case held to be one in which extreme penalty was not called for.

The accused committed the murder of her husband with unnecessary brutality, inflicting a large number of injuries, not only on the neck but also on the chest and face, and herself brought the neighbours to the scene of the murder by her cries and failed to make even a pretence of grief by shedding tears, but at the same time, there was no intelligent motive on the part of the accused and she made a full confession stating that she had committed the murder in pursuance of the bidding of a spirit:

Held: that the circumstances brought the case within the class in which it was not usual to pass a capital sentence: 10 *Bom* 512, *Foll.* [P 247 C 2]

M. K. Mukharji—for Appellant.

Assist. Govt. Advocate—for the Crown.

Judgment.—This is a reference under S. 374, Criminal P. C., made by the Sessions Judge of the Muzaffarpur division sitting at Motihari for confirmation of a sentence of death passed by him upon Sukni Chamain for the murder of her husband Tapsi Chamar. There is also an appeal preferred by Sukni Chamain; and we have heard the reference and the appeal together. Sukni is a young woman of about 17. Two years ago she was married to Jagan Chamar (P. W. 15), son of Sheoratan Chamar (P. W. 14). But as she used to leave the side of her husband when he fell asleep at night, he divorced her. In July last she was married to Tapsi Chamar of Dhumnagar about two miles from her father's house. About midday, on 28th July, six days after her wedding with Tapsi Chamar, she cried out that her husband had been killed.

The cries at once brought on the scene her neighbours Ghunia Chamain and Patia Chamain, P. Ws. 10 and 11, whose houses are within ten cubits of Tapsi's house. These Chamains found Sukni wearing a yellow sari and a red jhula, with blood marks on both of them. Ghunia speaks of seeing blood on Sukni's hands and feet as well. Sukni was not shedding tears. Her husband was lying dead, obviously killed very recently, and in the presence of Ghunia and Patia, Sukni changed into another dirty sari and had a wash. Ghunia and Patia were followed by Patia's nephew and foster-son Mangal Chamar (P. W. 12), and he also saw enough of the change of sari and the wash by Sukni to entitle him to speak to them as he does. These witnesses left the scene just as Kitab Mian (P. W. 8), one of the chaukidars of the village, was coming up with Gulzar Mian (P. W. 9), another Chaukidar. The Chaukidars found that the woman had just had a wash. They also saw the dead body of Tapsi lying in the room; and then Kitab left Gulzar in charge of the scene and fetched Mahangu (P. W. 3), the chaukidar of the beat. Mahangu came up, saw the dead body of Tapsi and then went with Kitab to the thana of Bettiah, four miles away, where he lodged an information which concludes:

> It appears that some one has killed him (Tapsi) just now, in consequence of which he has died.

In this information, Ex. 4, it is stated (and the statement is repeated in the evidence given in Court) that Sukni, when questioned, had said that she had gone outside to relieve nature and on coming back had seen that her husband had been killed by somebody, she did not know by whom. It is also stated that Kitab had seen that her feet and hands were wet and that there was some blood on her jhula. The Sub-Inspector arrived on the scene at about 4-30 in the afternoon. The usual inquest was held in the presence of Sastidat Dubey, (P. W. 5), an assessor punch from a neighbouring village, who happened to be passing by and was stopped by the Sub-Inspector and one Ramghulam Mahton. The house was also searched in their presence, and a garasi full of fresh blood was discovered from under a granary in the room in which Tapsi was lying dead in a pool of blood. There was a large number of incised injuries found on Tapsi, and the Sub-Inspector speaks of the recovery of a yellow sari with blood-stains before the discovery of the garasi. The evidence is that this yellow sari was the sari which Sukni had received from Tapsi at the time of the wedding six or seven days previously. The post mortem showed that Tapsi had no less than fifteen incised injuries, three on the face, three on the chest, one on the shoulder and eight on the neck. Three of the injuries on the neck looked like one big wound and were very long and deep, cutting more than one of the cervical vertebrae together with the blood vessels, trachea, oesophagus and larynx. In the opinion of the Assistant Surgeon who made the post mortem, death was due to shock and haemorrhage resulting from the three injuries on the neck. In the room the Sub-Inspector had found blood not only on the floor but also on the wall and the granary up to a height of six feet. On the 30th July Sukni was produced before the Magistrate at Bettiah as a confessing prisoner and was given one day's time for reflection. On the 31st Babu Jamuna Prasad, a Magistrate of the 1st class, recorded her confession after giving her a particular full warning under S. 164, Criminal P. C. In this confession Sukni stated :

> I am possessed by two evil spirits. I was married to Tapsi at Dhumanagar six days previous (to the occurrence). Four days ago, one of the two spirits slept with me at noon. My husband Tapsi came with grass and slept in the house by my side. The spirit pressed me (saying) as to why I was making him sleep by my side and that I should kill him (my husband) otherwise he (the spirit) would kill me. Thus I lost my senses and cut my husband Tapsi with a garasi. When I regained my senses, I began to cry. On this people turned up. Ghunia Chamain and Batunbahu (wife of Batun) came. I narrated all the facts to them. Also a day before the occurrence a spirit had possessed me. I regained my senses by means of exercising. I did not kill my husband while in senses.

The evidence of the witnesses to whom we have referred has been scrutinised before us, but nothing has been shown to us which will throw any doubt on the truth of statements made by them. (The judgment then discussed the evidence and proceeded). We do not think that the confession gives any ground at all for suspecting that the Sub-Inspector had tutored her or brought any pressure to bear upon her or had offered her any inducement. The contents of the confession, the story of being possessed by two evil sprits and so

on, can hardly be said to be such as any Sub-Inspector could have suggested. What is more, Patia, who is by no means unfriendly to Sukni, speaks of a strange incident of the previous day when she was cleaning Sukni's hair and Sukni began to shiver and behave strangely and closed her eyes (though she did not faint) and said that she was a netua of Chainpatia and only came to a ghanta or two afterwards, after one Rajkumar Chamar (who was not called as a witness in the case) had sprinkled water on her face. This supports the story of exercising that is mentioned in the confession. But even apart from the confession, we have in the present case the facts that Sukni and Tapsi were alone in the house, that Tapsi is not known to have had any enemy, and that there was a garasi with fresh blood on it which goes some little way to suggest (as the learned Sessions Judge has shown) that the deed was not done by an outsider, the blood on Sukni's clothes, particularly the yellow sari, which (as the Sessions Judge found) looked as if the blood had spurted on it, and lastly the circumstance that though there were so many injuries on the neck, the neck was not cut which suggests, though it does not absolutely prove, that the injuries were inflicted by a weak female. The theory that Tapsi may have been murdered by an unknown person while Sukni was away relieving nature also becomes difficult to believe when we take into account her behaviour after her alleged discovery of the murder : she calls out to neighbours, but none of them finds her weeping though she was a bride of but six days. So far as is known whether to Sukni or to the witnesses in the case, Tapsi had no enemy; and his poverty also helps to make the story of murder by an unknown person extremely improbable. These considerations taken all together point to but one conclusion.

The case was tried with the help of four assessors who were not satisfied that the accused had done the deed, apparently because she was not shown to have had any reason to do it. The absence of a motive is however not a sufficient reason for coming to the conclusion that the witnesses in the case are all telling lies, they also have no reason to do so, or that the confession is false. Agreeing with the learned Sessions Judge we hold that the murder of Tapsi has been brought home to Sukni. The question of sentence seems to have caused some difficulty to the learned Sessions Judge, who says that if and when it is decided to uphold the conviction, the High Court would doubtless consider whether the sentence should be reduced to transportation for life on account of Sukni's youth or on account of her primitive beliefs. As to these beliefs, the learned Sessions Judge was apparently referring to Sukni's story of the two spirits possessing her. Some support is given to that story by the way she behaved in the house of her first husband and the incident of the previous day spoken to by Patia. It ought to be made clear at once that that story is not a story which will save Sukni by making S. 84, I. P. C., applicable.

It is not a case of unsoundness of mind rendering her incapable of knowing the nature of the act or that she was doing what was either wrong or contrary to law. On her own showing she knew perfectly well that she was killing her husband; and she was (according to that story) killing him in pursuance of the bidding of the spirit on pain of being killed herself by that spirit. She was perfectly sane at the time of the trial, but the committing Magistrate's suggestion that she should be placed under medical observation at the headquarters of the district seems to have been overlooked, though on the two occasions when the Civil Surgeon of Motihari saw her with special reference to her mental condition, no reason was found to suspect unsoundness of mind, and her behaviour in the District Jail had been quite normal. The unnecessary brutality of the murder, the large number of injuries inflicted not only on the neck, but also on the chest and face, the fact that she herself brought the neighbours on the scene by her cries, and her failure to make even a pretence of grief by shedding tears, are however features which, together with the want of an intelligible motive, and the full confession made by her, seem to bring this case within the class in which it is not usual to pass the capital sentence: see the observations in 10 Bom 512 (1). We are inclined to think that, like the last case, the present is a case where future symptoms may, perhaps, throw more light on

1. Queen-Empress v. Lakshman Dagdu, (1886) 10 Bom 512.

the mental condition of the accused and possibly justify a reduction of sentence by the Local Government; but that is not a matter with which we are directly concerned at the present moment. While upholding the conviction under S. 302, I. P. C , we therefore decline to confirm the death sentence, and pass instead a sentence of transportation for life upon Mt. Sukni. Let a copy of the judgment be sent to the Local Government together with the paper book for such action as may be considered proper.

R.M./R.K. *Order accordingly.*

A. I. R. 1936 Patna 248

DHAVLE, J.

Ganauri Mia—Accused – Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 345 of 1935, Decided on 23rd July 1935, from order of Magistrate, Gaya, D/- 28th June 1935.

(a) Criminal Trial — Trespass and riot—Joint trial — Person found in possession of another's shop after riot— No finding as to whether person is put in possession by rioters or whether object of riot was to transfer possession—Joint trial of person accused for trespass with those accused of rioting is not proper.

A person was accused of an offence of trespass under S. 448, I. P. C. He was tried jointly with other persons who were accused of rioting. During the trial there was no finding of the Court to the effect that the trespasser was put in possession of the shop trespassed upon by the rioters or that the riot was caused in furtherance of an intention to put the trespasser in possession by ousting the possession of another:

Held: that joint trial was not proper.

[P 248 C 2]

(b) Criminal Trespass—Accused put in possession of property after riot—Possession of complainant ending before possession of accused began—Offence under S. 448, I. P. C., not made out—Intention to annoy if can be inferred.

The offence of criminal trespass is not made out merely by the fact that after the riot the accused is found in possession, the possession of the complainant having come to an end some time before that of the accused began. Intention to annoy in a charge for trespass cannot be properly inferred from something done after the complainant's possession of the property trespassed upon had come to an end.

[P 248 C 2]

G. Muhammad and *H. R. Kazimi*—for Petitioner.

Judgment.—In this case eight persons were charged with rioting, and there were several individual charges against some of them besides a charge under S. 448, Penal Code, against the petitioner. As to the petitioner, the finding of the lower Courts is that he

> was not seen at the occurrence near the house nor is it alleged that he took part in the loot, but he was found in occupation when the Sub-Inspector came quietly attending to his sewing when the A. S. I. came,

the reference being to the shop that the rioters are said to have looted and apparently turned the complainant out of it. The petitioner's conviction is assailed on two grounds. The first is that he should not have been tried along with the rioters at all as on the findings of the lower Courts his criminal trespass was no part of the riot. This contention is supported by the fact that there is no finding when the petitioner was put into possession by the rioters nor any allegation even that it was the object of the riot forcibly to transfer the possession from the complainant to the petitioner. Even more effective is the second ground urged before me, namely that the offence of criminal trespass is not made out merely by the fact that after the riot the petitioner was found in possession of the shop, the possession of the complainant having, on the findings of the lower Courts, come to an end some time before that of the petitioner began. As regards the criminal intent also, the trial Court says that the petitioner's

> presence in the shop in view of all that had taken place must have given great annoyance to the complainant;

and the learned Magistrate who heard the appeal expressed himself on the same point thus:

> His occupation after the loot was apparently to support the defence claim that the maliks were in possession and amounted to intention to annoy.

It is clear on the findings of the lower Courts that the intention has not been properly found; intention to annoy cannot be properly inferred, if it can be inferred in such cases at all, from something done after the complainant's possession of the shop had come to an end. The rule must, therefore, be made absolute and the conviction of the petitioner under S. 448 set aside. The petitioner is acquitted. The fine, if paid by him, must be refunded.

B.D./R.K. *Rule made absolute.*

A. I. R. 1936 Patna 249

ROWLAND, J.

Raghuni Prasad Mahto and *others*—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 596 of 1935, Decided on 18th November 1935, from order of Dist. Magistrate, Darbhanga, D/- 26th September 1935.

(a) Practice—Record—Order sheet of one case filed in another—Only copy of original order sheet filed on record submitted to appellate Court—Copy should be certified as true copy and number given to original should be noted in margin.

Where an order-sheet in a trial is filed in another case, but on appeal from it only a copy of the original order-sheet is placed on the record submitted to the appellate Court, the original order-sheet being kept in the record of the case in which the order was passed, the proper course, if it is so done, is that the copy placed on the record of the appellate Court should be certified to be a true copy, and on the margin of it it ought to be noted that the original has been given a particular number.

[P 249 C 2; P 250 C 1]

(b) Criminal P. C. (1898), S. 87 (3)—Section applies when statement in writing by Court specifies date on which proclamation was published.

Section 87 (3) is only applicable when a statement in writing by the Court specifies the date on which the proclamation was published. When this is not done the record of such an order will not suffice to take the place of direct evidence of publication and service of proclamation [P 250 C 1]

(c) Penal Code (1860), Ss. 224, 225—Person alleged to be arrested without warrant in exercise of general power of Police Officer under S. 54 (1) thirdly of Criminal P. C.—Proclamation not proved to have been served—Arrest is illegal—Escape and rescue from such custody does not amount to offence under Ss. 224, 225.

Where a person committing an offence under S. 186, Penal Code, is alleged to have been arrested without a warrant, in exercise of the general powers of a Police Officer, S. 54 (1), thirdly of Criminal P. C., but it is not proved that the proclamation mentioned in S. 54 (1) thirdly was duly served, the arrest of the accused without a warrant is illegal, and if the accused escapes or is rescued from the custody of the police, his escape and rescue cannot be said to be from lawful custody and as such are not punishable under Ss. 224 and 225, Penal Code. [P 250 C 1]

Naqui Imam—for Petitioners.

Gopal Prasad for *Asst. Govt. Advocate*—for the Crown.

Order.—The only point of law arising in this case is whether petitioner No. 1 Raghuni was lawfully arrested, so that it was an offence for him to escape from the custody of the constable Rajo Singh and for the other petitioners to rescue him. A prosecution was pending against Raghuni for an alleged offence under S. 186, I. P. C., and a warrant of arrest had been issued against him on his failure to appear in response to a summons. The warrant had come to Mohiuddinnagar Police Station and the constable was aware of this. But he had not the warrant with him. Therefore the provisions of the Code regarding arrest in execution of a warrant did not apply and it is necessary to see whether there were facts entitling the constable to arrest Rughuni in exercise of the general powers of a Police Officer under S. 54, Criminal P. C. That section authorises the arrest without warrant firstly of a person concerned in a cognizable offence or credibly alleged to have been so concerned. This clause does not apply because the offence for which Raghuni was wanted was that of obstructing a Public Officer under S. 186, I. P. C., which is noncognizable. The section authorises arrest thirdly of any person who has been proclaimed as an offender under this Code, and the prosecution relied mainly on this clause, it being their case that a proclamation for the appearance of the accused had been issued and served.

The proclamation has not been put on the record, nor has any witness been examined to prove that he served it. The date on which it was served has also not been disclosed. Prosecution Witness 1, Rajo Singh, Constable and P. W. 8, the Sub-Inspector, have spoken of process having been served under Ss. 87 and 88, but it does not appear from their depositions that either of them speaks from direct knowledge or was present at the service. Then the prosecution relies on Ex. 7, order-sheet of S. 186 case against the accused. With reference to this exhibit, I must point out that the original order-sheet is not on the record as submitted to this Court. There is what purports to be a copy of it, but the copy is not authenticated as a true copy. It has been suggested for the prosecution that probably the original order-sheet may have been marked an exhibit at the trial and that at the conclusion of the proceedings the original order-sheet was kept in its proper place on the record of the S. 186 case, a copy being retained on this record. That is the ordinary procedure, but I should point out that if it is so

done, the copy placed on the record ought to be certified to be a true copy and in the margin of it, it ought to be noted that the "original has been marked Ex. 7," or whatever the number may be. Assuming however that this is a correct copy of the order-sheet, the order relied on is that dated 2nd October 1934 which runs thus:

Process 87 and 88, Criminal P. C., served. Accused absent. Call P. W.s for recording evidence S. 512, Criminal P. C., for 21st October 1934.

The prosecution relied on this order as sufficient proof of the service in virtue of S. 87, Cl. (3):

A statement in writing by the Court issuing the proclamation, to the effect that the proclamation was duly published on a specified day, shall be conclusive evidence that the requirements of this section have been complied with and that the proclamation was published on such day.

This provision is only applicable when a statement in writing by the Court specifies the date on which the proclamation was published. Where this is not done, the recording of such an order will not suffice to take the place of direct evidence of publication and service of the proclamation. I must hold that it is not proved that the proclamation was duly served and that it is not proved that the petitioner Raghuni was a person liable to be arrested without warrant. Consequently, it is not proved that his escape and rescue were from lawful custody and therefore punishable under Ss. 224 and 225. The convictions under these sections must accordingly be set aside and the conviction under S. 147 for rioting with the common object to rescue him, must fail with them. The Rule is made absolute.

R.M./R.K. *Rule made absolute.*

A. I. R. 1936 Patna 250

COURTNEY-TERRELL, C. J.

Janki Das and *another*—Defendants—Petitioners.

v.

Kalu Ram and *another*—Plaintiffs—Opposite Parties.

Civil Revn. No. 511 of 1935, Decided on 20th January 1936, against orders of Sub-Judge, Cuttack, D/- 20th June 1935.

(a) Civil P. C. (1908), O. 14, R. 2—Question whether Court should grant or reject prayer to try preliminary issue of law—Court should observe harmony between general principle that cases should not be tried piece-meal and the wholesome provisions of O. 14, R. 2.

In deciding the question as to whether the Court should grant or refuse a prayer to try a preliminary issue on a point of law, some harmony is to be observed between the general principle that it is undesirable to try cases piece-meal and the specific and wholesome provisions of O. 14, R. 2, Civil P. C., which is for the purpose of preventing the injustice of a party being able to force his opponent to go at great length into evidence when the simple decision on a point of law might render the investigation of the facts unnecessary. [P 252 C 2]

(b) Civil P. C. (1908), S. 115, O. 14, R. 2—Interlocutory order although within discretion of lower Court, can be set aside when discretion is not exercised judicially—Court summarily rejecting prayer for trying preliminary issue on point of law—No opinion expressed as to whether question of law would be sufficient to dispose of case—High Court would interfere in revision.

Interlocutory matters are certainly matters of discretion of the lower Court but that discretion must be exercised according to proper principles of justice but it is the duty of the High Court to interfere when the discretion has not been according to judicial principles. [P 253 C 1]

Where a Court summarily rejects a prayer to try a preliminary issue on a point of law and in its summary jurisdiction has not even expressed any opinion as to whether the question of law would be sufficient to dispose of the case, to refuse to exercise the revisional jurisdiction in such case might give rise to the gravest hardship. The injured party has no right of appeal and refusal to exercise jurisdiction would mean that the lower Court's unfettered decision might put the injured party to the enormous expense in going into the issues which were unnecessary on the mere contention that the ultimate decision would be open to appeal: 1935 *Pat* 385, *Foll.*; 1934 *All* 986, *Not foll.* [P 253 C 1]

(c) Civil P. C. (1908), O. 14, R. 2—O. 14, R. 2 is mandatory—Only discretion left with the Court is to form and express opinion if case can be disposed of on issue of law only.

O. 14, R. 2 is mandatory; the only thing left open to the Court is to form and express an opinion of whether the case can be disposed of on the issue of law, but the opinion even if expressed must be expressed upon some reasonable materials. [P 253 C 1]

S. M. Mullick, *G. P. Das* and *G. C. Das*—for Petitioners.

P. K. Sen and *P. Misra*—for Opposite Parties.

Order.—This is a petition for the civil revision of an order by the Subordinate Judge of Cuttack declining to act under O. 14, R. 2, Civil P. C., and to direct the preliminary hearing of a certain issue in a suit. The facts which have given rise to the suit and the matter now before me may be shortly stated as follows: A firm called 'Janki Das Subhkaran' carries on business in Calcutta and another firm called 'Ganesh Das Kalu Ram' carries on business in

Cuttack. They had a series of dealings in merchandise between them. The Calcutta firm sued the Cuttack firm in the High Court in Calcutta alleging that a certain series of contracts had been entered into between them and the Cuttack firm in relation to betel-nuts and paddy, that the defendants had broken the contract and that the plaintiffs had a claim against the defendants for a sum of money. The defendants very shortly afterwards began a suit in the Court of the Subordinate Judge at Cuttack against the Calcutta firm setting forth that they had been in business relationship with the Calcutta firm, alleging the Cuttack firm's version of the nature of the contract, alleging breaches by the Calcutta firm of the alleged contract, and claiming from the Calcutta firm payment of a sum of money. The Cuttack firm then put in a written statement in answer to the suit in Calcutta against them by the Calcutta firm and in para. 9 of that written statement the defendants alleged that far from it being the case that the Cuttack firm was indebted to the Calcutta firm for the alleged breaches of the alleged contract, the contract was of a very different nature, that the plaintiffs (the Calcutta firm) had broken the contract and there was a liability on the part of the Calcutta firm to the Cuttack firm, further stating specifically that in respect of that liability of the Calcutta firm to the Cuttack firm the latter had already begun a suit in the Subordinate Judge's Court at Cuttack against the Calcutta firm.

It is clear therefore that the issues in the Calcutta case which would ultimately have to be settled between the parties were as to what was the nature if any, of the contract of dealing between the plaintiffs and the defendants of the suit, whether there had been breaches of the alleged contract, whether the defendant-firm owed the plaintiff-firm money or whether it was just the other way. It is true that in the suit in Calcutta the Cuttack firm did not raise a formal counter-claim in respect of the indebtedness which they alleged had been incurred by the Calcutta firm, but they set up that indebtedness as a defence to the suit and said that the same matter of indebtedness was the subject of the suit by the Cuttack firm against the Calcutta firm in the Cuttack Court. The parties were brought by mutual friends into a state of mind that they thought it might be well to refer the matter to arbitration and accordingly under the aegis of the Court two arbitrators were appointed to enter into the merits of the dispute, who stated in their award that neither party owed anything to the other. It was about the time of entering into this arbitration that an application was made in the Cuttack Court to stay the further hearing of the suit brought by the Cuttack firm on the ground that the matter was to receive the attention of the arbitrators, and an order was made on that application staying the further hearing of the suit. The form of the award made by the arbitrators was the subject of some discussion before the Court and the High Court at Calcutta referred the award back to the arbitrators for further consideration with the order that the award might be made more explicit. The arbitrators proceeded to comply with that order and reiterated the statement that in respect of the respective claims by each party against the other, neither was under any liability to the other. The Cuttack firm then objected to the award before the learned Judge of the High Court in Calcutta on the ground that the award purported to deal with matters in dispute other than the litigation before that Court and they said that the award should not be made an order of Court because it purported to deal with the Cuttack suit which was outside the jurisdiction of the Calcutta High Court which had no power to dismiss a suit brought in Cuttack. The learned Judge dealt with that objection and delivered a judgment which I think is perfectly clear, but which seems to have been misunderstood by the learned Subordinate Judge in the Court below.

The learned Judge stated that the written statement in the Calcutta suit set forth the matter of the alleged liability of the plaintiffs to the defendants and the version of the contract as put forward by the defendants as a basis for their allegation of the plaintiffs' liability, and that that matter, viz., the question of the alleged liability of the plaintiffs to the defendants, was, it is true, made the subject of the award but, on the other hand, the arbitrators did not purport in form to deal with the suit that was brought in Cuttack. I may quote a few sentences of the learned Judge's observations which to my mind put the

meaning of his order beyond dispute. He says :

> It seems to me that what they have done is to say that they have taken into account all the matters that have been placed before them in both suits The matters in dispute all arose out of the same series of transactions and it is urged on behalf of the Calcutta firm who are opposing this application that it is essential in coming to a conclusion in either this suit or the other to take an account of the various transactions between the parties. All that the arbitrators have done, they say, is to take an account, and in that account they are bound to know what claims have been made against either party, what are the debits and what are the credits; on looking into that account the arbitrators have come to the conclusion that neither party should have anything debited or credited against it.

The difficulty in the Cuttack suit has however arisen by reason of the ultimate sentences in the learned Judge's decision. That passage runs:

> They have only purported in their award to deal with matters which have come before them in examining the various transactions between the parties and their award is only as I interpret it to the effect that this suit, namely the Calcutta Suit No. 15 of 1932, be dismissed and it must be concluded that they have not dealt with the claim in the Cuttack suit which no doubt they will deal with separately.

Now, as a matter of fact, the arbitrators did issue an award in the Cuttack suit that the suit must be dismissed. An application was made to the Subordinate Judge at Cuttack to set aside the award. This application was made by the plaintiffs (the Cuttack firm) alleging that the award was made without hearing adequately the applicants. The Subordinate Judge acceded to that request and set aside the award and this Court on an application under revision declined to interfere with the decision. Now in the Cuttack suit the issues had been framed and the Calcutta firm (the defendants) made an application to the learned Subordinate Judge that he should first decide the issue as to whether or not the matters in dispute in the suit have already been a matter of res judicata in view of the award of the arbitrators in the Calcutta suit and the judgment of McNair, J., making that award an order of the Court. The learned Subordinate Judge allowed a fresh issue to be added to the effect "Is the suit barred by the principles of res judicata," but was disinclined to have this tried as a preliminary issue. The Calcutta firm, however, requested him to put this down as a preliminary issue and have it decided before entering upon the somewhat lengthy inquiry as to the nature of the contract between the parties and whether there had been a breach or not of such contract and whether the plaintiffs had suffered the alleged or any damage. When the matter came before him on the first occasion the learned Judge contented himself with the statement that it was undesirable to try cases piecemeal as such a course might result in a remand and the ultimate taking of evidence at a very much later stage; and the learned Advocate on behalf of the opposite party (the Cuttack firm) has endeavoured to support that decision by the general proposition that cases should not be tried piecemeal and has referred to that series of authorities in which limitation points have sometimes been decided by a lower Court to the disadvantage of the plaintiff resulting in remand by the High Court and the taking of evidence long after, and to the statements of learned Judges as to the undesirable nature of this practice.

The fact is that some harmony has to be observed between the general principle that it is undesirable to try cases piecemeal and the specific and wholesome provision of O. 14, R. 2, Civil P. C., which is for the purpose of preventing the injustice of a party being able to force his opponent to go at great length into evidence when the simple decision on a point of law might render the investigation of the facts unnecessary. The learned Subordinate Judge had the matter of this application before him on a second occasion and he then delivered an extremely lengthy judgment frankly stating that his original decision was couched in terms which were inadequate to justify the order and endeavouring to justify the order by reference to the judgment of McNair, J., which, in my opinion, he misunderstood. He has nowhere definitely expressed the opinion that the case could not be disposed of on the issue of law only nor is there any ground in this case for supposing that the question of res judicata cannot be easily decided as a preliminary issue. It is only necessary for the decision of that question to look at the pleadings in the Cuttack case and in the Calcutta case, to examine the awards of the arbitrators, to refer to the judgment of McNair, J., and to the circumstances in which the Cuttack case was stayed and then to arrive at a decision

as to whether or not the matter in issue is or is not a matter of res judicata by reason of the earlier Calcutta decision.

A further point arises as to whether or not this is a matter which can properly be dealt with by this Court in revision and my attention has been called to a decision of the Allahabad High Court in 1934 All 986 (1). In that case the learned Chief Justice and Rachhpal, J., laid down that even where the Court below summarily rejected the prayer to try a preliminary issue on a point of law and in its summary rejection had not even expressed any opinion whether the question of law would be sufficient to dispose of the case that the jurisdiction had been exercised and should not be interfered with by the High Court. No doubt the learned Judges of the Allahabad High Court have been very sparing in their exercise of revisional jurisdiction. The attitude of this Court, however, is set forth in the case of 16 P L T 311 (2). To refuse to exercise the revisional jurisdiction in a case of this kind might give rise to the gravest hardship. The party injured has no right of appeal and a refusal to exercise jurisdiction would mean that the Subordinate Judge's unfettered decision might put the injured party to an enormous expense in going into issues which were unnecessary on the mere contention that the ultimate decision would be open to appeal. Interlocutory orders are certainly matters of discretion of the lower Court, but that discretion must be exercised according to the proper principle of justice and with regard to the proper interpretation of the rules in question, and I conceive it the duty of this Court to interfere when the discretion has not been exercised according to judicial principles. O. 14, R. 2 of the Code is mandatory; the only thing left open to the Court is to form and express an opinion of whether the case can be disposed of on the proposed issue of law only, but the opinion, even if expressed, must be expressed upon some reasonable materials. In this case first of all the Court has not properly expressed its opinion, and secondly to express an opinion that the case cannot be disposed of on the question of law would be on the materials erroneous.

I direct therefore that the additional issue in the case, "Is the suit barred by the principles of res judicata," be tried preliminary to the other issues before the Court. The application is therefore allowed. As the matter was of some importance and the parties were heard at length I assess the cost at three gold mohurs.

R.M./R.K. *Application allowed.*

1. Shanta Nand Gir v. Basudeva Nand Gir, 1934 All 986=153 I C 546=1934 A L J 1204.
2. Harihar Prasad Narain Singh v. Gopal Saran Narain Singh, 1935 Pat 385=155 I C 976=14 Pat 488=16 P L T 311.

A. I. R. 1936 Patna 253

WORT, J.

(*Babu*) *Banarsi Lal* and *others*—Decree-holders—Appellants.

v.

Borho Sahu — Judgment-debtor and *another*, Surety—Respondents.

Appeal No. 325 of 1[illegible] Decided on 24th January 1936, from appellate order of Dist. Judge, Monghyr, D/- 16th August 1935.

(a) Civil P. C. (1908), O. 21, R. 2 (3)—O. 21, R. 2 (3) is mandatory—Payment not certified will not be recognised.

Order 21, R. 2 (3) is mandatory and means that, if there is a question of any payment in satisfaction of the decree or adjustment of the decree which has not been certified the Court shall refuse to recognise it in execution proceedings. [P 254 C 1]

(b) Civil P. C. (1908), O. 21, R. 22—Decree against father and son—Son dying before execution — Execution taken out against father personally and not as heir of son—Notice under O. 21, R. 22 is not necessary.

Where a decree is passed against father and son and the son dies before the institution of the execution proceedings and execution is taken out against the father not as heir of his son but against him personally, notice under O. 21, R. 22 is not necessary. [P 254 C 2]

(c) Civil P. C. (1908), O. 21, R. 2 (3)—O. 21, R. 2 (3) contemplates certification before objection is taken to execution on basis of adjustment.

Sub-clause (3) of R. 2, O. 21, clearly contemplates a certification before the objection is taken to the execution on the basis of an adjustment or payment in satisfaction of the decree or when the executing Court is about the business of execution, and, as such it is too late to apply for certification under O. 21. It is too late, when an objection is taken to the proceedings in execution, to assert that there is an agreement which has not so far been certified. [P 254 C 2]

(d) Civil P. C. (1908), O. 21, R. 2 (3)—Agreement between judgment debtor and decree-holder that balance of decree would be paid by instalments and that decree-holder will not be entitled to interest amounts to adjustment—It cannot be recognised unless certified.

The obvious policy of the legislature is to prevent a controversy during execution proceedings as to whether the dispute between the parties has been settled and the legislature enacting O. 21, R. 2 has used words which are of widest implication. Reference has been made not merely to payment but a payment of a part or a whole. [P 256 C 2]

Where part payment of the amount due under a decree is made by the judgment-debtor and it is agreed between the parties that not only the balance of the decree but also another decree should be paid by instalments and that the decree-holder would accept the instalments without interest, the arrangement amounts to an agreement which is certifiable under O. 21, R. 2, although only part of the decree is paid. Such an agreement affects the right of the decree-holder to execute the decree and it amounts to an adjustment and cannot be recognised unless certified: 13 *I C* 326; 1927 *Mad* 911; 1926 *Mad* 184 and 1933 *Mad* 28, *Ref.* [P 255 C 1; P 256 C 1]

G. P. Das—for Appellants.

B. B. Saran—for Respondents.

Judgment.—This is an appeal from an order of the District Judge who dismissed summarily an appeal from the order of the Munsif allowing an objection by the judgment-debtor in an execution case. The case is one of some difficulty, but in spite of that Mr. Lucas, the District Judge, seems to have thought it of little importance and, as I have stated, dismissed the case summarily. It is true that one of the main points which has been argued before me does not appear to have been argued before the lower appellate Court. But it was a point of law which in the circumstances arose and should have been disposed of by the Courts below having regard to the provisions of O. 21, R. 2, Civil P. C. In dismissing summarily the appeal before him the District Judge in effect dismissed the execution proceedings and recognized an adjustment or compromise of a decree which had not been certified under O. 21. O. 21, R. 2 (3) is mandatory and provides:

> A payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognized by any Court executing the decree.

I understand that to mean (although the point has not been taken) that if there is a question of any payment in satisfaction of the decree or adjustment of the decree which has not been certified, the Court shall refuse to recognize it in an execution proceedings. It has been argued in this case that the Judge of the trial Court was wrong in recognizing the adjustment which in this case is alleged to have been made. There is also a further question which I propose to deal with at once and that is that of the two persons who were judgment-debtors (father and son), the son having died before the present execution, the decree-holders should have given notice under O. 21, R. 22, which was not done. O. 21, R. 22, provides :

> Where an application for execution is made against the legal representative of a party to the decree, the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause.

Now quite clearly O. 21, R. 22, provides for a case where a person against whom execution has been taken out is not on the record of the execution case, or, if he is on the record, execution is being taken out against him as such. The short answer to this point is this: that in this case it is not asserted by the decree-holders that they are taking out execution against the father as heir (if he be that) of the son. The result may be that if the execution proceeds difficulties might arise, but with those difficulties we are not concerned. To repeat what in my judgment is conclusive on this matter, the decree-holders in these execution proceedings are taking out execution against Borho Sahu personally, not against him as the legal representative of his son. Therefore notice under O. 21, R. 22, is unnecessary. It is obvious that some meaning must be given to O. 21, R. 2 (3):

> A payment or adjustment which has not been certified or recorded . . . shall not be recognized by any Court executing the decree.

It was faintly argued in the first instance that the Court could recognize or certify this arrangement if proved at the stage at which the matter was when the objection was raised. With that I cannot agree. It would be in a sense repealing the third sub-clause of R. 2 of the order if that view of the law were taken : in other words, sub-cl. (3) clearly contemplates a certification before the objection is taken to the execution on the basis of an adjustment or payment in satisfaction of the decree, or, to put it in another way, when the executing Court is about the business of execution as such it is too late then to apply for certification under O. 21. It is therefore too late, when objection is taken to the proceedings in execution, to assert that there is an agree-

ment which has not so far been certified. Now the argument by the learned Advocate for the respondents in this case is this: that the arrangement (set out in his petition) was that on the date the payment of Rs. 200 was made, that is to say, on the day that he was arrested, it was agreed that not only the balance of this decree but also another decree should be paid by instalments. Para. 5 of his (the judgment-debtor's) petition asserted that that arrangement was made and that the decree-holders agreed to that arrangement and agreed to accept these instalments without interest. Before I deal with that I revert for a moment to the other question. Assuming it was an adjustment contemplated by O. 21, R. 2, this objection could be taken in substance to be an application to certify the payment. Now that will depend in this case upon the question of whether such an application was barred by limitation apart from the other considerations which I have stated. Now in the ordinary circumstances this point not having been raised in its particular form there was no decision by the trial Court on this matter, and, if it became necessary, the case would be remanded to the Judge to come to some finding with regard to this question.

But I am entitled, in the circumstances, to consider the matter under S. 103, Civil P. C., and I adopt that procedure all the more readily in this case because the fact is sufficiently clear from the record. It was the judgment-debtor's own case that this arrangement was made on the date of payment, that appears in his petition, and from the order-sheet it is found that the payment of Rs. 200 was made on 24th September 1934. As the objection was made in February of the following year, it is clearly barred by the rule of ninety days' limitation. I again come back to the point of whether this was a payment or adjustment coming within O. 21, R. 2. Now this point has never been directly decided, but the nearest case is the decision of the Calcutta High Court in 13 I C 326 (1). Coxe, J., decided that the arrangement which they were there considering was an adjustment within the meaning of O. 21, R. 2, and therefore certifiable, and that without certification the Court could not recognize it. In the course of his judgment he made this observation :

> It may be open to doubt whether a mere agreement to grant time would be an adjustment within the meaning of that section; although, speaking for myself, I should be inclined to think that it would be such an adjustment.

It is not necessary in this case to fall back upon the words of the Court in that case as it is asserted by the judgment-debtor in this case that not only was it an agreement to give time, but it was also an agreement to relinquish the interest which the decree-holders would otherwise be entitled to. Again in 50 Mad 897 (2), there was an appeal by the judgment-debtor and the question which came to be decided was whether by reason of S. 92, Evidence Act, an agreement which was not contemplated by O. 21, R. 2, that is to say, an agreement which did not extinguish the decree as such but which varied or modified a decree, could be proved having regard to the section of the Evidence Act to which I have referred. They there took a view different from the Calcutta High Court and also from that of one of the learned Judges of the Allahabad High Court and held that in any event any agreement made, barring in any way the decree-holder's right to execution to be recognized by the Court, must be certified. In a case reported in 49 M L J 730 (3), Wallace, J., as he then was, was considering the question of whether an agreement in the form of a composition scheme under which a decree-holder was to accept 80 per cent of his debt, was an adjustment of a decree and therefore certifiable and came to the conclusion that it was, as according to the decision of the learned Judge the decree did not become executable in full. The learned Advocate appearing on behalf of the respondents argues that if the decree-holder is entitled hereafter to execute his decree, it is not an adjustment within the meaning of O. 21, R. 2. I trust I have not misunderstood the argument, but as it appeared to me, it was an argument, to express it in other words to this effect; if at any time the decree-holder could execute any de-

1. Sham Lal Chatterjee v. Hazari Mal, (1912) 13 I C 326.

2. Rajah of Kalahasti v. Venkatadri Rao, 1927 Mad 911=105 I C 248=50 Mad 897=53 M L J 533.

3. Venkataswami v. Kotilingam, 1926 Mad 184=91 I C 1051=49 M L J 730.

cree, it was not an adjustment under O. 21, R. 2. That argument in any event cannot be accepted for obvious reasons. It is an agreement which is certifiable under O. 21, R. 2 although only a part of the decree has been paid. That is obvious from the plain reading of the rule. That is the first answer to the argument advanced. Again the case which would assist the respondents most in this respect is the decision in 49 M L J 730 (3), to which I have already referred. But there the decision was no more than this: that if the decree was executable in full there could be no adjustment within the meaning of O. 21, R. 2. But the learned Judge deciding the other case did not contemplate or did not say that if the decree could be executed at all there was no adjustment within the meaning of O. 21. Now there is the other decision in 56 Mad 198 (4) to the effect that an agreement which extinguishes a decree as a whole or in part is an adjustment within the meaning of the rule, and:

> A promise to do something in future is legal consideration, and there is no legal impediment in the way of a decree-holder accepting a mere promise that the judgment-debtor will do something at some future date as a legal and immediate adjustment in satisfaction of his decree.

I am reading for the moment from the head-note in that case which accurately states the effect of the judgment of the Court. I have already said and repeat that there is no definite decision on this point by any Court and the possible explanation of that is this: that in most of the cases I have referred to, objection has been advanced by the decree-holder in the first instance asserting that the agreement made is not certifiable under O. 21, R. 2. In this case we have an agreement on the judgment-debtor's own showing which has certainly affected the decree-holders' right to execute if that agreement can be proved. The question is whether it answers to the description of an adjustment under O. 21, R 2: It s true that the decree-holders under the agreement are not entitled to execute a decree but it is also obvious that they cannot execute their decree immediately nor could they execute the full decree in the sense that the interest has been remitted. I must say that I do not feel disposed to hold that under these circumstances it is not an adjustment. It has been stated by a number of Judges in many cases that the obvious policy of the legislature is to prevent a controversy during execution proceedings as to whether the dispute between the parties has been settled, and it seems to me that the legislature enacting O. 21, R. 2 has used words which are of the widest implication. Reference has been made not merely to payment but a payment of a part or a whole. As I have already said it appears to me that the words used are wide enough to contemplate the agreement alleged in this case. As the adjustment was not certified under the rules of the Code of Civil Procedure (O. 21, R. 2), the trial Court should have dismissed the objection as the law prohibits a Court to recognize any such payment or adjustment.

It seems to me that the decisions of the Courts below were wrong and they must be set aside and the appeal allowed. As the point was not taken in the exact form in which it was argued before me, there will be no costs. The judgment-debtors of course in the circumstances will get credit for Rs. 200 admitted to have been received by the decree-holders.

R.M./R.K. *Appeal allowed.*

4. Ramanarsu v. Venkata Reddi, 1933 Mad 28 =141 I C 429=56 Mad 198=63 M L J 598.

A. I. R. 1936 Patna 256

JAMES, J.

Barari Co-operative Bank, Ltd.—Petitioner.

v.

Singheswar Jha—Opposite Party.

Civil Revn. No. 569 of 1935, Decided on 20th January 1936, from order of Dist. Judge, Bhagalpur, D/- 30th July 1935.

Civil P. C. (1908), O. 21, R. 58, Ss. 47 and 115—O. 21, R. 58 applies to all cases in which judgment-debtor makes objection in representative capacity and not in his personal capacity—Judgment-debtor alleging that land attached is held by him on behalf of deity—His objection falls under O. 21, R. 58 and not under S. 47—Order is not appealable.

Order 21, R. 58 applies in all instances, in which the judgment-debtor makes the objection not in his personal capacity but in a representative capacity, i. e., when he claims to be holding the land on behalf of somebody else, and not merely to cases when the objection is made by a shebait, or a mutawalli or a trustee.

[P 257 C 1]

Where therefore the judgment-debtor on attachment of certain land of which he is in pos-

session objects to the attachment, alleging that the land is debuttar land and that he holds it by virtue of the performance of certain sacrifices to the temple for service of which the land is dedicated, his objection falls under O. 21, R. 58 and not under S. 47 and the order passed on such objection is not appealable, and the appellate Court setting aside the order on appeal acts without jurisdiction. [P 257 C 1, 2]

Raghunath Jha—for Petitioner.

G. N. Mukharji—for Opposite Party.

Order.—The petitioner put into execution a decree against the opposite party by attaching certain land which was in his possession. The judgment-debtor took the objection that he held this land not in his private or personal capacity : the land was debuttar land, and he held it by virtue of the performance of certain sacrifices for the temple to the service of which the land was dedicated. The objection was dismissed for default by the Munsif and the objector appealed to the District Judge. The District Judge held that the objection fell within 'the provision of S. 47, Civil P. C. The order of the Munsif was therefore appealable : and he set the order aside and directed that the objection should be heard. It is argued on behalf of the decree-holder petitioner, the Barari Co-operative Bank, that this objection properly fell under O. 21, R. 58, so that no appeal lay to the District Judge, and he had no jurisdiction to set aside the order of the Munsif. The learned Advocate relies particularly on two decisions, that of a Full Bench of the Calcutta High Court in 39 Cal 298 (1) and that of the Division Bench of this Court in 1 Pat 637 (2). In the Calcutta case a judgment-debtor objected that he held the attached property as shebait, not in his personal capacity ; and it was held by the Court that an objection made in this manner by a shebait could not be treated as an objection made by a party to the decree, so that the provisions of S. 47, Civil P. C., or S. 244, as it was then, did not apply to the case.

In the Patna case the judgment-debtor took the objection that the property attached was wakf, and following the decision in 39 Cal 298 (1) the Judges held that no appeal lay to the District Judge, because the objection was an application under O. 21, R. 58. Mr. G. N. Mukharji on behalf of the opposite party suggests that this rule can only apply when the objection is made by a shebait or mutawali or a trustee ; but I think it must be held to apply in all instances in which the judgment-debtor makes the objection not in his personal capacity but in a representative capacity, that is to say, when he claims to be merely holding the land on behalf of somebody else. In the present case the judgment-debtor is himself holding the land on behalf of the deity to whom it had been dedicated in consideration of his performing certain services for that deity ; and the principle laid down in the decisions cited on behalf of the petitioner must be held to apply. The application was therefore made under O. 21, R. 58. The District Judge had no jurisdiction to set aside the order of the Munsif and his order in appeal must be set aside. The application is allowed with costs. Hearing fee one gold mohur.

R.M./R.K. *Application allowed.*

1. Kartick Chandra Ghosh v. Ashutosh Dhara, (1912) 39 Cal 298=12 I C 163 (F B).
2. Nazir Hussain v. Ejaz Hussain, 1922 Pat 196 =67 I C 438=1 Pat 637=3 P L T 432.

1936 P/33 & 34

A. I. R. 1936 Patna 257

SAUNDERS, J.

Babu Ramlal—Plaintiff—Petitioner.

v.

Secy. of State — Defendant—Opposite Party.

Civil Revn. No. 585 of 1935, Decided on 23rd January 1936, from order of Sm. C. C. Judge, Gaya, D/- 3-9-1935.

Provincial Small Cause Courts Act (1887) S. 25—Suit for damages, against Secretary of State in respect of consignment booked with railway—Wilful neglect on part of railway must be proved—Lower Court holding that misconduct on part of railway not proved by mere fact that damage was caused by rain water coming through flaps of wagon—It commits no error of law—High Court will not interfere.

If the plaintiff, in a suit for damages against the Secretary of State, in respect of consignment booked with a railway company, fails to prove wilful neglect on the part of the company, he equally fails to prove wilful misconduct, which cannot be less than wilful neglect. The expression "wilful neglect" means that the act was done deliberately and intentionally and not by accident or inadvertence, so that the mind of the person who does the act goes with it. [P 258 C 2]

Where, therefore, there is no finding nor there is any evidence on which a finding could be based that there was any omission on the part of the railway to observe any prescribed precautions for the protection of goods from the risk of damage by rain water, by which they are alleged to have been damaged, and the lower Court holds that misconduct on the part of the railway cannot be inferred from the mere fact that damage was caused by the entry of water between the hinges of the door-flaps of

the wagon, he cannot be said to have committed any error of law and the High Court will not interfere in revision: 1930 *Pat* 283, *Foll*; 1933 *Pat* 630, *Not foll.*; 1932 *Mad* 544, *Disting.* [P 258 C 2]

U. N. Banerjee—for Petitioner.

Netai Chandra Ghosh—for Opposite Party.

Order.—This application under S. 25, Small Cause Courts Act, arises out of a suit by the petitioner against the Secretary of State for damages in respect of two consignments, one of piece-goods and the other of rice, which reached their destination, a station on the E. I. Ry., in a damaged condition. The former consignment was on a contract with the G. I. P. Ry., which, however, was not made a party to the suit, and the latter had been delivered to the E. I. Ry. In both cases the plaintiffs executed risk-notes freeing the railway from responsibility for the condition in which the goods might be delivered to the consignee and for any loss arising from that cause except upon proof that such loss was due to misconduct on the part of servants of the railway administration. The damage was caused by rain water and, as the roofs and sides of the wagons were found to have been water-tight, it was presumed that rain-water must have forced its way into the wagons through the crevices between the door flaps and the walls. The learned Judge who tried the suit held that damage caused in this manner could not in the circumstances of the case be attributed to misconduct. With respect to the first consignment he dismissed the suit also on the ground that the G. I. P. Ry. had not been impleaded and the plaintiff had failed to prove that the damage had been caused while the goods were being conveyed on the E. I. Ry. It is contended on behalf of the petitioner that the finding with regard to the responsibility of the E. I. Ry. is wrong. Mr. U. N. Banerjee appearing for the petitioner relied on 1933 Pat 630 (1) in which a single Judge of this Court took the view that failure to provide against such an ordinary contingency as rain-water forcing itself into the wagon and causing damage to grain in it amounts to misconduct. It has, however, been held in 11 P L T 161 (2), by a Division Bench of this Court that if a plaintiff fails to prove wilful neglect, he equally fails to prove wilful misconduct, which cannot be less than wilful neglect, and that the expression "wilful neglect" means that the act was done deliberately and intentionally and not by accident or inadvertence so that the mind of the person who does the act goes with it.

Mr. Banerjee relied also on the case of 62 M L J 573 (3), but that was a case in which it was found that there had been reckless carelessness on the part of the railway and deliberate omission to take reasonable care. Mr. Banerjee referred to another decision of a single Judge of this Court in 16 P L T 837 (4) in which it was held that an unexplained and habitual failure to act in accordance with rules or standing orders obviously designed to prevent damage to goods by water amounts to misconduct on the part of the railway administration. In the present case there is no finding, nor is there evidence on which a finding could be based, that there was any omission on the part of the railway to observe any prescribed precaution for the protection of the goods from risk of damage by rain-water. No error of law has been committed by the learned Judge in his finding that misconduct should not be inferred from the mere fact that damage was caused by the entry of water into the wagon between the hinges of the door-flaps. In this view of the matter it is not necessary to consider the other ground on which the suit was dismissed with regard to one of the consignments. The application is accordingly dismissed with costs. Hearing fee two gold mohurs.

R.M./R.K. *Application dismissed.*

1. Jamunadas Ramjas v. E. I. Rly., 1933 Pat 630=148 I C 396.
2. Durga Dutta ShriRam Firm v. Secy. of State, 1930 Pat 283=124 I C 833=9 Pat 733=11 P L T 161.
3. S. I. Rly. Co. Ltd. v. Messrs V. M. S. P. Brothers, 1932 Mad 545=137 I C 884=62 M L J 573.
4. B. N. Rly. v. Janki Das Marwary, 1936 Pat 70=159 I C 580=16 P L T 837.

A. I. R. 1936 Patna 258

WORT, J.

Mukhram Mahto and *others*—Plaintiffs—Appellants.

v.

Kesho Prasad Singh Bahadur — Defendant—Respondent.

Appeal No. 387 of 1933, Decided on 23rd January 1936, from appellate decree of Dist. Judge, Shahabad, D/- 23-12-1932.

(a) Landlord and Tenant—Rent—Decree for—Execution—It is not obligatory on part of landlord to execute rent decree against rent paying property—He may execute it against other property belonging to judgment-debtor—But Bengal Tenancy Act would not then apply—Case would be governed by ordinary law relating to execution of money decree.

It is not obligatory upon the landlord to execute a rent decree against the rent .paying property and not against other properties belonging to the judgment-debtor. He may, if he thinks fit, proceed to execute the decree against other properties owned by the judgment-debtor; but if he does so, he will not have the advantage of the provisions of the Bengal Tenancy Act with regard to rent decrees and would be thrown back into the position of having a money decree in execution of which he can sell the property of the joint family in case the judgment-debtor happens to be a member of joint Hindu family only in those circumstances under which a joint family property would be liable. [P 259 C 2]

(b) Civil P. C. (1908), O. 1, R. 3—Suit for decree against Hindu joint family property—It is not necessary for plaintiff to state that he is suing defendant as karta—Suit against karta without mention of other members—Decree is not liable to be set aside merely because members are not joined—But members can raise question whether decree binds joint family property.

It is quite unnecessary for plaintiff in an action in which he wishes to obtain a decree binding upon the joint family property to state in his pleadings that he is suing the defendant as the karta of the family. It is perhaps better if he did so, but it is not necessary if the plaintiff sues the karta of the family without mentioning the other members of the family and without joining them as parties to the suit. The position is that he may obtain a decree which decree is not liable to be set aside merely because some of the other members of the family were not joined. But in those circumstances they (the other members) are entitled to have an opportunity in a suit of their own to raise the question as to whether the decree and its execution binds the joint family property and that decision would depend upon the ordinary considerations of Hindu law which are well known. The mere omission on the part of the plaintiff to state that the defendant is sued as karta of the family is not conclusive. The intention must be gathered from the plaint and subsequent proceedings. [P 260 C 1]

Harians Kumar and *Mahabir Prasad* —for Appellants.

Rajeshwari Prasad — for Respondent.

Judgment.—This appeal raises a question which presents no difficulty so far as the question of law is concerned, but difficulty so far as the facts of the case are concerned. It is not the business of this Court to consider questions of fact. But the difficulty in the case, to be more particular, arises out of the form in which the plaintiffs claimed their relief. Having regard to the decisions of the Courts below in the principal questions of fact it is clear now that the plaintiffs asked too much. They contended that the whole of the decree was fraudulent, all processes were suppressed and the usual allegations in that regard; but the Courts below have declined to accept the plaintiff's version of that matter. That being so it is quite clear that the plaintiffs were not entitled to a declaration that the decree was a nullity and that the execution was a nullity. At most the plaintiffs would be entitled to a declaration that the right, title and interest only of Ramdahin passed and not the interest in the joint family property.

A certain amount of confusion has arisen by reason of the argument which, as I understand it, was to the effect that as it was a rent decree the plaintiffs were bound to execute it against the rent-paying property and not against the other properties against which execution has issued. There is no obligation on the landlord to do that : he may for reasons best known to himself proceed to execute against other properties, and, if he did, he would not have the advantage of the provisions of the Bengal Tenancy Act with regard to a rent decree and would be thrown back into the position of having the money decree in execution of which he could sell the property of the joint family only in those circumstances under which a joint family property would be liable. I would have no hesitation in coming to the conclusion in this case that the plaintiffs' case failed but for one point. Whereas the appellate Court has dealt primarily and almost exclusively with the question of whether the proceedings were fraudulent, the trial Court under issue 9 dealt to some extent with the question of whether the decree bound the joint family property. It is with regard to the finding of the trial Court on issue 9 that it seems to me the only difficulty in the case arises. The trial Judge observed :

> It will not do for defendant to urge that Ramdahin being the malik the decree is binding against all the members because Ramdahin was not sued as such.

If the learned Munsif meant that Ramdahin was sued in his personal capacity and not in the capacity of karta of the joint family, then of course the matter is concluded in favour of the plaintiffs. But

there seems a possibility at any rate of the learned Judge misunderstanding the position, and that what he meant was merely that Ramdahin was not sued as karta of the family. Now the position is this. It is quite unnecessary for a plaintiff, in an action in which he wishes to obtain a decree binding upon the joint family property, to state in his pleadings that he is suing the defendant as the karta of the family. It is perhaps better if he did so but it is not necessary, as I have said. Now if the plaintiff sues the karta of the family without mentioning the other members of the family and without joining them as parties to the suit, the position is this : that he may obtain a decree which decree is not liable to be set aside merely because the other members of the family were not joined. But, as their Lordships of the Privy Council have pointed out, in those circumstances they (the other members) are entitled to have an opportunity in a suit of their own to raise the question of whether the decree and its execution binds the joint family property and that decision would depend upon the ordinary considerations of Hindu law which are well-known. Now, coming back to the case in hand, as the learned Judge of the trial Court has stated that Ramdahin was not sued as the karta of the family, I think the appellants should have the opportunity of obtaining a decision on that question by the appellate Court.

It must be pointed out that the point is not what Ramdahin was described as, but whether it is clear from the pleadings that he was sued merely in his personal capacity. If the learned Judge comes to the conclusion that Ramdahin was sued in his personal capacity the matter will be concluded in favour of the plaintiffs and the decree and the subsequent execution shall not bind the joint family property. But the mere omission to state that Ramdahin was sued as the karta of the family is not conclusive. The intention must be gathered from the plaint and the subsequent proceedings, and if it is shown that Ramdahin was sued as the karta of the family and, as obviously a decree for payment of rent is a necessity, the property of the family and of the appellants would be involved in such a decree and its execution.

The matter will be remanded for the learned Judge to come to a definite conclusion as to whether the plaintiffs intended to sue Ramdahin as the karta of the family. If the finding is in the affirmative then the plaintiffs' suit fails ; if in the negative, the plaintiffs would be entitled to a declaration that the decree and the execution bound the interest of Ramdahin only and not of the plaintiff-appellants. The plaint and the record of the rent suit will be produced before the learned Judge in the Court below. I have considered the matter carefully and have come to the conclusion that, having regard to the very loose manner in which the plaintiffs framed their suit, and the fact that they were obviously asking what in the circumstances of the case has proved to be too much, the appellants should have no costs of this appeal. The remand to the learned Judge is for the determination of the case finally and the case will not be remitted to this Court.

R.M./R.K. *Case remanded.*

A. I. R. 1936 Patna 260

MACPHERSON AND MOHAMMAD NOOR, JJ.

Nanak Prasad Sahu — Defendant — Appellant.

v.

Mt. Kaseda Kumri—Plaintiff — Respondent.

Appeal No. 1268 of 1931, Decided on 13th November 1935, from appellate decree of Addl. Dist. Judge, Monghyr, D/- 13th June 1931.

(a) Bengal Land Revenue Sales Act (11 of 1859), Ss. 33 and 25—Land sold for arrears of revenue—Appeal to set aside sale filed beyond time—Appeal filed out of time is no appeal in law—Suit to set aside sale is not entertainable.

Where land is sold for arrears of land revenue and an appeal from the order refusing to set aside the sale was filed beyond sixty days of the date of the sale:

Held : that an appeal preferred out of time is no appeal in the eye of the law ; therefore, a suit to set aside the sale cannot be entertained under S. 33 unless the appeal to set aside the sale was filed in time under S. 25 : 1932 *Pat* 21, *Ref.* [P 262 C 1]

(b) Appeal—New point should not be allowed at late stage.

It is very necessary that every discouragement should be given to an invention of new points at a late stage, points which might have been met if taken properly by adducing further evidence: 1927 *Cal* 835, *Foll.* [P 262 C 2]

(c) Bengal Land Revenue Sales Act (11 of 1859), Ss. 2 and 3 — Kistabandi and kist — Meaning of—Kistabandi dates are according

to Fasli era—Latest dates fixed in January, March, June, September, whether are Kistabandi dates — R. 1, Bengal Tauzi Manual, —Definition of word "kist."

In Bihar the original kistband is fixed under the engagement entered into with the proprietors for payment of the Government revenue where almost invariably according to the Fasli era, and the four dates in June, September, January and March fixed for the payment of the Government revenue are the latest dates of payment determined by the Board of revenue under S. 3, Revenue Sales Act, and could not possibly be kistabandi dates of the Fasli era. Where the original kistabandi under S. 2 of the Act is unknown and forgotten the latest dates fixed under S. 3 are popularly known as the kist dates. They are not the kistbandi dates as provided by S. 2 but only the latest dates of payment as fixed by the Board of Revenue under S. 3 of the Act. R. 1 of the Bengal Tauzi Manual sets out that the tauzi roll of a district is the list of the estates from which the land and police revenue of the district is collected, showing the revenue assessed upon each estate divided into the amounts due on each latest day of payment, while the term "kist" indicates "the period between one latest day for payment of arrears of revenue and the next" and that the word is not used therein in the restricted meaning assigned to it by S. 2, Bengal Land Revenue Sales Act: 1933 *Pat* 236 and 1926 *Pat* 549, *Ref.*

[P 262 C 2; P 263 C 1]

(d) Bengal Land Revenue Sales Act (11 of 1859), S. 33—Suit to set aside sale—Jurisdiction of Collector to sell land challenged—Decision depends on nature of estate being liable for arrears of land revenue on date when it was sold.

In a suit where the jurisdiction of the Collector to sell an estate is impugned, the decision depends upon what is alleged and proved as to the estate not being liable for an arrear of revenue in respect of which the Collector could sell it on the date on which he did sell it.

[P 263 C 2]

(e) Appeal—Lower appellate Court allowing question of jurisdiction to be raised — Court must secure material to be able to adjudicate on the point—It may direct original Court to take further evidence.

If the lower appellate Court permits the question of jurisdiction to be raised in appeal, it certainly is incumbent upon it to secure the materials upon which a decision could be safely arrived at either by taking the necessary evidence or by directing the Court of fact to take it.

[P 264 C 1]

S. N. Bose—for Appellant.

L. N. Singh and *C. P. Sahi*—for Respondent.

Macpherson, J.—This is the last of three second appeals which have been preferred from decisions in 1931 of Mr. Sharma as officiating Additional District Judge of Monghyr in appeals arising from suits to set aside sales held under the Revenue sales Act. The decisions in the others are reported in 12 Pat 750 (1) and 16 P L T 785 (2).

In the suit out of which the present appeal arises the plaintiff sued to have the sale under the Revenue Sales Act, 1859, held on 6th June 1927, in respect of his ten annas odd share in village Nishara bearing tauzi No. 761, set aside on the ground that the essential notices had not been served. It was averred that the defendant, in collusion with Teni Sahu, his son-in-law, had fraudulently secured surreptitious service return of the notice and fraudulent sale of the plaintiff's share and purchase thereof and Teni Sahu, in collusion with the Court peon, had also prevented plaintiff from having any knowledge or information of the sale until 22nd September following. The plaint sets out that an appeal against the said sale had been summarily rejected by the Commissioner of Bhagalpur. There was no allegation in the plaint that the sale had been held by the Collector without jurisdiction nor even that there had been no arrear of land revenue in respect of which it could have taken place and in particular there is no reference to any "kist" or instalment whether in the restricted meaning of S. 2 of the Act or in the signification of the term in the Tauzi Manual, the Tauzi Ledger and popular parlance. Equally in the issues framed there is no mention of any question of jurisdiction or in particular of the sale having been held prior to the date on which the Collector could legally hold it. Further nowhere in the judgment of the first Court is there any mention of the question of jurisdiction or of "kist."

Thus until the stage of appeal the substantial question agitated was whether the sale was liable to be set aside on the ground of fraud and suppression of notice. The learned Subordinate Judge decided the issue on that point in the negative. The appellate Court found itself in complete agreement with that finding and it is not contested before us. It differed indeed from the view of the first Court that the suit on the ground set out in the plaint was not entertainable

1. Jadunandan Singh v. Savitri Devi, 1933 Pat 236=143 I C 869=12 Pat 750=14 P L T 247 (S B).
2. Damodar Prasad v. Mt. Wakulunissa Bibi, 1935 Pat 490=160 I C 14=15 Pat 58=16 P L T 785.

by reason of S. 33 of the Act, which enables the Court to annul a sale only on a ground set out in the appeal provided by S. 25 which appeal must be preferred on or before the sixtieth day of sale whereas the plaintiff's appeal being late, there was no valid appeal. The appellate Court is here in error, since an appeal preferred out of time is no appeal in the eye of the law as observed by my brother Mohamad Noor, J., in 12 P L T 401 (3) and the trial Court's view that the suit, as framed, would fail also on this ground, is correct. Thus the suit, as framed, was bound to fail on these grounds of fact and law. But the lower appellate Court allowed to be raised and accepted a point in favour of the plaintiff-appellant admittedly raised for the first time at the hearing of the appeal. The point is that the Collector had in the circumstances of the case, no jurisdiction to sell the estate.

The learned Judge sets out that the estate was sold for alleged arrears of Government revenue amounting to 14 annas for the kist ending 28th March 1927, and accepts the argument for the appellant that the share was not liable to be sold until the expiration of the last day of payment, namely the 12th January 1928, so that the sale by the Collector on 6th June 1927 was void for want of jurisdiction. His attention was drawn to notification No. 2557-A, dated 6th August 1910, made in pursuance of S. 3, Sales Act, that the 12th January and the 28th March are fixed as the latest dates for payment of revenue exceeding Rs. 10 but not exceeding Rs. 50 in districts where the Fasli era prevails, as it does in this case, and the revenue of tauzi No. 761 (which, it may be observed, was the residue after partition in 1880) falls within those limits. He goes on to say that the record shows that the interest of the appellant in the estate was sold for the March kist, and that the March kist must be viewed in the light of the meaning of the word "kist" in S. 2, Sales Act, though such could hardly be the case when the notification itself is expressly under S. 3. He relied upon the decision in 12 P L T 357 (4), without however realising that that decision proceeded on its own facts as found, and went on to say that there was no evidence before him as to what the original kistbandi date was as contemplated in what he considers to be the conflicting decision in 7 P L T 747 (5), and he was not prepared to assume from certain evidence before him that the arrear had already accrued due and that the 28th March was the latest date of payment.

It is urged in second appeal that the lower appellate Court ought to have held that on the pleadings the question of jurisdiction did not arise and that if it admitted the argument to consideration, that there were no materials upon which a decision was possible, and further that the actual decision is wrong on the facts. It is certainly clear that the learned Judge was hazy as to law and practice in respect of revenue dates, and in particular failed to distinguish the two meanings of the term "kist" or to require the plaintiff to show which of them applied to his case. And certainly as Rankin, C.J. remarked in 46 C L J 253 (6):

> It is very necessary that every discouragement should be given to an invention of new points at a late stage, points which might have been met if taken properly by adducing further evidence.

A second appeal from another came before a Special Bench of this Court in which the facts were very similar to those of the present litigation. The decision is reported in 12 Pat 750 (1), the placitum to which runs:

> It is a well-known fact that in Bihar the original kistbandis fixed under the engagement entered into with the proprietors for payment of the Government revenue were almost invariably according to the Fasli era, and the four dates in June, September, January and March fixed for the payment of the Government revenue are the latest dates of payment determined by the Board of Revenue under S. 3, Revenue Sales Act; and could not possibly be kistbandi dates of the Fasli era. It was pointed out in 7 P L T 747 (5) that where the original kistbandi under S. 2 of the Act is unknown and forgotten the latest dates fixed under S. 3 are popularly known as the kist dates. They are not the kistbandi dates as provided by S. 2 but only the latest dates of payment as fixed by the Board of Revenue under S. 3 of the Act.

Where therefore it appeared that the original kistbandi fixed in respect of the estate in arrear was according to the

---

3. Pirthwi Chand Lal v. Kirtyanand Singh, 1932 Pat 21=134 I C 149=10 Pat 757=12 P L T 401.
4. Saraswati v. Suraj Narayan, 1931 P C 57=130 I C 676=10 Pat 496=12 P L T 357 (P C).
5. Shyama Kant Lal v. Kashi Nath Singh, 1926 Pat 549=96 I C 807=7 P L T 747.
6. Jonab Biswas v. Siva Kumari Debi, 1927 Cal 855=104 I C 733=46 C L J 253.

Fasli era, and the 7th June was not the kistbandi date under S. 2, but the latest date under S. 3 and the June instalment was not paid on the latest date, viz., the 7th June, it was held that it was within the jurisdiction of the Collector to sell the estate after that date and that therefore the sale held on 20th September was a valid sale. The decision in 12 Pat 750 (1) was given after an opportunity had been accorded to the appellant to adduce evidence on the point. The plaint was in very much the same form as the present plaint and the learned District Judge had allowed the point of jurisdiction to be first taken on appeal. Kistbandi dates of the Fasli era under S. 2 are usually 11 or 12 while latest days of payment under S. 3 are usually the four dates in the English months of June, September, January and March mentioned above. In the present instance the notification of 1910 under S. 3 of the Act merely reduced the four latest dates of payment to two in certain cases where the annual revenue being of small amount, it was not worth while for Government to insist upon four kists, so that the learned Judge was prima facie in error in inferring from it that the 12th January and 28th March were kistbandi dates contemplated by S. 2 of the Act. They are shown as the instalment dates in the tauzi ledger, as a copy now produced establishes, but in this connexion reference is necessary to R. 1 of the Bengal Tauzi Manual which sets out that the tauzi roll of a district is the list of the estates from which the land and police revenue of the district is collected, showing the revenue assessed upon each estate divided into the amounts due on each latest day of payment, and to the definition of the word "kist" in the introductory chapter to the Manual where it is set out that in that Manual the word indicates "the period between one latest day for payment of arrears of revenue and the next" and that the word is not used therein in the restricted meaning assigned to it by S. 2 of the Act. The decision of the Special Bench relates to cases in Bihar covered by the engagement in accordance with the Fasli era which is the rule. There are however abnormal or exceptional cases such as was found in *Saraswati Bahuria's* case (4) where the latest dates of payment under S. 3 or popular 'kist' dates are found to coincide with the original kistbandi dates (or some of them) under S. 2, and the decision of the Special Bench sets out:

> That in some very rare cases the two dates fixed under Ss. 2 and 3 of the Act may coincide is illustrated by 39 Cal 981 (7) which was a modern case in a Government khas mahal.

It is possible too that after a regular partition the Collector may, whether inadvertently or not, have made a new kistbandi in this manner. In a recent decision of this Court in 16 P L T 785 (2) also preferred from the decision of the same officiating District Judge, it was held that where the Government revenue of a certain estate which was payable (in one kist) on 28th March, remained unpaid within the meaning of S. 2 of Act XI of 1859, the sum did not become an arrear until the 1st of April following and as in that case the latest date of payment fixed under S. 3 of the Act coincided with the kistbandi date, the estate could not be sold till the 28th March of the following year. The difference between that case and the present case and 12 Pat 750 (1) is that the case of jurisdiction had been raised in the plaint where it was set out that the whole of the revenue

> according to the terms of the kabuliat under which the mauza was held, was payable only once a year and that was on 28th of March

and the statement was not expressly denied in the written statement, and it was further found as a fact that in that case

> as the kistbandi date was fixed by the kabuliat under which the estate is held and it is a mere coincidence that the kistbandi date and the date fixed by the Board of Revenue as the latest date of payment happen to be the same, the case cannot be distinguished from 39 Cal 981 (7).

The case, therefore, was found to fall in the category of exceptional cases mentioned in the Special Bench decision which are governed by the decision of the Judicial Committee in 39 Cal 981 (7). Manifestly, therefore, the decision in a suit where the jurisdiction of the Collector to sell an estate is impugned, depends upon what is alleged and proved as to the estate not being liable for an arrear of revenue in respect of which the Collector could sell it on the date on which he did sell it. Here there was no allegation at all that he had no jurisdiction to sell on 6th June and no issue between the parties, still less any proof. The learned District

7. Haji Buksh Elahi v. Durlav Chandra Kar (1912) 39 Cal 981=16 I C 821.

Judge had not before him the materials upon which a decision on the point was possible. Prima facie, indeed, the 28th March was the latest date of payment of a previous arrear (or several previous arrears) of land revenue but conceivably the case was an exceptional one and indeed what has been suggested before us on behalf of respondent and denied on behalf of the appellant is that after the partition of 1880 there may have been a new kistbandi. We gave the respondent an opportunity to produce it, but it is not yet forthcoming. Now if the learned District Judge at all permitted the question of jurisdiction to be raised in appeal, it certainly was incumbent upon him in the circumstances to secure the materials upon which a decision could be safely arrived at either by taking the necessary evidence or by directing the Court of fact to take it since clearly the record neither purported to show nor did show that the 28th March was not the latest date of payment (after which the Collector could sell) and was the kistbandi date, (in which case he could only sell after a subsequent "latest date of payment.") At the least the defendant could not but be very seriously prejudiced. We have decided to adopt the course which the lower appellate Court should have taken. We set aside the decree under appeal and remand the appeal to the District Judge for decision after permitting the plaintiff-appellant before him to amend his plaint if he so desires and whether he desires so or not to adduce evidence on the issue "was the sale by the Collector of Monghyr of the estate in suit on 6th June 1927 without jurisdiction."

The evidence may be either taken by himself or by the trial Court at his discretion. It is necessary to impress upon the lower appellate Court and upon the parties the urgent necessity of placing the full history of the tauzi before the Court and in particular any change which may have taken place in the kistbandi which is referred to in S. 2 of the Act. Substantially the point will be whether 28th March 1927 was the latest date of payment under S. 3 or merely the date under S. 2 on which the revenue was due. If it was the latest date of payment within the meaning of S. 3 and the Tauzi Manual, it is clear that the Collector had jurisdiction to sell. If it was merely the "kist or instalment of any month of the era according to which the settlement or kistbandi of the mahal has been regulated" then he had no jurisdiction to sell, as it had not become "an arrear of revenue" within the restricted definition of that term in S. 2 and the Collector would have to wait for the latest date of payment prescribed under S. 3. Upon decision of this question of jurisdiction the lower appellate Court will determine the appeal. No other point falls to be considered by that Government.

It is hoped that he will find time to deal with this long pending matter with the least possible delay. If there is obscurity or difficulty in tracing the history of the tauzi or in regard to the revenue payable and the dates for payment thereof, we feel sure that he can rely upon the good offices of the Collector to enable him and the parties to elucidate them. In this connection we may refer to replies produced before us which were given to certain applications for information filed by the plaintiff-respondent. Prima facie, the information supplied does not seem to have been given by a person of understanding. No doubt, on his attention being drawn to it, the Collector will have the replies furnished by a reliable officer who understands the difference between a kist of the "engagement" (doul or kabuliyat) and the kist date in the sense of the Board of Revenue's latest date of payment under S. 3 of "an arrear of revenue," as defined in S. 2 for the peremptory purposes of the Act, that is to say, of any part of a kist or kists of the "engagement" which was unpaid (and so already an arrear in the ordinary sense) on the first day of the month following the month of the era in respect of which the kist was fixed, to save the estate from summary sale. The appellant is entitled to his costs up to this stage. Future costs will be in the discretion of the Court below.

Mohammad Noor, J.—I agree.

B.D./R.K. *Case remanded.*

A. I. R. 1936 Patna 265

WORT AND ROWLAND, JJ.

Kamakhya Narain Singh—Plaintiff—Appellant.

v.

Inderman Ram Sahu and *others*—Defendants—Respondents.

Appeals Nos. 642 and 643 of 1932, Decided on 7th January 1936, from appellate decrees of Addl. Sub-Judge, Hazaribagh, D/- 19th January 1932.

Chota Nagpur Tenancy Act (6 of 1908), S. 6—Settlement of cultivation—No difference between planting orchard on land settled and gathering fruits of orchard already in existence.

There is no difference between taking settlement of land for purpose of planting an orchard, which may be held to be cultivation, and taking settlement of a land upon which an orchard already exists : in other words, taking settlement for gathering all the fruit from an existing orchard. [P 265 C 2]

Govt. Pleader—for Appellant.

L. K. Chowdhury and *Ramanandan Pd.*—for Respondents.

Wort, J.—The appellant in these cases is the plaintiff who resumed certain land over which a mukarrari lease had been granted for the lives of two persons in the year 1865. The villages, as I have said, were resumed on the death of the latter of the two persons for whose lives the lease had been granted and the plaintiff in this action sought to recover possession of certain holdings in respect of which, according to the defendants, they (the defendants) had occupancy rights. There are two appeals before us, one relating to suit No. 90 and the other to suit No. 91. With regard to suit No. 90 the land in dispute consisted of one plot 1.18 acres in area. Suit No. 91 referred to six plots of land, in area 15 acres, at a jama of Rs. 7-8-0. These 15 acres consisted of three plots of orchard and three plots on which there were tanks. The learned Judge in the Court below has confirmed the decision of the trial Court, holding on the terms of the patta relating to land in suit No. 90, that it was for agricultural purposes ; and as regards the land in suit No. 91, he has affirmed the decision of the trial Court on the basis that crops were in fact grown in this land.

It is the contention of Mr. Sinha who appears on behalf of the appellant that the settlement of the defendants on the plots in question was not for purposes of cultivation and that therefore the defendants did not acquire occupancy rights. Under S. 6, Chota Nagpur Tenancy Act, "raiyat" means primarily a person who has acquired a right to hold land for the purpose of cultivating it by himself or by members of his family, or by hired servants or with the aid of partners ; and the explanation of that section is :

> Where a tenant of land has the right to bring it under cultivation, he shall be deemed to have acquired a right to hold it for the purpose of cultivation, notwithstanding that he uses it for the purpose of gathering the produce of it or of grazing cattle on it.

As I understand the argument of Mr. Sinha, he contends, relying on a decision of the Calcutta High Court, that there is a difference between taking settlement of land for the purpose of planting an orchard, which he admits may be held to be cultivation, and taking settlement of a land upon which an orchard already exists : in other words, taking settlement for gathering all the fruit from an existing orchard. In my judgment there can be no such distinction. But in any event in this case it seems to me that, so far as the appeal relating to suit No. 90 is concerned, the matter is disposed of by the decision of the learned Judge in the Court below, who states that the terms of the patta relating to this plot are clearly for agricultural purposes. The patta is not before this Court and we are not called upon to construe its terms and, in its absence, we must rely upon the decision of the Judge in the Court below, that the settlement of this land was for the purposes of cultivation. The matter therefore comes within the explanation under S. 6, Chota Nagpur Tenancy Act. The appeal relating to suit No. 91, involving an area of 15 acres in six plots, is also disposed of for similar reasons. In this case the learned Judge accepting the evidence of the witnesses for the defendant holds that the defendant is carrying on cultivation in the plots the subject matter of the settlement. The fact that a portion of the land is occupied by tanks makes no material difference in the matter.

Both the appeals, in my opinion, are disposed of by the findings of the Judge in the Court below. The defendants have occupancy rights and therefore come within the exception of S. 14, Chota Nagpur Tenancy Act. In the circumstances, I would hold that both the ten-

ants are holding for the purposes of cultivation and consequently they have by the settlement in the circumstances obtained occupancy rights and cannot be ejected by the plaintiff. Both appeals fail and must be dismissed with costs.

Rowland, J.—I entirely agree. The basis of the suit is the claim to annul under S. 14, Chota Nagpur Tenancy Act, a sub-tenancy created by the holder of a resumable tenure. S. 14 says that such sub-tenancies on the resumption of the tenure shall be deemed to be annulled with certain exceptions. The Courts below have upheld the right of the defendants under exception (b) of S. 14, the Munsif observing that exception (a) in favour of a lease of land "whereupon . . . a permanent garden, plantation, tank . . . . has been made" applies only to cases in which this has been done by the sub-tenant inducted by the lessee whose tenure has been resumed. I do not find any such limitation in the words of the section and in the terms of the exception; but as the plaintiff's suit is concluded by the findings of the Courts below on the applicability of exception (b) it is not necessary definitely to decide this point.

B.D./R.K. *Appeals dismissed.*

A. I. R. 1936 Patna 266

MACPHERSON AND FAZL ALI, JJ.

Haripada Gupta—Defendant—Appellant.

v.

Babu Lal Mahto and *others*—Plaintiffs—Respondents.

Appeal No. 3 of 1931, Decided on 9th January 1936, from original decree of Sub-Judge, Hazaribagh, D/- 26-7-1930.

Civil P. C. (1908), O. 22, Rr. 3 (1), 9 (2)—Appeal by deceased sole appellant abating—No application by legal representatives under O. 22, R. 3 (1) for substitution of their names—Court cannot substitute their names and proceed with appeal—Proper procedure for them is application under O. 22, R. 9 (2).

Where an appeal by a deceased sole appellant has abated, it is not open to the Court, in the absence of an application by his legal representatives under O. 22, R. 3 (1), to substitute them and direct that the appeal be proceeded with in their names. The proper procedure for them is an application at such date, as they may be advised, under O. 22, R. 9 (2), under which they may ask for an order to set aside the abatement: 1936 *Pat* 158, *Disting*. [P 266 C 2]

R. S. Chatterjee and *L. K. Chaudhuri*—for Appellant.

B.C. De, *K.K. Banerji* and *Kameshwar Dayal*—for Respondents.

Judgment.—From the decision in a partition suit defendant 6 Haripada Gupta preferred this appeal. During the preparation of the appeal the Registrar being informed by the learned Advocate for the appellant that the sole appellant was dead and that he had no instructions in the matter, sent the record to a Division Bench for orders. Some time later the Advocate for the deceased appellant mentioned to the Bench that the appellant left him surviving two sons who were his legal representatives. An order was made substituting them in place of the deceased appellant and appointing the Deputy Registrar to be their guardian ad litem. On the case coming up for hearing, it is contended on behalf of the contesting plaintiffs-respondents that the appeal had abated and that the order substituting the minors without an application, such as is contemplated in O. 22, R. 3 (1), was incompetent. Upon consideration of the matter we are of opinion that the argument has force and that in fact the appeal of the deceased sole appellant has abated and that in the absence of an application by his representatives under O. 22, R. 3 (1) it is not open to the Court to substitute them and direct that the appeal be proceeded with in their name. The proper procedure for them is an application at such date as they may be advised under O. 22, R. 9 (2), under which they may ask for an order to set aside the abatement.

Accordingly it is only necessary to say here that the appeal has abated. The pleaders appearing on behalf of the Deputy Registrar and on behalf of the lunatic, respondent 13, whose interest is similar to that of the deceased appellant, have waived any claim to remuneration for their service. Our attention has been drawn to the decision in First Appeal No. 19 of 1922 (1) in which the Division Bench directed a stay of further proceedings, leaving it to the respondents to take steps in the matter, and observing that, if they took no steps, the minor on attaining majority will have to elect whether to proceed with the appeal or not. The position however there was quite different. The minor appellant was already on the record and his mother who had been his guardian having died, no

---

1. Ramji Das v. Rai Mahamaya Prasad Singh Bahadur, 1936 Pat 158=16 P L T 789.

steps had been taken either by the respondents or by anybody else to provide him with a next friend.

R.M./R.K. *Order accordingly.*

---

* A. I. R. 1936 Patna 267

COURTNEY-TERRELL, C. J. AND MOHAMMAD NOOR, J.

Ramkinkar Banerji—Assessee—Petitioner.

v.

Commissioner of Income-tax, Bihar and Orissa—Opposite Party.

Misc. Judicial Case No. 50 of 1934, Decided on 27th November 1935.

*** Income-tax — Assessment — Income in hands of woman—No presumption that it is benami for husband—Absence of evidence that income is benami—Income cannot be assessed in husband's name.**

There is no presumption that the property standing in the name of a married Hindu lady does in fact belong to her husband. The ordinary presumption of law is that the apparent state of affairs is real unless the contrary is proved. The absence of evidence one way or the other does not under the law justify an inference that a lady is a benamidar of her husband. Therefore in the absence of evidence to show that a woman is a benamidar, the income in the hands of the woman which has come to her in her own capacity cannot be assessed to income-tax in the name of her husband.

[P 268 C 1]

S. M. Gupta and *R. S. Chatterji*—for Assessee.

Manohar Lal—for Opposite Party.

Mohammad Noor, J.—Under the orders of this Court, dated 20th August 1934, the Commissioner of Income-tax has under S. 66 (3), Income-tax Act, submitted a statement of the case for the orders of this Court. The proposition of law which, as ordered by this Court, he has submitted is :

Whether upon the facts as found by the lower appellate Court (meaning thereby the Assistant Commissioner) the assessee is entitled to a deduction of Rs. 15,352 as claimed by him.

The facts as stated by the commissioner are these. The assessee has an interest in the Sitalpur Colliery which was being worked by Messrs. Ojha & Co., who paid him in the year in question Rupees 15,408-14-0 as royalty. The assessee did not include this income in his return. The income-tax officer somehow or other came to know of this income and called upon the assessee to show cause why a penalty should not be imposed upon him under S. 28, Income-tax Act, for concealing this income. Thereupon the assessee appeared and stated that he did not in fact get any income inasmuch as he had paid Rs. 15,353 as royalty to the superior landlord who, admittedly for some time, was Mr. L. A. Creet, but whose right to receive the royalty had been acquired by Saibalini Debi, the wife of the assessee. The assessee also gave some other figures showing a loss of Rs. 184-11-3 in his colliery income. The income-tax officer seems to have accepted the other figures of the assessee, but apparently treating the lady to be his benamidar refused to allow him to deduct Rs. 15,353 for the royalty and included this amount for the purposes of the assessment. The assessee appealed to the Assistant Commissioner of income-tax who upheld the order of the income-tax officer but allowed a deduction of Rs. 4,000 which the lady had to pay to her own superior landlord. The Income-tax Commissioner having refused to refer the question of law stated above to this Court, the assessee came up to this Court and obtained the order above referred to.

Now the contention on behalf of the assessee before us has been that as it was not disputed by the Department that in fact Rs. 15,353 was paid as royalty, it was not open to the Income-tax Officer or to the Assistant Commissioner to refuse to deduct this amount on the ground that there was no evidence to show that the lady acquired the right of Mr. Creet from her own stridhan funds. Mr. Gupta contends that having shown the payment of royalty, the duty of the assessee ended. If the Department wanted to refuse deduction of this amount on the ground that the lady was a benamidar, they could only do so on some evidence and not on the ground that there was no evidence that the lady was the real owner. The facts found by the Assistant Commissioner and his reasons for refusing the deduction have been thus summarised by the Commissioner :

(a) That the right by virtue of which the payment of Rs. 15,353 was made stands in the name of S. Devi, the assessee's wife.

(b) That it was not seriously contended that she acquired this right with her stridhan nor was any evidence to that effect produced, and

(c) That in the absence of any evidence to the contrary, it was reasonable to presume that the right in question was acquired by the assessee as head of the undivided family in the name of his wife.

There being therefore no dispute that the property stands in the name of the lady, she must be taken to be the owner

of it unless there is any evidence to show that she is a benamidar. Now (b) and (c) are not strictly speaking findings of fact, but are reasons given by the Assistant Commissioner for holding that the real owner was the assessee. They are based upon no evidence whatsoever. There is no presumption that a property standing in the name of a married Hindu lady does in fact belong to her husband. The ordinary presumption of law is that the apparent state of affairs is real unless the contrary is proved. The absence of evidence one way or the other did not under the law justify the Assistant Commissioner in drawing an inference that the lady was a benamidar of her husband. If the Assistant Commissioner had disbelieved the payment of the money, much would have been said in favour of the view that it was a finding of fact, but in this case the payment is not disputed. What the Assistant Commissioner has found is this : that the payment was to himself because the lady in whose name the payment has been made was a benamidar. For coming to this finding some evidence was essential, which, in my opinion, was wanting in this case. I would, therefore, answer the question of law referred to this Court in the affirmative. The petitioner will be entitled to a refund of his deposit and also to his costs incurred in this Court : hearing fee ten gold mohurs.

Courtney-Terrell, C. J.—I agree.

B.D./R.K. *Answered in affirmative.*

A. I. R. 1936 Patna 268

AGARWALA AND VARMA, JJ.

Bhan Kumar Chand and *another*—Defendants—Appellants.

v.

Ajhodhya Prasad Singh and *others*—Defendants and *others*—Plaintiffs—Respondents.

Appeal No. 112 of 1934, Decided on 6th November 1935, from original order of Sub-Judge, Shahabad, D/- 30th January 1934.

Res judicata—Claim in execution of decree that property attached belongs to claimant, dismissed for default—Application for restoration also dismissed—Suit for declaration that property attached is not liable to be attached and sold is barred by reason of rule of constructive res judicata or by general policy of law.

A party who has been defeated at one stage of a litigation is not entitled, either by reason of the rule of constructive res judicata or by reason of the general policy of law to re-agitate the same question at a subsequent stage.

[P 269 C 2]

Where during the execution of a decree certain persons who were parties to the suit but against whom the suit was dismissed prefer a claim alleging that a portion of the property attached by the decree-holders in execution of their decree belongs to them and not to the judgment-debtors, but the claim is dismissed for default and the application for restoration of the same is also dismissed, and the objectors institute a suit for a declaration that the properties are not liable to attachment and sale in execution of the decree, the suit does not lie as the question raised in the previous application cannot be re-agitated; more so when the claim case started by the plaintiffs is in fact an application under S. 47 and the plaintiffs have on the dismissal of the case a remedy open to them by way of an appeal from the order under S. 47 and they do not avail themselves of it: 1924 *Pat* 122, *Ref.* [P 268 C 2; P 269 C 1 ; P 270 C 1]

Manohar Lal and *D. N. Varma*—for Appellants.

Harinandan Singh, *N. K. Sahay* and *Mahabir Prasad*—for Respondents.

Agarwala, J.—Plaintiffs 1 to 4, plaintiffs 5 to 8 and defendants 3 to 7 were respectively the members of three branches of a joint Hindu family. Defendant 3 executed two mortgage bonds in December 1923, and May 1924, respectively, in favour of defendants 1 and 2. In 1929 the mortgagees sued on their mortgage impleading both sets of plaintiffs and defendants 3 to 7. Defendants 4 to 7 were the minor sons of defendant 1. The general defence to the suit was that the mortgage did not bind the family because the executant had no power to act on behalf of the family and the loan was not contracted for family necessity. The special defence of the two sets of plaintiffs was that there had been separation in the family in 1925. On 27th January 1931, the Court passed a decree for money ex parte against defendant 3. The suit was dismissed as against both sets of plaintiffs. The sons of defendant 3 were declared to be liable to the extent of their interest in the joint family property. It may be mentioned that by the partition a mukarrari interest in two villages had been allotted to defendants 3 to 7 as their share in the family properties. The decree-holders took out execution of the decree, and, on 20th May 1931, two claim cases were filed: one, No. 30 of 1931 by plaintiffs 1 to 4, and the other, No. 31 of 1931 by plaintiffs 5 to 8. In each of these claim cases the applicants alleged that the property

attached by the decree-holders in execution of their decree included property belonging to the applicants and not belonging to the judgment-debtors, defendants 3 to 7. On 13th February 1932, claim case No. 30 of 1931 was dismissed for default. Claim case No. 31 of 1931 was allowed on 20th April 1932.

On the same day an application for restoration of claim case No. 30 of 1931 was made by plaintiffs 1 to 4. This application was dismissed on 16th July 1932, on the ground that O. 9, R. 9 does not apply to execution proceedings. The execution proceedings continued. On 17th January 1933 both sets of plaintiffs instituted the suit which has given rise to this appeal, for a declaration that certain of the properties attached in execution of the decree passed against defendants 3 to 7 were not liable to attachment and sale in execution of that decree. The decree-holders and defendants 3 to 7 were impleaded in the suit. The plaint alleged that as no partition deed had been prepared at the partition of 1925, such a deed had been subsequently executed and registered in August 1931. It was stated that by this deed the former partition was confirmed, but that some of the properties which had been allotted to plaintiffs 1 to 4 at the partition of 1925 had now been allotted to plaintiffs 5 to 8 and that some of the properties which had been allotted to plaintiffs 5 to 8 by the partition of 1925 had now been allotted to plaintiffs 1 to 4. There can be no doubt that the object of the re-distribution of property between the two sets of plaintiffs was to meet the difficulty that had arisen by the claim case of plaintiffs 1 to 4 having been dismissed. By allotting to plaintiffs 1 to 5 properties which had been the subject matter of that claim case it was sought to enable them to object successfully to the sale of those properties in execution of the decree.

Those properties however were under attachment in August 1931. The suit was found by the learned Subordinate Judge to be not maintainable for the reasons that the matter in dispute between the parties was a matter relating to the execution of the decree, that both sets of plaintiffs were parties to the suit in which that decree had been passed and that S. 47, Civil P. C., was a bar to the suit. The learned Subordinate Judge, however, treated the plaint as an application under S. 47, and held that properties allotted to the plaintiffs by the partition are not liable to sale in execution of the decree against defendants 3 to 7. Defendants 1 and 2 have preferred this miscellaneous appeal against the decision of the learned Subordinate Judge. Substantially the question that falls for decision is whether the dismissal for default of claim case No. 30 of 1931 debars the plaintiffs from raising again the question which it was sought to raise in that application, viz., the liability to sale of those items of property which, in that claim case, plaintiffs 1 to 4 claimed to have been allotted to them at the partition. The learned advocate for the appellants relies on the decision of the Court in 2 Pat 759 (1), where it was held that a judgment-debtor, whose objection to execution on the ground that the application for execution was barred by limitation, has been dismissed for default, is not entitled, on a subsequent application for execution, to object that the previous application was time-barred. There are other decisions to the effect that a party who has been defeated at one stage of a litigation is not entitled, either by reason of the rule of constructive res judicata or by reason of the general policy of the law, to re-agitate the same question at a subsequent stage The learned Court below however has relied on a decision of the Calcutta High Court in 36 C W N 367 (2). That was a case where objections of a judgment-debtor had been dismissed for default, and the question then arose whether the same objection could be agitated in subsequent execution proceedings. With regard to this contention, the learned Judges observed:

> So far as res judicata is concerned, there have been cases in this Court in which it has been held that where objections of a judgment-debtor have been dismissed not on their merits but upon the ground that the judgment-debtor was in default, the dismissal of such objections would not be a bar to the judgment-debtor taking the same objections in subsequent execution proceedings. If that be so, it is somewhat difficult to urge that any different view should apply with regard to objection of this character which may be taken at a subsequent stage of the same execution proceedings. On the other hand the difficulty of applying this proposition in such a case is very great, because

1. Jago Mahton v. Khirodhar Ram, 1924 Pat 122=74 I C 130=2 Pat 759.
2. Akhoy Kumar Kar v. Krishna Chandra, 1932 Cal 569=141 I C 618=55 C L J 184=36 C W N 367.

then it would be open to the judgment-debtor to come up with the same objection as often as it has been dismissed for default. One thing however is quite clear and it is this: that the doctrine that a decision at one stage of the execution proceedings cannot be questioned at a later stage of the proceedings proceeds not upon any ground of res judicata under S. 11, Civil P. C., but upon general principles of law, for if it were not binding there would be no end of litigation.

It is quite clear from the passage just read that the Bench of the Calcutta High Court, which was considering the question, was opposed to the view that it was open to a judgment-debtor to raise at a later stage of the execution proceedings objections which were raised at an earlier stage and which were dismissed on account of the judgment-debtor's default. But in the particular case which their Lordships were considering, they came to the conclusion that the first objection of the judgment-debtor had not been disposed of in a satisfactory manner and they therefore remanded the case to the Court below for a reconsideration of the original objection preferred by the judgment-debtor. In the case that is before us, the registered partition deed on which the plaintiffs now rely were executed in August 1931. Their claim case was not disposed of until 13th February 1932. No attempt was made in the interval between the execution of the deed and the disposal of the claim case to place the terms of the deed before the Court. The claim case has been rightly held by the Court below to have been in fact an application under S. 47, Civil P. C., and the correctness of that decision is not in question before us. The plaintiffs therefore on the dismissal of their claim case had a remedy open to them by way of an appeal from the order under S. 47. That remedy they did not avail themselves of. Being of opinion that the judgment-debtors are not entitled to re-agitate the question which had already been raised in the previous application, I would set aside the order of the Court below and allow this appeal with costs of this Court.

Varma, J.—I agree.

R.M./R.K. *Appeal allowed.*

A. I. R. 1936 Patna 270

MACPHERSON AND DHAVLE, JJ.

Harihar Prasad Singh and *others*—Decree-holders—Appellants.

v.

Bhubneshwari Prasad Singh and *others*—Respondents.

Appeal No. 257 of 1935, Decided on 16th January 1936, from appellate order of Sub-Judge, Monghyr, D/- 19th August 1935.

(a) Second Appeal—Finding of fact—Arrived at on fair consideration of evidence is binding on High Court.

A finding of fact by the lower appellate Court will be binding upon the High Court in second appeal, provided it is arrived at on a fair consideration of the evidence in the case.

[P 272 C 1]

(b) Execution—Certification of payment—Decree-holder's omission to certify payment by judgment-debtor in spite of promise—Judgment-debtor cannot override 90 days limitation of Art. 174, Limitation Act, for application under O. 21, R. 2, Civil P. C.—Court cannot exercise its inherent jurisdiction.

An omission on the part of the decree-holder to certify a payment, even if he may have promised to do so, does not entitle the judgment-debtor to override the 90 days limitation of Art. 174 for making an application under O. 21, R. 2 and to secure an investigation of the same matter by invoking S. 47. The decree-holder may be guilty of fraud, but if the judgment-debtor does not avail himself of the procedure laid down in Cl. 2 of the Rule, he must be content to let the sale of his properties in execution stand, and seek his remedy in damages or otherwise without challenging the sale. The contention that the Court need not look helplessly on the decree-holder's fraud, but may deal with it in the exercise of its inherent jurisdiction, is opposed to the scheme of the Civil P. C. as found in S. 47 and O. 21, R. 2.

[P 273 C 2]

Manuk, A. B. Mukherji and *D. C. Varma*—for Appellants.

Mahabir Prasad and *Rameshwar Misser*—for Respondents.

Dhavle, J.—This appeal arises out of an application under S. 47, Civil P. C., to set aside an execution sale. The decree under execution was obtained by the appellants in May 1932, against four sets of defendants, out of whom we are concerned with two only, namely, respondents 1st party and respondents 2nd party. It was a joint and several decree for Rs. 3,430 and against the four sets of defendants who each had a four annas interest in the properties to which the decree related. In August 1932 the decree-holders applied for execution

against defendants 1st party and defendants 2nd party, who resisted on the ground among others that the decree had already been satisfied. Their objections were overruled, and 6 items of property, 3 belonging to defendants 1st party and 3 to defendants 2nd party, were attached and advertised for sale. The sale was actually held on 24th May 1933, and the decree-holders bought the 3 items of property belonging to defendants 1st party for a price totalling the entire amount for which the execution was levied, with the result that the other 3 items of property were not proceeded against. On 22nd June 1933 defendants 1st party made an application under O. 21, R. 90, to have the sale set aside.

In the course of this proceeding they stated on 8th December 1933, that they had come to know of a sale deed executed by defendants 2nd party in favour of the decree-holders by which the decree-holders' dues were satisfied. No details were apparently given, but on 17th March 1934, they applied again, saying that they had come to know on 7th December 1933, that half the decree had been satisfied by the sale-deed of defendants 2nd party in favour of the decree-holders and that therefore the sale should be set aside on the ground of the decree-holders' fraud. The date of the sale-deed was not given, and the Munsif held that the allegations were irrelevant to the proceeding before him, but that it was open to the objectors to file an application under S. 47 or O. 21, R. 2, giving the date of satisfaction. On 19th March, the application under O. 21, R. 90 was dismissed after trial. There was an appeal which was summarily dismissed by the District Judge in April 1934, and then there was an application in civil revision to this Court, which was disposed of by Wort, J., upholding the orders of the lower Courts. The learned Judge dismissed the application on the ground that the satisfaction alleged by the objectors was not a matter under O. 21, R. 90, and that they, the objectors, had sat down under the order of 17th March, leaving it open to them to apply under S. 47, and he added:

> The petitioners had certain rights or they must be presumed to have certain rights apart from the question of limitation which I do not propose to deal with, and I assume that those rights exist at the present moment. This Court does not revise the orders of the Subordinate Courts in matters in which the parties have remedies within their own hands as they had in this case.

About two weeks after this, on 24th September 1934, defendants 1st party applied to the lower Court under S. 47 for setting the sale aside on the ground that the decree had already been satisfied to the extent of half under a sale-deed executed on 28th March 1933, by defendants 2nd party in favour of the decree-holders. The sale-deed in fact says nothing about any satisfaction of the decree; and the learned Munsif dismissed the application, holding as matter of fact that half the decretal dues had not been satisfied and as a matter of law that the application, though headed as an application under S. 47, really fell under O. 21, R. 2, and was barred by limitation. On appeal the learned Subordinate Judge of the Second Court, Monghyr, differed from the Munsif on both points and allowed the application. The decree-holders have accordingly appealed; respondents 1st party are judgment-debtors 1st party, being the objectors, and respondents 2nd party are defendants 2nd party who executed the kobala in favour of the decree-holders in the name of their nominee, one Babu Hit Narayan Singh.

It has been contended on behalf of the appellants that the lower appellate Court has erred both on the facts and as regards the law. The learned Subordinate Judge finds that half the decretal amount was satisfied by the kobala on the ground of a statement made by Brahmadeo Narayan Singh, one of the decree-holders, on 28th February 1934, in a proceeding under S. 145, Criminal P. C., that his entire demand against respondents 2nd party was satisfied. That deposition was not made in the course of the execution proceedings, nor was it made in proceedings to which defendants 1st party were parties. The deposition was admitted in evidence without any objection, but if it is read as an admission that half the decretal dues were satisfied by the kobala, it is opposed to the evidence of Brahmadeo Narayan Singh himself witness 3 for the defendants 1st party in these proceedings, who says that what he had deposed on that occasion was that nothing was due to him on account of certain mortgages. Ram Prakash, son of the leading member of defendants 2nd

party, was witness 1 for the objectors and claimed to have paid up half the decretal amount by executing the kobala, but he had to admit that his share (the share of this party) "was four annas in the decretal dues," and that it is not entered in the kobala that half the decretal dues were satisfied. His cross-examination concludes with the statement that the decree-holders had told him that they would realize the entire decree from Bhubaneshwar (the leading member of defendants 1st party.) None of this evidence, which was considered by the learned Munsif along with Brahmadeo Narayan's deposition of 28th February 1934, was referred to by the learned Subordinate Judge.

In support of his reading of somewhat ambiguous deposition as an admission that the consideration for the sale included half the decretal amount, the learned Subordinate Judge referred to the fact that the decree-holders had actually put up to sale only those items of property that belonged to defendants 1st party. It was pointed out to him that as these items of property fetched the amount under execution, it was unnecessary for the decree-holders to proceed against the properties belonging to defendants 2nd party, but the learned Subordinate Judge said that he was not much impressed with this contention, and that the decree-holders could easily have put up to sale some of these properties, had they been so minded, but that they had deliberately abstained from doing so and that they had not come to Court with clean hands because they had failed to certify to the Court the adjustment entered into with defendants 2nd party. A finding of fact by the lower appellate Court that half the decretal amount "was satisfied" as alleged by the objectors would be binding upon us in second appeal, provided it was arrived at on a fair consideration of the evidence in the case, even if the Subordinate Judge erred in his reasoning and argued in a circle as he has clearly done. But the finding in the present case practically ignores all the evidence in the case, particularly those circumstances specifically mentioned by the trial Court which led that Court, on a construction of the deposition, to the opposite conclusion. It is however unnecessary to say anything further about the finding of fact of the lower appellate Court, because it is quite clear that the order of the lower Court cannot be supported on the law.

The learned Subordinate Judge held that the application of respondents 1st party was not governed by the 90 days limitation laid down in Art. 174, Limitation Act, because it came not under O. 21, R. 2, but under S. 47, Civil P. C. The case of respondents 1st party was that the respondents 2nd party had paid half the decretal amount to the decree-holders; and Cl. 3, O. 21, R. 2, which deals with "payment out of Court to decree-holder" provides that :

> A payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognized by any Court executing the decree.

The learned Subordinate Judge accepted the contention of respondents 1st party that this provision does not apply to a payment made by one judgment-debtor but set up by another judgment-debtor in order to have a sale of his property set aside. The clause does not speak of any judgment-debtors or decree-holders at all ; but the learned Subordinate Judge held that Cl. 2 of the Rule which enables "the" judgment-debtor to apply to the Court and have a payment made out of Court recorded as certified applies only to the particular judgment-debtor who makes such payment. This conclusion was rested on the use of the definite article before the word "judgment-debtor" in the clause. The reasoning is manifestly unsound, and the definite article is, as a matter of grammar, easily intelligible as distinguishing not one judgment-debtor from another but one party to the suit from the other, the judgment-debtor from "the" decree-holder already dealt with in Cl. 1 of the Rule. The appellants have been able to find a decision, 49 Bom 548 (1), in which some judgment-debtors set up payments made by other judgment-debtors which were not certified, and it was held that the words of Cl. 3

> are too plain to admit of any other construction than that the Court executing the decree is barred in limine from considering any allegation that a payment not certified has been made. The party alleging such a payment may have a remedy, but not before the Court executing the decree.

---

1. Mehbunissa Begum v. Mehmedunnisa Begum, 1925 Bom 309=95 I C 687 = 49 Bom 548=27 Bom L R 403 (F B).

This was a Full Bench decision overruling the view taken in 40 Bom 333 (2), in accordance with the views of Heaton, J., in 34 Bom 575 (3), that a Court executing the decree could deal with the question whether uncertified payments had, as a matter of fact, been made or not. It is true that in 49 Bom 548 (1) no contention was raised that Cls. 2 and 3 of O. 21, R. 2 refer only to payments made by the particular judgment-debtor who applies to have the sale set aside. But what possible reason can there be for the legislature to enact that the judgment-debtor who pays himself must apply within 90 days to have the payment recorded or (failing to do so) remain without any remedy in the Court executing the decree, while leaving it open to the other judgment-debtors, who have an even smaller claim on the decree-holder and the executing Court alike, to assail the execution within the three years allowed under Art. 181, Limitation Act, for applications for which no period of limitation is provided elsewhere in the schedule or by S. 48, Civil P. C. ? As Rankin, C.J., observed in the Full Bench decision in 57 Cal 403 (4), the legislature could not, in enacting O. 21, R. 2, have been ignorant that decrees will be executed despite unrecorded adjustments and that such cases would commonly, if not necessarily, raise a question of fraud ; and the rule was introduced, as Dawson Miller, C. J., said in 48 I C 765 (5), with the very object of avoiding in execution proceedings disputes between the parties, and frequently long enquiries, as to what sums had or had not been paid out of Court in satisfaction of the decree.

It was pointed out in 5 P L J 70 (6), following 16 C W N 923 (7), that the judgment-debtor who pays out of Court is not at liberty to plead in the executing Court that the decree-holder has been guilty of fraud in failing to have the payment recorded, because Cl. 2 of the Rule enables him to protect himself by having the payment recorded. An omission on the part of the decree-holder to certify a payment, even if he may have promised to do so, does not entitle the judgment-debtor to override the 90 days' limitation of Art. 174 for making an application under O. 21, R. 2, and to secure an investigation of the same matter by invoking S. 47 : see 50 Cal 468 (8). The decree-holder may be guilty of fraud, but if the judgment-debtor does not avail himself of the procedure laid down in Cl. 2 of the Rule, he must be content to let the sale of his properties in execution stand, and as Rankin, C. J., said in the case already referred to, seek his remedy in damages or otherwise without challenging the sale.

The view taken in some old decisions that uncertified payments ought to be inquired into under S. 47 because the Court will not tolerate fraud is not now, so far as I am aware, accepted in any High Court; and Mr. Mahabir Prasad's contention that the Court need not look helplessly on the decree-holder's fraud but may deal with it in the exercise of its inherent jurisdiction is opposed to the scheme of the Civil Procedure Code as found in S. 47 and O. 21, R. 2. This being the position when there is only one judgment-debtor, it is inconceivable that the legislature could have intended, where there are several judgment-debtors in a case, to place the judgment-debtor who does not pay in a stronger position to assail the execution proceedings than another who does pay. It is true that the judgment-debtor who does not pay may conceivably, unlike one who does pay, be able to avail himself of S. 18, Lim. Act, in getting a payment by another recorded by showing that the decree-holder had by means of fraud kept him from the knowledge of his right to do so; but this is merely because the judgment-debtor who does pay cannot plead ignorance. No such case, however, was made out in the application of respondents 1st party, which speaks of fraud in para. 12 alone, the fraud consisting merely in not giving credit for the moiety of the decretal amount realized from respondents 2nd

2. Hansa Godhaji v. Bhawa Jogaji, 1916 Bom 217=33 I C 232=40 Bom 333 = 18 Bom L R 22.
3. Trimbak Ramkrishna v. Hari Laxman, (1910) 34 Bom 575=7 I C 940.
4. Lakshman Chandra Naskar v. Ramdas Mandal, 1929 Cal 374=118 I C 857=49 C L J 441 =57 Cal 403=33 C W N 795 (F B).
5. Sukhdei Kumri v. Mahamaya Prasad, 1918 Pat 278=48 I C 765.
6. Imamuddin Khan v. Bindubasinin Prasad, 1920 Pat 833=55 I C 890=5 Pat L J 70=1 P L T 149.
7. Biroo Gosain v. Mt. Jaimurat Koer, (1912) 16 C W N 923=13 I C 63.
8. Mukund Lal De v. Bansidhar Marwari, 1923 Cal 342=76 I C 311=50 Cal 468.

party and realizing the entire decretal amount by the execution sale. Bindeshwari Prasad Singh, the only member out of defendants 1st party who went into the witness box, speaks of coming to know of the kobala of respondents 2nd party on 7th December 1933, but the kobala makes no mention of the decree under execution; and while his statement in cross-examination that his uncle, the leading member of respondents 2nd party told him that he had satisfied half the decretal dues is not supported by any evidence nor accepted by the lower Courts, he proceeds to say that the uncle told him so "one day or one month or one year after the kobala," which he immediately changes to "I came to know from the deposition of Brahmadeo Narayan." That deposition was dated 28th February 1934, and could not have been the basis of his application of 8th December 1933.

Quite apart from the fact, therefore, that as shown by the learned Munsif on a consideration of the entire evidence the deposition does not establish the payment of a moiety of the decretal amount by respondents 2nd party, it is clear that the respondents 1st party failed to show that their application was made under Cl. 2, O. 21, R. 2 within 90 days of coming to know of what they called the decree-holders' fraud in proceeding with the execution for the entire decretal dues. The contention that a party may be barred under O. 21, R. 2, and yet may move for the same relief under S. 47 has been repeatedly held to be unsound; nor does the fact that the respondents 1st party erroneously, as it was found, pleaded the kobala in the proceedings under O. 21, R. 90 on which much stress was laid by Mr. Mahabir Prasad, entitle them to any relief in this proceeding in view of the circumstance that, as I have already shown, they made no real effort to establish that they moved the Court within 90 days of their knowledge of the alleged payment by respondents 2nd party. Mr. Mahabir Prasad has endeavoured to read Wort, J's observations which I have already quoted as amounting to a decision that respondents 1st party were entitled to proceed under S. 47 in respect of the alleged payment. But the learned Judge expressly declined to deal with the question of limitation, and it is under Cl. 2, O. 21, R. 2, read with Art. 174, that the question of limitation arises in the case. The learned Subordinate Judge was, in my opinion, entirely mistaken in holding that these provisions of the law had no application to the case, on the ground that the payment set up is not a payment made by respondents 1st party themselves.

I would, therefore, allow the appeal, reverse the order of the lower appellate Court, and dismiss the application made by respondents 1st party on 24th September 1934, with costs in all Courts.

Macpherson, J.—I agree.

B.D./R.K. *Appeal allowed.*

A. I. R. 1936 Patna 274

SAUNDERS, J.

Munshi Sahu and *another* — Petitioners.

v.

Bhupal Mahton and *others*—Opposite Parties.

Civil Revn. No. 547 of 1935, Decided on 29th January 1936.

Promissory Note—Suit on—One of two co-promisees cannot bring suit without making other party to it.

One of the co-promisees in respect of a promissory note is not entitled to bring a suit without making the other party to it. Under S. 45, Contract Act, the right to claim performance of the promise rests with them jointly. [P 275 C 1]

Where, therefore, a promissory note is executed in favour of two brothers forming a joint Hindu family, only one of them who is not the karta of the family is not entitled to bring a suit on basis of the note without joining the other : 1932 *Pat* 346 and 1934 *Pat* 85, *Disting.* [P 275 C 1]

S. N. Sahay—for Petitioners.

Yasin Yunus—for Opposite Parties.

Order.—The two petitioners are brothers in whose favour a handnote was executed by the opposite party. One of the brothers, the elder, brought a suit in a Court of Small Causes for recovery of the debt without making his brother a party to the suit, either as plaintiff or defendant, and there was no mention in the plaint of the fact that the handnote had been executed in favour of his brother as well as himself. The opposite party took an objection on this ground, whereupon the plaintiff was permitted to amend his plaint and add his brother as a co-plaintiff; but as this was done after the period of limitation

had expired, the suit was dismissed in view of the provisions of S. 22, Limitation Act.

It is contended on behalf of the petitioners that the original plaintiff's brother was not a necessary party since he as the manager of the family consisting of himself and his brother had lent the money and could in the same capacity give to the defendants a valid discharge for the debt. The learned advocate for the petitioners relied on the decisions of this Court in 11 Pat 616 (1) and 1934 Pat 85 (2). But those were cases in which suits had been brought by the person in whose favour a handnote had in reality been executed although in the name of another person and the decisions were with reference to the provisions of S. 78, Negotiable Instruments Act. It was held that if the beneficiary was in a position to give a valid discharge, the fact that the promissory note did not stand in his name would not disentitle him to a decree in the suit where the person in whose name the document stood was a party to the suit, which in both cases he was. The decisions are not authority for the proposition that one of two co-promisees can bring a suit on the promise without making the other a party to it. Under S. 45, Contract Act, the right to claim performance of the promise rests with them jointly. In the present case, moreover, as I have said, the original plaintiff was not suing as karta of the family. I see no reason to suppose that the learned Munsif has committed any error of law in dismissing the suit and I accordingly dismiss this application with costs: Hearing fee two gold mohurs.

R.M./R.K. *Application dismissed.*

1. Surajman Prasad Misra v. Sadanand Misra, 1932 Pat 346=140 I C 572=11 Pat 616.
2. Ramnagina Prasad v. Biswanath Prasad, 1934 Pat 85=147 I C 726=15 P L T 102.

---

* A. I. R. 1936 Patna 275

WORT AND ROWLAND, JJ.

Sri Darbar Saheb—Plaintiff—Appellant.

v.

Bare Lal Kandarp Nath Sah Deo—Defendant—Respondent.

Appeal No. 476 of 1932, Decided on 20th December 1935, from appellate decree of Judicial Commissioner, Chota Nagpur, D/- 17th November 1931.

(a) Deed—Construction—Question does not depend upon use of any particular term—Lease termed as 'bemiadi' patta — Other terms of lease considered—Lease deed held created permanent lease.

In construing a deed the question depends not so much upon the use of any particular term but upon the proper construction of the deed to which the term is applied, and the use of the term also does not necessarily conclude the matter. [P 277 C 1]

Where in a lease deed besides the use of the expression 'bemiadi thica patta' the lease is granted to the lessee and his heirs and they are to pay rent to the lessor and to his disciples and the rent payable is referred to as "a fixed rent" and moreover the lease permits the lessee not only to enjoy the property himself in any manner he thinks proper, by holding it in direct possession by planting orchards, cultivating it, building houses but also to let to tenants as he thinks fit, the lease is a permanent lease : 1931 *P C* 207; 1924 *Pat* 88 and 1922 *Pat* 161, *Foll.*; 1917 *Pat* 46 and 1918 *Pat* 468, *Not foll.* [P 281 C 1, 2; P 282 C 1]

(b) Evidence—Ambiguity, not latent—Judge cannot take help of questions of fact to enable to construe document—No expression in document enabling Judge to construe—Question of fact can be availed of.

The mere fact there is ambiguity or difficulty not being a latent ambiguity, will not entitle the Judge to consider questions of fact to assist him in construing a deed. But if there is no expressions in the document itself which, properly construed, will entitle the Court to come to any conclusion with regard to the matter, then the questions of fact are certainly open to him to consider in coming to a conclusion with regard to the matter. [P 277 C 2]

(c) Civil P. C. (1908) S. 100—Legal necessity is question of fact.

The question of legal necessity is a question of fact. [P 278 C 2]

*** (d) Practise —Presumption—Proprietary rights long enjoyed—Presumption of lawful origin—No evidence on question of necessity of grant—No evidence to support that grant is ultra vires—Grant should be presumed for legal necessity**: *Rowland, J. contra.*

Per *Wort, J.*—The presumption of a lawful origin in suport of proprietary rights, long and quietly enjoyed, is not a branch of law of the evidence but a presumption arising in law in the absence of evidence. [P 279 C 2]

Where there is no fact established directly connected with the question of necessity of a grant and there is no evidence in support of an argument, that the grant was within the competence of the grantor and also where the grant has been challenged after a long lapse of time, the Judge in the circumstances is entitled to assume that the grant was lawfully and not unlawfully made in the sense that it was a grant made for legal necessity. [P 279 C 2]

B. C. De and *K. K. Banarji*—for Appellant.

G. S. Prasad and *Rai Parasnath*—for Respondent.

Wort, J.—If it is remembered in this case that we are dealing with an appellate judgment, the difficulties said to arise in my judgment disappear, as the only matters within the competence of this Court are questions of law. I do not propose to state in as great detail, as has been stated in the Court below the facts, but merely to give the relevant points in order to indicate the questions of law which arise in this appeal. It is the plaintiff's appeal, the plaintiff's action in ejectment having been dismissed by the learned Judicial Commissioner of Chota Nagpur. His case was based on a notice to quit at the end of the agricultural year. Apparently the plaintiff's view of the lease, which was the subject-matter of this action was that it was a tenancy from year to year, and that has been emphasised by Mr. De, who appears on behalf of the appellant, in the course of his argument. The lease was granted sixty-one years before the commencement of the action. The subject-matter of the lease was a piece of land granted to the math many years ago by the ancestor of the defendant. The lease was dated 1924 Sambat, that is 1867, and was made to the predecessor in title of the defendant at Rs. 3 per annum.

The questions which arose in the action were, first, what was the nature of the lease, whether it was a permanent lease or lease from year to year; secondly, whether the lease was within the powers of the grantor; and thirdly (a question which has been raised for the first time in this Court) whether in any event, as Mr. De contends, the plaintiff was entitled to eject the defendant, the defendant having (so it is alleged) repudiated the title of the grantor. The last point is based on the contention that in some other proceedings and in this case in the written statement the defendant denied the original grant to the math and therefore repudiated the title of the grantor. The question as to the construction to be placed upon the lease raises two points. The first matter upon which the appellant relied was the fact that the lease was described as a thica bemiadi. "Bemiadi," I am informed, is an expression which means 'without term.' It is contended therefore by Mr. De that this lease cannot be described as a permanent lease but merely as creating a tenancy at will. It will be seen from what I have already said that that argument runs counter to the statement in the plaint itself and the argument which has been addressed to us. It is impossible to apply the term 'bemiadi' to a lease from year to year. A lease from year to year is a lease with a term. But apart from that, the appellant relied upon certain decisions of this Court, being the the decision in 2 P L J 180 (1), a decision very strongly in favour of Mr. De's contention having regard to the fact that the lease there was not only a lease of the surface but also of the mineral rights. The lease there was 'bemiadi,' but the learned Judges deciding that case came to the conclusion that in spite of the grant of the mineral rights as well as the surface rights, the expression 'bemiadi' led to the conclusion that it was not a permanent right as contended for by the tenant-defendant.

This case was distinguished in 6 P L J 687 (2). But Mr. De contends that it is the duty of the Court to choose between these two decisions. The duty of the Court in circumstance of this kind is to endeavour, if it is possible, to reconcile the two decisions which on a casual reading, might be held to be conflicting. Coutts and Macpherson, JJ. deciding the later case made this observation :

> The learned vakil for the appellant on the authority of 2 Pat L J 180 (1), contended that a permanent tenure cannot be created by a bemiadi patta. This contention however, is by no means supported by the judgment referred to. In that case what happened was that the defendant pleaded that as the patta was a bemiadi one, it created a permanent right, but the learned Judges held that a bemiadi patta or lease without a term, did not necessarily create such a right.

That view of the matter, viz. that the use of the expression does not necessarily conclude the matter, is supported by the decision of their Lordships of the Judicial Committee of the Privy Council in 35 C W N 982 (3). There, Lord Russel of Killowen in delivering the opinion of the Judicial Committee, said that :

> The question cannot be resolved by reference only to the use and meaning of the word 'bemiadi,' but should be determined after consideration of all the provisions of the kabuliyat, by which the rights of the parties are defined.

---

1. Mt. Parshan Kuer v. Mt. Tulsi Kuer, 1917 Pat 46=39 I C 658=2 Pat L J 180.
2. Kangali Charan v. Surja Narain Sah, 1922 Pat 161=65 I C 308=6 Pat L J 687.
3. Janki Nath Roy v. Dinanath Kundu, 1931 P C 207=133 I C 732=35 C W N 982=54 C L J 412 (P C).

As I have said, the view there expressed, in my judgment, quite clearly supports what the learned Judges, deciding *Kangali Charan's case* (2), considered to be the true view of the matter, namely that the question depends not so much upon the use of the term but the proper construction of the deed to which the term is applied, and therefore the use of the word does not necessarily conclude the matter. In this case there are provisions in the lease itself which are of material assistance in coming to the conclusion on the matter at issue. The lease provided :

> The said Missir (or grantee) should remain in possession and occupation of the same and he and his heirs shall pay Rs. 3 to me and to my disciples and remain in possession and occupation of the land and tenants and make such settlement as deemed proper.

The statement, "The said Missir should remain in possession and occupation .... and he and his heirs" is not without significance, although it might be said, and indeed has been argued in this case, that it merely indicates that the heirs after the death of the grantee are entitled to remain in possession; in other words, the grant is a heritable one but not necessarily a permanent one. But the view advocated by the defendant-respondent in this case is supported by the other words coming immediately after the ones to which I have referred, the words being, "shall pay Rs. 3 to me and my disciples." They clearly signify, in my judgment, that the lease should subsist after the death of the grantor, and therefore in my opinion is a permanent lease. This is borne by the other clause which I have already read "and make such settlement as deemed proper" etc. The learned Judicial Commissioner has relied upon the provisions of the lease itself and also upon a number of other circumstances in coming to the conclusion that the lease was a permanent one. He finds first, that the evidence establishes the fact that the land has been built upon, although built upon by the sub-tenants. The land as I have indicated had been let out to sub-tenants and that fact, far from being in favour of the appellant, is very strongly against him (the plaintiff) and that for the reasons given by the learned Judicial Commissioner. He points out that the land being built upon by the sub-tenants, one of the plaintiff's witnesses admits that Gopal Missir had authority to settle the land with tenants; and, in any event, in this case there was no evidence or suggestion in fact that the sub-letting was in any way objected to by the grantor. The learned Judicial Commissioner in this connexion states :

> This .... would certainly indicate that the defendant's lease was of a permanent nature for building purposes.

The further fact upon which the learned Judicial Commissioner relies is that the grantee that is to say (the lessee) and his successor were left in undisturbed possession of the land for about sixty years. Now it might be said that the learned Judicial Commissioner had no jurisdiction to consider questions of fact to assist him in coming to a decision as to what was the proper construction of the deed. The mere fact that there was ambiguity or difficulty, not being a latent ambiguity, would not entitle the Judge to consider these questions. But if, as might be argued in this case, there was no expression in the document itself which, properly construed, would entitle the Court to come to any conclusion with regard to the matter, then the questions of fact which the learned Judge in the Court below discussed were certainly open to him to consider in coming to a conclusion with regard to the matter. But the point in my judgment does not arise for the reason that, in the view I take, the lease purported to be a lease of a permanent character. This leads me to the question pleaded in Para. 5 of the plaint to the effect :

> Besides a temporary lease, Manohar Dasji (the original grantor) was not competent enough to make such a settlement.

Now the point arises in these circumstances : Para. 5 of the plaint could not possibly be said to be insufficient to raise the question of necessity. In any event, so far as it was a matter to be proved, the onus was on the defendant to establish that the circumstances were such as to entitle the original grantor to grant a permanent lease ; in other words, it was either for the benefit of the math or for legal necessity. The matter was not discussed in the trial Court but a reference was made to an authority, from which fact it has been argued that the question was raised. But there is certainly no decision on the question by the trial Judge, the trial Judge having given the plaintiff a decree in a modified

form. In appeal the matter appears to have been argued before the learned Judicial Commissioner who dealt with it on the assumption that evidence was not called by either side on the question. But the learned Judicial Commissioner has stated certain facts, and relying upon a decision of the Privy Council has presumed that there was legal necessity. It is important to notice the words used by the Judicial Commissioner. Dealing with the point he says:

> However he (the grantor) can do so for legal necessity. In the present case the number of years that has elapsed since the date of the lease, renders it impossible for the defendant to prove what were the circumstances which led to the lease being granted.

Then, quoting an authority, and having considered the circumstances of the present case, he goes on to say :

> I am prepared to hold that Mahanth Manohar Das granted the lease for legal necessity. and that the present successor of the original lessee is not liable to be ejected.

Reliance for this finding is placed on the decision in 49 I A 54 (4). There, Lord Buckmaster, delivering the opinion of their Lordships of the Judicial Committee of the Privy Council, relied upon an earlier decision reported in 19 Mad 485 (5), and stated that the disability of a shebait of a Hindu deity to make a permanent grant of endowed property is not absolute, meaning thereby, as I understand the learned Law Lord, that if legal necessity is established the grant would be valid. In referring to 19 Mad 485 (5), Lord Buckmaster makes this statement :

> In that case it was pointed out that although the manager for the time being had no power to make a permanent alienation of temple property in the absence of proved necessity for the alienation, yet the long lapse of time between the alienation and the challenge of its validity is a circumstance which enables the Court to assume that the original grant was made in exercise of that extended power;

and then observes, as regards the facts of the case before him :

> At a lapse of 100 years, when every party to the original transaction has passed away, and it becomes completely impossible to ascertain what were the circumstances which caused the original grant to be made, it is only following the policy, which the Courts always adopt, of securing as far as possible quiet possession to people who are in apparent lawful holding of an estate, to assume that the grant was lawfully and not unlawfully made.

Now the only distinguishing feature between that case and the case which we have before us is, as pointed out by Mr. De in the course of his argument, that there 100 years had elapsed, and it is quite obvious that no one who had any connexion with the original transaction could be called to prove the circumstances under which it was carried out, whereas in this case the period between the lease and when the action was brought under the lease was only 61 years. And Mr. De contends that, had the question been raised as a question of fact in the sense that all the parties called evidence to establish their respective cases, or had the defendant pleaded the matter definitely in his written statement, he might have been in a position to have called evidence to show the circumstances under which the transaction was carried out. In my judgment there can be no doubt about this point. If the facts of the case were open to this Court, the conclusion at which it might have arrived might be different from that at which the learned Judge in the Court below has come ; but we are, as I pointed out at the commencement of this judgment, concerned only with questions of law. The question of legal necessity is a question of fact ; and the learned Judge in the Court below has disposed of it by applying a principle of law to the proved facts of the case. I have already referred to the matters relied upon by the learned Judicial Commissioner in coming to his conclusion on one part of the case, such as, the sub-leases, the building by the sub-lessees and no disturbance by the grantor; and it is on those circumstances and the other to which I have in detail referred, that the learned Judicial Commissioner says :

> However, considering the circumstances of the present case, I am prepared to hold that the Mahanth Manohar Das granted the lease for legal necessity and that the present successor of the original lessee is not liable to be ejected.

Now, it is true that there is a distinguishing feature, namely, the difference between the period of years lapsing from the date of the lease to the date of the action in the Privy Council decision and this case ; but the question we have to determine is not whether we should pre-

---

4. Magniram Sitaram v. Kasturbhai Manibhai, 1922 P C 163=66 I C 162=49 I A 54=46 Bom 481 (P C).
5. Chockalingham Pillai v. Mayandi Chettiar, (1896) 19 Mad 485=6 M L J 247.

sume legal necessity in the case, but whether the learned Judicial Commissioner has misdirected himself in law in applying this principle to the particular facts of the present case. That, in my judgment, is the only question open to this Court. It might be said that, as the defendant did not raise the case in his written statement, the matter was left open, but that is an argument which is not open to the appellant in this case because he has in the first instance depended upon his allegation in the plaint contained in para. 5 to the effect that the grant was beyond the competence of the grantor. The point has been raised and the only question which the learned Judge in the Court below was entitled to or could under any circumstances, decide was whether on the facts the defendant had established that there was legal necessity ; in other words, whether the grant being a permanent one was within the competence of the grantor. It is impossible therefore to contend that this matter could be left open, first for the reason that the lease has been found to be permanent, and secondly by reason of the fact that the learned Judicial Commissioner has dealt with it and come to a conclusion thereon.

Now, was it open to the learned Judicial Commissioner to apply this principle ? In this connexion the decision of their Lordships of the Privy Council in 57 I A 125 (6) is important. Mr. De contends, and rightly so, that in that case the Privy Council was considering whether in the absence of evidence of the grant itself a grant could be presumed, and it might be supposed that the principle applied in the case reported in 49 I A 54 (4) had no reference to the particular matter which was before their Lordships of the Privy Council in 57 Indian Appeals. But, on an analysis of the judgment, it is obvious that that argument cannot be supported. In considering the question, Viscount Sumner makes this statement :

> This question (that is to say, the principle which was sought to be applied in that particular case) was dealt with by their Lordships' Board in 49 I A 54 (4).

Then his Lordship proceeds to discuss that case and the authorities upon which that case depended and then makes this observation :

> The question then is whether this decision applies in the present case, or whether any ground exists on which it can be properly distinguished.

And then, towards the end of the judgment, states :

> In principle the cases are in themselves analogous.

In other words, their Lordships were applying the principle stated in 49 I A 54 (4), that it was proper to assume that the grant was lawful and not unlawful. The importance of the decision of the Privy Council is this that

> The presumption of a lawful origin in support of proprietary rights, long and quietly enjoyed, is not a branch of law of the evidence but a presumption arising in law in the absence of evidence.

The relevance of that authority to the facts of this case is this: that there being no fact established directly connected with the question of necessity and the defendant having adduced no evidence in support of his argument, that the grant was within the competence of the grantor whether the learned Judge in the circumstances might be entitled to assume that the grant was lawfully and not unlawfully made in the sense that it was a grant made for legal necessity. It is not to be forgotten that the case, in which the principle was laid down, was the case of a grant by a shebait, and the question was whether it was made for legal necessity. I might add on this point that the case in 49 Indian Appeals has been sought to be distinguished on the footing that there was a statement by Lord Buckmaster in the course of his judgment to this effect :

> It certainly is not plain that the original lease in 1824 was made by anybody in the position of a shebait at all, because the note is given to the widow of the original grantee, and although it might have been fair to assume that the original grantee was intended to hold as a shebait, even if the widow could hold the office it was not in virtue of that capacity that she granted the lease.

But if this had been the fact, in other words, if the case had ended there and had been decided on the assumption that the grant was not made by a shebait the further discussion as to the presumption of legal necessity would be quite unnecessary; but, in the state of uncertainty as to whether the grant was made by the widow or shebait, the discussion became necessary, and the question was

---

6. Mahammad Muzaffar-Al-Musavi v. Jabeda Khatun, 1930 P C 103=123 I C 722=57 I A 125=57 Cal 1293 (PC).

decided in the manner which I have stated in some detail. In my opinion the only matter that is open to us here is to say whether, as a matter of law, the learned Judicial Commissioner has misdirected himself in presuming that there was legal necessity; and, in my opinion, it cannot be said that there was any misdirection merely by reason of the fact that the difference between the two cases was a difference in lapse of years between the date of the grant and the time when action was brought. The only other question is the question of whether the plaintiff is now entitled in this action to rely upon the repudiation by the defendant-tenant of the landlord's title. We are asked to say that the facts are obvious; we are asked by Mr. De to look at two judgments in certain rent suits in which it is stated that the defendant-tenant had repudiated the title of the landlord. As to that point all that need be said is that this is a question of fact which was not raised in the case, the case in no way depended upon it and it would be beyond my jurisdiction to decide this question. Mr. De then falls back on the repudiation said to have been made in the written statement. To that there is one reply that is given in 17 A L J 552 (7). The case there was a case in which the plaintiff sought possession based upon a repudiation of his title by the defendant. Lord Phillimore, in delivering the opinion of their Lordships of the Judicial Committee of the Privy Council, had said that the matter was governed by justice, equity and good conscience,

> and the rules of English law as to forefeiture of tenancy may be held and have been held to be consonant with these principles and to be applicable to India;

and then went on to say :

> The qualification that the denial must be in clear and unmistakable terms has not unfrequently been applied by the Courts in India.

Their Lordships then, having quoted authorities, make this statement :

> Counsel for the respondent contended that she was entitled to the benefit of these rulings, and that in this case there was no such clear and unmistakable denial. Whether this be so or not, their Lordships do not find it necessary to decide for the following reasons: (1) There is here no denial by matter of record before the present suit was instituted. Denial in the suit will not work a forfeiture of which advantage can be taken in that suit because forfeiture must be accrued before the suit was instituted.

That in my judgment is a complete answer to the point. For reasons which I have somewhat elaborately stated, I am of opinion that the appeal fails and it must be dismissed with costs.

Rowland, J.—The suit out of which this second appeal arises was a suit in ejectment brought by Sri Darbar Saheb, through Mahunt Gyan Prakash Das, praying to eject a tenant from the property held by him on a lease granted by a predecessor of the present Mahunt on an annual rent of Rs. 3. In the plaint it was alleged that this lease was a lease from year to year terminable on giving notice to quit, and terminated by giving such notice. Several defences were taken. The contesting defendant, who happens to be the superior landlord, denied that the property had ever been granted to the Darbar Saheb or to the predecessor of the present Mahunt, and by him sub-let to the predecessor of the present defendant; that is to say, the title of the plaintiff and the relation of landlord and tenant was flatly repudiated. Alternatively the defendant contended that assuming that the property had been let by Mahunt Manohar Das to Pandit Gopal Misra as alleged, the plaintiff had no right to cancel the lease or determine it, the lease being permanent.

The Courts below concurred in affirming the plaintiff's title to the property and the existence of the lease and the fact that the defendant was holding under it. The Subordinate Judge examined the lease and held that it was never intended to create a permanent tenancy, and that the plaintiff was entitled to resume the property. He gave the plaintiff a decree. On appeal the Judicial Commissioner reversed the finding as to the nature of the lease, holding that it was a permanent lease. That finding, if correct, was sufficient for the disposal of the suit. But two other matters have been argued before us. One is the question of legal necessity for the creation of the lease and the question whether such a lease created by Mahanth Manohar Das is binding on his successors, and the other is whether the plaintiff is entitled to re-enter by forfeiture of the holding in consequence of denial of his title by his tenant, the defendant. I shall discuss

---

7. Maharaja of Jaipore v. Rukmini Pattamahadevi, 1919 P C 1=50 I C 631=46 I A 109=42 Mad 589=17 A L J 552 (P C).

first the construction of the lease. It is expressed to be a bemiadi thica patta. This is an expression frequently used in documents of lease in this Province, which has been more than once for consideration in this Court. It was held in 2 Pat L J 180 (1) that the words "bemiadi patta" did not connote any permanence of tenure, and in that case the Court found nothing in the patta to lead to the conclusion that the lease was permanent. The same view was taken in 3 Pat L J 576 (8), and these decisions might suggest that a bemiadi patta would not in any case be regarded as creating a permanent lease. But in 6 Pat L J 687 (2), it was held that where the terms of the lease and the circumstances point to the conclusion that a lease created by a bemiadi patta was intended to be permanent, the use of the expression "bemiadi patta" would not be taken to negative the permanence of the tenure. The above decisions and several cases of the Calcutta High Court were reviewed in 2 Pat 452 (9) where the question whether a bemaidi patta created a permanent lease or not was examined with reference both to the terms of the document itself and the circumstances and purpose for which it was granted.

The construction of a grant such as this should be determined after considering the whole of the terms of the grant and any light that may be thrown on the matter by the circumstances in which it was granted. This method, it seems to me, agrees with that which was adopted by their Lordships of the Privy Council in 54 C L J 412 (3). Turning now to the document itself, we find besides the use of the expression "bemiadi thica patta," that the lease is granted to the lessee and his heirs; that they are to pay rent of Rs. 3 to the lessor and to his disciples; and that the rent payable is Rs. 3 per annum which is referred to as "a fixed rent more than which I shall not demand." The lease permits the lessee not only to enjoy the property himself in any manner he thinks proper by holding it in direct possession, by planting orchards, cultivating it, building houses but also to let to tenants as he thinks fit. There is no such reservation regarding the use to which the land is to be put as is so often found in leases where the eventual re-entry of the landlord is contemplated. I may mention in passing that there is no trace in the document of the lessee, who, by the way, was a Brahmin, paid any premium or nazarana whatever; that the lessor at the time of the grant was receiving Rs. 3 per annum as the rent of a portion of the demised property from one Sheikh Alam Ali to whom that portion had been let until a period expiring three years after the date of the lease that we are construing. The lessee under this present grant was to get for a fixed rent of Rs. 3 a larger property than had been previously let to Sheikh Alam for a term on a rent of Rs. 3.

Before I express my view on the construction of the terms of the grant itself, I should first refer to the argument which Mr. De for the appellant has raised on the point of necessity. It was open to the appellant to argue that if there was no necessity to grant more than a temporary lease, and if there was no benefit to the Darbar Saheb by the grant of a permanent lease, it should not be presumed that the intention of the parties was that the lease should be permanent, on the principle that a transaction will never be presumed to be illegal if it could be referred to a lawful origin. The absence of any premium and the low rent taken are circumstances against the supposition that there was necessity. We have not been referred to any circumstance from which necessity could be inferred, except lapse of time. With great respect to what has been said by my learned brother, I feel difficulty in regarding the finding of the Judicial Commissioner that there was necessity either as a finding of fact founded on evidence or as a presumption warranted in law.

But it is not necessary that I should further discuss this matter regarding which no issue was framed because in the view I take, it makes no difference to the result of the appeal. Even if there was no necessity whatever for the transaction and allowing to this fact of absence of necessity such weight as can be given to it along with other circumstances as an aid in determining what the patta meant,

---

8. Kailaspati Choudhury v. Muneshwar Choudhury, 1918 Pat 468=43 I C 965=3 Pat L J 576.
9. Forbes v. Hanuman Bhagat, 1924 Pat 88=77 I C 32=2 Pat 452=4 P L T 414.

still I think that there is no doubt that the meaning of the patta was to create a permanent tenancy and not a tenancy terminable at the will of the landlord by a notice to quit. I speak with reference to the terms generally, but I regard the fact that the lessee had to wait three years to get possession of a part of the property as particularly significant. The plaintiff therefore fails on the cause of action set up in his plaint, it being sufficient for the purpose of the disposal of this matter to say that the plaintiff can get no such benefit from the absence of necessity as to displace the conclusions arrived at on a reading of the terms of the patta. But the case has been argued by Mr. De before us as if the plaintiff hoped to succeed on the footing that the interest created by Mahanth Manohar Das, even if expressed to be a permanent tenancy, would create no title in the tenant beyond the life of the grantor, and that his successor could eject the lessee on the principle of 44 Mad 831 (10). But there are two insuperable obstacles in his way: Firstly, the plaint was not so framed and the cause of action for such a suit would be a different cause of action from that on which the plaintiff has sought relief in the present litigation. Secondly, if the suit had been so framed as to claim relief on this ground and on such a cause of action limitation must have been held to run against the present Mahanth at latest from the date of the death of his predecessor in 1908, so that the suit would have been dismissed as time-barred. It would, therefore, have been hopeless for the plaintiff to frame his suit in that manner and it was equally desperate for Mr. De to attempt to argue the appeal on those lines. The result of the appeal is not therefore affected by the fact that on the question whether there was necessity for the transaction or not, I am unable to associate myself with all that my learned brother has said.

The last point taken by Mr. De was that the plaintiff was entitled to re-enter on the land on the principle of forfeiture because of the repudiation of his title by the defendant. Here I am in no doubt that Mr. De's contention must fail. It is not enough that the defendant in the clearest and most emphatic terms repudiated the title of the plaintiff in his written statement. The Privy Council decision in 42 Mad 589 (7) has made it quite clear that the denial which is relied on as the basis of forfeiture must have taken place before the institution of the suit. Failing this Mr. De has pointed out that there was in fact a repudiation of the tenancy before the institution of the suit; that is to say, on two previous occasions the plaintiff brought rent suits against this defendant who contested them by written statements denying the title of the plaintiff. The answer to this is that nothing was said of this denial in the plaint of this suit, and we cannot allow the plaintiff to raise this case, as now suggested, altering the nature of the suit and founding it on a new cause of action not taken in the pleadings. The rest is that I agree that the appeal should be dismissed with costs.

B.D./R.K. *Appeal dismissed.*

10. Vidya Varuthi v. Balusami Ayyar, 1922 P C 123=65 I C 161=48 I A 302=44 Mad 831 (P C).

A. I. R. 1936 Patna 282

DHAVLE AND ROWLAND, JJ.

Dwarka Mahton—Petitioner.

v.

Patna City Municipality— Opposite Party.

Criminal Revn. No. 592 of 1934, Decided on 2nd May 1935, from order of Special Magistrate, Patna, D/- 26th September 1934.

(a) Bihar and Orissa Municipal Act (1922), S. 194 (2)—Notice to demolish—Non-compliance—Person cannot urge before Court that requisition to demolish was unnecessary.

To a charge under S. 194 (2) for failure to comply with notice to demolish certain building, the accused cannot urge before the Court that the requisition for demolition was unnecessary. It is for the Municipal Commissioners to decide whether the issue of a requisition is necessary and the accused can prefer an objection to such notice under S. 360: 9 *W R* 279, *Rel. on.* [P 283 C 2; P 284 C 1]

(b) Interpretation of Statutes—Some rules stated.

The first principle is that the intention of the legislature is to be ascertained by reference to the words used. The grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugance or inconsistency with the rest of the statute. Where the language of a statute is clear and unambiguous, it must be interpreted in its ordinary sense. A reasonable interpretation is to be preferred to one that leads to unreasonable results. The state of the law, at the time a statute was passed, is a matter material to be considered to arrive at the inten-

tion of the legislature. A construction, which will make the purpose of the enactment ineffective, is to be avoided if the language used will bear a meaning more in harmony with the general purpose of the statute: 12 *Bom* 474, *Rel. on.* [P 284 C 1, 2]

(c) Bihar and Orissa Municipal Act (1922), S. 194—It is for Municipality to decide as to condition of building and as to whether demolition or repairing is to be made—Decision cannot be questioned in civil Court.

The scheme of the Act is that it is for the Municipality to decide not only whether a building is in a ruinous condition or is dangerous to person or property, but also whether demolition is necessary or repairs would suffice. The decision of the Municipality is not one to be questioned in the Courts, but the rate-payer is not absolutely helpless for he has the alternative of preferring an objection under S. 360. Hence a notice is not contrary to law even though it does not give the accused the choice between demolition and repair.

[P 284 C 2; P 285 C 1]

(d) Bihar and Orissa Municipal Act (1922), S. 194 (2)—Notice under S. 194—Non-compliance—Objection filed late but inquired into and report obtained from engineer—Prosecution for original non-compliance with notice held contrary to law.

Where a notice sent under S. 194 was not complied with by the accused and he filed an objection though at a late date, but it was entertained, enquired into and a report was prepared by the Municipal engineer:

Held: that, prosecution of the accused for non-compliance with the original requisition was contrary to law. [P 285 C 2]

S. De—for Petitioner.

Order.—This is an application in revision against a conviction under S. 194 (2), Bihar and Orissa Municipal Act, 1922, with a sentence of a fine of Rs. 25 or in default a week's simple imprisonment. On 14th February 1934, a notice was served by the Patna City Municipality on the petitioner, as the owner of a holding, requiring him within 7 days to demolish the front portion of his house (*makan ke samne ka hissa*), and intimating as required by S. 359 (2) of the Act that if he had any objection to make to the requisition he should prefer it within five days, failing which the demolition will be carried out by the Municipality and the expenses recovered from him. The notice also added that the person addressed would, if he failed to comply or prefer an objection, be prosecuted. The petitioner did not comply with the notice but filed an objection on 20th February explaining, as he says in para. 4 of his petition in revision, that demolition was unnecessary as the damage done to the building by the earthquake was in no way dangerous and repairs would be sufficient for which a month's time was prayed for, and further praying

that an expert might be called after a month to inspect the repair and thereupon, if anything still remained to be done, the petitioner expressed his readiness to carry them out.

On 10th April 1934 the Municipality issued another notice to the petitioner requiring him to be in attendance on the spot on 12th of April 1934 at 9-30 in the morning so that the dangerous portion of the holding could be pointed out to him. This was doubtless in response to the petitioner's representation of the 20th February, and the Municipal Engineer inspected the house in the presence of the petitioner on 12th April and recorded a note that the first floor was to be dismantled totally and the two central pillars to be rebuilt after the dismantling, but that if the owner wanted to keep the first floor, he should dismantle the main wall of the eastern verandah from the very foundation and rebuild it on another foundation etc. On this report the Municipal Engineer appears to have been asked whether the petitioner had complied with the requisition or not, as the Sectional Officer had reported on 27th March that the petitioner had not removed the dangerous portion. The Municipal Engineer reported on 21st April that the petitioner had not complied with the requisition, and he was thereupon prosecuted. There was and is no dispute that the petitioner received the notice under S. 194 (2) on 14th February and failed to comply with it either by demolition or by preferring an objection within five days. It was contended before the trying Magistrate that no demolition was in fact necessary. This defence was rightly held to be no answer to the charge, for S. 194 authorizes the Municipalty to make a requisition

when it appears to the Commissioners that any building, part of a building, wall, ... is in a ruinous condition and dangerous to persons or property.

It is not necessary for the legality of the requisition that the building should be found by the Courts to have been in a ruinous condition and dangerous to persons or property. Should the house-owner be disposed to dispute the question whether the building is in such a condition, he is entitled under S. 360 to

prefer an objection within five days and the Chairman or Vice-Chairman or the Commissioners at a meeting as the case may be, are to dispose it of under S. 362, and record an order withdrawing, modifying or making absolute the requisition, and if such order does not withdraw the requisition, it has to specify the time within which the requisition is to be carried out. That is the procedure provided by the Act, and it is not open to the petitioner to urge before the Courts that the requisition for demolition should be held to have been unnecessary in view of the condition of the building. It is for the Municipal Commissioners to decide whether the issue of a requisition is necessary: this was held on a construction of the similar provisions of S. 64, Bengal District Municipal Improvement Act, (Bengal Council) Act 3 of 1864, in 9 W R 279 (1). It has been contended on behalf of the petitioner that the notice under S. 194 was illegal because it required him merely to demolish the building, whereas it is said he should have been given the choice of one of the alternatives implied in the wording of the sub-section "to demolish, secure or repair such building, wall, etc." The notice was on a printed form which spoke of demolishing or repairing *tor dijiye ya maram-mat kardijiye*, but the alternative of repairing was penned through.

Macpherson, J., who first heard this case, sitting singly, considered that this was a point of such general importance that it would be well to have it decided by a Bench. The case has accordingly come before us, but neither the Crown nor the Municipality have entered appearance to oppose the petition. The point is apparently one of first impression. We must, therefore, construe the section in the light of the general principles which are to be applied in the interpretation of statutes. The first principle is that the intention of the legislature is to be ascertained by reference to the words used (Beal's Cardinal Principles of Legal Interpretation, Edn. 3, p. 314); and the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the statute (*ibid.* p. 343). Where the language of a statute is clear and unambiguous it must be interpreted in its ordinary sense. A reasonable interpretation is to be preferred to one that leads to unreasonable results (ibid. p. 370). The state of the law at the time a statute was passed is a matter material to be considered to arrive at the intention of the legislature (ibid. 9. 321). S. 194, Bihar and Orissa Municipal Act, takes the place of S. 210, Bengal Municipal Act, 1884, which (as amended in 1894) empowered the Commissioners, in a case like the present, to require the owner or occupier

> within seven days to take down, secure or repair such building, wall or other structure as the case may require.

We feel no doubt on the language used in that enactment, that it was intended that the Commissioners should come to a decision both as to whether a building, wall or structure was in a ruinous state and dangerous and as to what action the case might require by way of remedy, and should issue a requisition accordingly. In the Bihar and Orissa Municipal Act, S. 194, the words "as the case may require" are omitted; but they may have been dropped merely as being unnecessary; it would not be safe to draw from that fact an inference that a substantial alteration in the law was intended; an alteration that might make the power entrusted to the Municipality for the public benefit largely ineffective. Such a construction is to be avoided if the language used will bear a meaning more in harmony with the general purpose of the statute, 12 Bom 474 (2). As we have already seen, if the owner or occupier disputes the necessity of doing the thing he is called on to do, he has his remedy by objection under S. 360, and the orders which are to be passed on such objection may withdraw, modify or make absolute the previous requisition. The procedure seems nugatory unless at least the final order specifies some definite thing which is to be done; and consistency seems to demand that in issuing the original notice the Commissioners should have the power to call on the owner or occupier to do some definite thing and not merely to choose between several things. It seems to us that the Scheme of the Act is that it is for the Municipality to decide

1. Gopee Kishen v. H. W. Ryland, (1868) 9 W R 279.

2. Ollivant v. Rahimtullah Nur Mohamed. (1888) 12 Bom 474.

not only whether a building is in a ruinous condition or is dangerous to person or property, but also whether demolition is necessary or repairs would suffice. The decision of the Municipality is not one to be questioned in the Courts, but the rate payer is not absolutely helpless for he has the alternative of preferring an objection under S. 360 of the Act. We must, therefore, overrule the contention of the petitioner that the notice was contrary to law in that it did not give him the choice between demolition and repair.

It was also urged that the Municipality had virtually condoned the delay of the petitioner by issuing its notice of 10th April, and in this connection stress is laid on the fact that the trying Magistrate, after inspecting the house in the presence of both parties, recorded the opinion that the house was probably not so dangerous as to warrant its being demolished. Some repairs were apparently carried out by the petitioner, but neither this nor the condition of the house as it appeared to the Magistrate has any bearing on the question whether the petitioner is liable to be convicted and fined under sub-s. 2, S. 194 for failing to comply with the requisition under Cl. (ii), sub-s. 1. It is clear that if the petitioner had made his .objection one day earlier he would not have been liable to prosecution except for failure to comply with the final order passed under S. 362 disposing of the objection and would have been entitled to a further period of grace as provided in that section for compliance with the final order: see 3 P L T 301 (3). The objection of the petitioner was in fact inquired into and the report of the Municipal Engineer is to the effect that instead of demolishing the entire front part of the house, it would suffice if the upper storey only were dismantled and the two central pillars rebuilt; it also indicates a possible alternative method of repair by which the first floor also need not disappear for ever. It seems inconsistent that the Municipal authorities should entertain an objection and have before them a report from their own responsible expert showing that specified repairs other than demolition would suffice to render the building safe, that they should leave the petitioner under the impression that the carrying out of those specified repairs was all that was demanded of him, and that they should still prosecute him for non-compliance with the original requisition, taking advantage of the technical defect that the objection was a day late, a matter which appears to have escaped notice at the time. Though the Municipality has prosecuted the petitioner, it has not chosen to oppose the petition in revision. It seems to us that in the circumstances, we should not be straining the law unduly in favour of the petitioner if we were to hold that the procedure followed was not in accordance with law and that such a prosecution was not maintainable. The rule is accordingly made absolute, the conviction set aside and the petitioner acquitted. The fine if paid is to be refunded.

K.S./R.K. *Rule made absolute.*

3. Ram Pratap Lal v. Barh Municipality, 1922 Pat 183=66 I C 417=23 C L J 273=3 P L T 301.

A. I. R. 1936 Patna 285

WORT, J.

Naga Rai and *others*— Defendants—Appellants.

v.

Buchi Rai—Plaintiff—Respondent.

Appeal No. 435 of 1933, Decided on 31st January 1936, from appellate decree of Sub-Judge, 2nd Court, Chapra, D/- 13th January 1933.

(a) Bihar Tenancy (Amendment) Act (1935), S. 26-N—Sale before 1923—Consent of landlord is presumed even if purchaser is one of co-sharers.

Sale before 1923 is presumed to be with consent of the landlord even if the purchaser is one of the co-sharer landlords and he is in the position of a third party purchaser of a holding or part of holding: 1936 *P C* 49, *Applied.* [P 286 C 1]

(b) Landlord and Tenant— Partition of landlord's interest —It does not affect or increase rights against tenants.

Partition of landlord's interest in a holding does not affect or increase rights against the tenants or their transferees: 1917 *Pat* 635, *Foll.* [P 286 C 2]

(c) Bengal Tenancy Act (8 of 1885), S. 22— S. 22 applies to transferable holding even with the landlord's consent.

Section 22 applying obviously to the case of a transferable holding without the consent of the landlords would also apply to those cases in which the landlords had given their consent; that is to say, the purchase by the co-sharer landlord of a holding of one of the tenants with the consent of his co-sharers would place the purchaser co-sharer landlord in the position provided for by S. 22 (2), Ben. Ten. Act. [P 287 C 1]

Harnarain Prasad—for Appellants.

Rajkishore Prasad—for Respondent.

Judgment.—This case creates some difficulty and involves a question under the Bihar Tenancy (Amendment) Act of 1935. It is the defendant's appeal, and they with the plaintiff were co-sharers in a certain village of a plot numbered 2312. On the finding of the Courts below this admittedly was the occupancy holding of one Parma Lal. Parma Lal sold a portion of this holding in 1908 to the plaintiff and about 1928 there was delivery of possession in a partition by which the portion of the holding which Parma Lal had sold to the plaintiff in 1908 fell to the patti of the defendants. There was some dispute over possession as between the defendants and the plaintiff; proceedings under S. 145, Criminal P. C. were started; and by reason of the order made in those proceedings it has been found by the lower Courts that the plaintiff was dispossessed. I understand that to mean (and indeed it is consonant with the decision of the Courts below) that in spite of the Subdivisional Magistrate holding that the defendants were in possession, in fact the plaintiff has been in possession of this plot since 1908 the date of his purchase. Both the Courts below have considered this case from the point of view of the purchase by the plaintiff in 1908.

I was at first surprised to learn that certain other transactions were not taken into consideration, nor was the case made to depend upon them, but the explanation is simple. Between the purchase of 1908 and the partition of 1928 the plaintiff had entered into certain transactions which the Courts below have held showed his determination to keep possession of the land which he had purchased. By one of these transactions the plaintiff purported to sell the property to one Sukhlal Misser in 1916 and by another Sukhlal Misser purported to sell the property back to the plaintiff in 1929. In the meantime (that is between 1916 and 1928 when the partition took place) the revisional survey had recorded this land as the occupancy holding of Sukhlal Misser, the purchaser under the sale deed of 1916. Now it is clear from the judgments of the Courts below that these transactions between the plaintiff and Misser, and the Misser and the plaintiff, were nothing more than fictitious transactions, the transaction of 1916 which purported to convey title to Sukhlal Misser being nothing more than a benami transaction and the socalled sale of 1929 being nothing more than a ladavi deed or deed of release. That is the reason why neither the parties in the Courts below nor the learned Judges who decided the case took into consideration these transactions of 1916 and 1929, as the real title of the plaintiff was got by the purchase in 1908. Now, if the plaintiff got his title under the sale of 1908, the matter would be concluded by S. 26-N of the Amending Act of 1935 which provides:

> Every person claiming an interest as landlord in any holding or portion thereof shall be deemed to have given his consent to every transfer of such holding or portion by sale, exchange, gift . . . . made before the first day of January 1923.

The later S. 26-O provides for sales after January 1923 and before the date upon which the Act came into force. As this was a purchase before 1923, S. 26-N is conclusive having regard to the decision of their Lordships of the Privy Council in 17 P L T 25 (1). Now does the fact that the purchaser under the sale of 1908 was a co-sharer landlord make any difference? The contention of the learned Advocate for the appellants is that the batwara proceedings of 1928 made this portion of the holding a separate holding, and the defendants would be entitled to joint possession with the plaintiff. That is to say, the land would be treated as bakasht land. But it must be remembered that the entry in the Record of Rights was that the land was the occupancy holding of Sukhlal Misser, the purchaser from the plaintiff in 1916. Eliminating the fact for the moment that the plaintiff was the purchaser in 1908, the question of whether the batwara proceedings conferred any right on the defendants which they had not before is concluded by the decision of this Court in 2 Pat L J 225 (2). I believe there is a later decision, but the authority of the case to which I have referred has never been questioned nor has the decision been overruled, and therefore it is binding upon me. That being so, the batwara proceedings not having affected nor having increased the rights of the defendants, does it make any difference that

1. K. C. Mukherjee v. Mt. Ramratan Kuer, 1936 P C 49=160 I C 105=17 P L T 25 (P C).
2. Suraj Deo Narayan Singh v. Pachh Narain Singh, 1917 Pat 635=39 I C 98=2 Pat L J 225.

the purchase was by the plaintiff co-sharer landlord in 1908? It is quite clear that in 1908 the co-sharer landlords had no right to possession and that is admitted as the purchase was only of a part of a holding. I have already stated and repeat that the decision reported in 2 Pat L J 225 (2) decides that the batwara proceedings in no way increases the right of the plaintiff. Now S. 22, Ben. Ten. Act, has been held by the decision of this Court in 8 Pat 650 (3) to apply in those cases in which the holding so purchased was transferable. But there is no decision and I imagine there could hardly be any decision to the effect that S. 22, Ben. Ten. Act, does not apply to a case in which the landlords had given their consent, in other words, S. 22 applying obviously to the case of a transferable holding without the consent of the landlords, would also apply to those cases in which the landlords had given their consent; that is to say, the purchase by the co-sharer landlord of a holding, of one of the tenants with the consent of his co-sharers would place the purchaser co-sharer landlord in the position provided for by S. 22 (2), Ben. Ten. Act. Now that brings me to S. 26-N, Amending Act. This was a purchase I repeat in 1908. It is a purchase by a co-sharer landlord; and if I am right in holding and I think it is impossible to hold otherwise, that S. 22 as it stood before the amendment would apply to a case where the co-sharer landlord had given his consent, then under S. 26-N the consent is deemed to have been given. Therefore the plaintiff found himself in the position of a third party purchaser of a holding or part of a holding in which the landlords had given their consent to transfer. For those reasons, in my judgment the appeal fails and must be dismissed with costs. There will be leave to appeal under the Letters Patent.

K.S./R.K. *Appeal dismissed.*

3. Lachmi Narain Tewari v. Ramsaran Tewari, 1929 Pat 185=118 I C 129=8 Pat 650=10 P L T 204.

A. I. R. 1936 Patna 287

MOHAMMAD NOOR AND ROWLAND, JJ.

(Raja Sri Sri) Jyoti Prasad Singh Deo Bahadur—Plaintiff—Appellant.

v.

Rajendra Narayan Singh Deo and *others*—Defendants—Respondents.

Appeal No. 897 of 1932, Decided on 4th February 1936, from appellate decree of Dist. Judge, Manbhum-Sambalpur, D/- 12th May 1932.

(a) Second Appeal—Construction of document of title is question of mixed fact and law.

The construction of a document of title is a question of law or at any rate of mixed fact and law and the second appellate Court can go into such matter. [P 288 C 1]

(b) Deed—Construction—Discrepancy between designation of property in body and description by boundary — Former should prevail.

If there is a discrepancy between the designation of the property in the body of the grant and its description by boundaries, the designation of the property must prevail. [P 288 C 1, 2]

(c) Adverse Possession—Mere non-payment of rent is not.

Mere non-payment of rent does not by itself create adverse possession: 1922 *P C* 272, *Foll.* [P 289 C 1]

(d) Record of Rights—Entry stating fact of possession without person paying rent—But this does not debar landlord from filing suit for rent.

Where the record of rights correctly stated that the defendants were holding certain lands and purporting to hold them as a part of their patni tenure and were in fact not paying any additional rent for it:

Held: that the record of rights did not stand in the way of the plaintiff obtaining a decree for rent against the defendant. [P 289 C 1, 2]

S. C. Mazumdar and *S. M. Mullick*—for Appellant.

H. S. Chatterji and *A. B. Mukherji*—for Respondents.

Rowland, J.—The plaintiff-appellant is a proprietor under whom the defendants are patnidars. The suit was brought to declare that mauza Mohanpur does not appertain to the defendants' patni and that the defendants are bound to pay rent for it separately. The suit was decreed by the trial Court but dismissed on appeal, the District Judge holding that village Mohanpur was included in the patni grant. This finding is challenged in second appeal as being based on an erroneous reading of the defendants' document of title the patni grant dated 1286 B. S. corresponding to

1879 A. D. The respondents contend that the question what was conveyed by the grant is a question of fact on which the finding of the lower appellate Court is final. No doubt findings of fact are final and the meaning of documents has been held in some cases to be a question of fact, but the construction of a document of title is a question of law or, at any rate, of mixed fact and law, and I think we are bound to go into the matter. The patni grant is a grant of 4 mauzas, namely, Kumardanga, Basantpur, Berali and Amadih in pargana Joytara. It does not mention Mohanpur. The defendants' case was that mauza Mohanpur is a part and parcel of mauza Kumardanga.

The Subordinate Judge decided this question in the negative, but the District Judge has reversed this finding. To ascertain what was mauza Kumardanga the test is to see how the villages were surveyed in the revenue survey which took place in 1866, 13 years before the patni grant. Kumardanga was surveyed as a part of pargana Joytara with boundaries which were mapped. Mohanpur was surveyed as a part of pargana Khaspel having its own survey No. 2912 and thak No. 108, that is to say it was surveyed as a separate and distinct unit from mauza Kumardanga and was not treated as a part of that mauza. The District Judge is clearly in error in saying that this is not a sufficient ground for holding that Mohanpur is not included within Kumardanga as alleged by the defendants. It is clear that the property designated in the body of the grant is Kumardanga and is not Mohanpur. But the District Judge thinks that the property described by boundaries in the schedule does not agree with the designation in the body of the grant and the description by boundaries should prevail. The Subordinate Judge, after considering the report of the Commissioner, had found that the boundaries in the patta correctly described the mauza Kumardanga as surveyed and mapped by the revenue survey authorities, excluding Mohanpur. The District Judge thought otherwise, but his view rests on an error of record. He says that on the east of Mohanpur the revenue survey map shows a jore (stream), but in fact the map shows a road. In the case before us, even if there is a discrepancy between the designation of the property in the body of the grant and its description by boundaries, I am of opinion that the designation of the property must prevail. I am clearly of opinion that the grant of Kumardanga was not a grant of Mohanpur.

The District Judge has referred to the history of the property as showing that before the grant of the patni tenure Mohanpur had been in the possession of a khorposhdar whose tenure had been resumed by the proprietor and that thereafter the patnidar got possession of Mohanpur under colour of his patni tenure. In coming to this conclusion the District Judge has unfortunately fallen into another error of record. He has said: "The recital in the document shows that the entire thing that was resumed from the khorposhdar was given in patni." There is nothing in the patni grant to indicate this, and a reference to the papers of the resumption suit shows that the thing that was resumed from the khorposhdar was a tenure comprising about 50 villages. The list refers to Kumardanga both by name and by its revenue survey number indicating that in resumption proceedings at least Kumardanga meant exactly what the revenue survey had defined it to contain. The District Judge points out that the khorposhdar had given a settlement of mauza Mohanpur to some persons of the name of Choudhury whose successors are still in possession and are holding it under the present patnidar of Kumardanga. Conceding that that is the history of the mauza, it shows possession under claim of title; but it does not alter the meaning of the language used in the grant.

It is, however, contended for the respondents that in any case the patnidars have by long possession acquired the right to hold this mauza as part of their patni without paying additional rent for it. This contention involves two points. First, the right to hold and to be protected from ejectment, and secondly, the negation of the plaintiff's right to rent. As regards the first point it is to be observed that the plaintiff has not sought ejectment or challenged the right of the defendants to hold the mauza. He seeks to establish his right to realize additional rent. Therefore such decisions as that in 35 Mad 618 (1) are of no assistance to

1. Mathurakkoo Thevan v. R. G. Orr, (1912) 35 Mad 618=10 I C 575.

the respondents. In that case the suit was for khas possession and the defence was that the plaintiff's right was limited to claiming only rent for the excess lands. The contention of the defendant was maintained but no question arose of his right to hold the property without paying rent. The same is true of 17 C L J 277 (2). The respondent relies on two decisions of the Calcutta High Court in 22 C L J 129 (3) and 22 C L J 309 (4). In the former of these cases it was decided that where the defendant more than 12 years before the commencement of the suit, had asserted openly and to the knowledge of the plaintiff a title to hold the land without payment of rent the title of the plaintiff to realize rent from the defendants was barred by the statute of limitation. In the other case a rent free grant was presumed. It was also pointed out that the claim was in any case barred by limitation as the right to hold the land free of rent has been asserted to the knowledge of the plaintiff more than 12 years before the suit. In the present case there is no trace of such an assertion being made by the defendants at any time earlier than the settlement proceedings. Mere non-payment of rent does not by itself create adverse possession, as pointed out by the Privy Council in 2 Pat 38 (5). The plaintiff's right to recover additional rent is therefore not barred by time.

It remains to consider one further point which may be expressed thus: There is a presumption of correctness attaching to the record-of-rights. The plaintiff was bound to prove by evidence that it is incorrect. The actual entries in the record were not placed before us in argument but the record, as disclosed in the judgments of the Courts below, states correctly the facts of possession. The record correctly states that the defendants are holding Mohanpur and purporting to hold it as a part of their patni tenure and are in fact not paying any additional rent for it. Whether the defendants were liable to pay additional rent for excess area was a matter on which the settlement officer was not bound to record any opinion and, it does not appear that he did so. I am of opinion, therefore, that the record-of-rights does not stand in the way of the plaintiff obtaining a decree. The plaintiff should have been granted a declaration that the defendants are bound to pay the plaintiff a proper rent for village Mohanpur in addition to the rent which they pay for the patni tenure granted to them in 1879. I would allow the appeal and decree the suit for this declaration with costs throughout.

Mohammad Noor, J.—I entirely agree.

K.S./R.K. *Appeal allowed.*

---

* A. I. R. 1936 Patna 289

MOHAMMAD NOOR AND VARMA, JJ.

Narottan Das and *others*—Appellants.

v.

Krishna Prasad and *others* — Respondents.

Appeal No. 117 of 1935, Decided on 7th February 1936, from original order of Sub-Judge, Bhagalpur, D/- 9th March 1935.

*** (a) Civil P. C. (1908), O. 34, R. 14 — Money decree ordered to be paid in instalments on judgment-debtor executing security bond hypothecating property—Default in instalments — Such property can be sold in execution of decree—Fresh suit is not necessary.**

Where a money decree is ordered to be paid in instalments on the judgment-debtor executing a security bond hypothecating immoveable property for the satisfaction of the decree and default is committed in the payment of instalments, the hypothecated property can be sold in execution of the decree and a fresh suit is not necessary : *Case law discussed.*

[P 291 C 1; P 291 C 1, 2]

*** (b) Execution — Property given by judgment-debtor as security for satisfaction of decree—Subsequent purchase of property by another decree-holder in execution of his money decree — Execution of first decree against property is as if it is charge — Purchaser decree-holder being representative of judgment-debtor should be given opportunity of redemption.**

When a money decree is being executed against a property given in security for the satisfaction of a decree, it is not being executed as a simple money decree but as a decree against the property on which it is a charge. Hence where such property is subsequently purchased by another decree-holder in execution of his money decree, the property is transferred to him only subject to the charge and hence in execution proceedings by the former decree-holder against such property, the purchaser

2. Dharani Kant Lahiri Chowdhuri v. Gabar Ali Khan, (1913) 17 C L J 277 = 18 I C 17 (PC).
3. Birendra Kishore Manikya v. Laksmi, 1915 Cal 386=30 I C 896=22 C L J 129.
4. Kali Mohan v. Birendra Kishore, 1915 Cal 527=31 I C 391=22 C L J 309.
5. Jagdeo Narain Singh v. Baldeo Singh, 1922 P C 272=71 I C 984 = 49 I A 399 = 2 Pat 38 (PC).

decree-holder should be present as he is a representative of the judgment-debtor within S. 47, Civil P. C., so that he may be given an opportunity to redeem the property by paying off the amount due to the prior decree-holder : *Case law discussed.* [P 292 C 2 ; P 293 C 2]

(c) Civil P. C. (1908), S. 47 — S. 47 should be liberally construed.

Section 47 should be liberally construed and the decree-holder should get his relief as expeditiously as possible : 19 *Cal* 683 (*P C*), *Foll.* [P 294 C 2]

S. M. Mullick, *Baldeva Sahay* and *D. C. Varma*—for Appellants.

A. B. Mukherji and *B. B. Saran*—for Respondents.

Mohammad Noor, J.—This appeal is from the order of the Subordinate Judge of Bhagalpur directing the names of the appellants to be added as judgment-debtors in an execution proceeding. The facts are these: The respondent Kishun Pershad obtained a decree against Partap Narayan Chaudhury and another for a sum of Rs. 9,562-14-0. The decree directed that the decretal amount was to be paid in annual instalments provided that the judgment-debtors filed in Court within one month a registered security bond hypothecating certain property as security for the realization of the decretal debt. This order was obviously passed under O. 20, R. 11, Civil P. C. The defendants complied with the conditions and filed the security bond hypothecating their property for the satisfaction of the decree. There was some question raised between the decree-holder and the judgment-debtors whether the terms of the decree were complied with and the bond was filed in time. I need not enter into it, as it has been held in an earlier proceeding that it was done.

The judgment-debtors made a default in the payment of the instalments and the decree-holder who is the principal respondent before us, put the decree in execution and proceeded to sell the hypothecated property without first getting it attached. An objection was raised on behalf of the judgment-debtors that the property could not be sold without an attachment. This was upheld by the executing Court on 2nd November 1932, but the order was reversed on appeal by this Court on 16th March, 1934. The judgment is reported in 13 Pat 387 (1). In the meantime the execution case was dismissed on 20th March 1933, for default of the decree-holder. When this Court decided that an attachment was not necessary, the execution case was restored on 10th July 1934. In the meantime the appellants purchased the hypothecated property in execution of their own simple money decree. When the execution case was restored, the decree-holder applied that as the appellants had purchased the hypothecated property of the judgment-debtors they should be deemed to be their representatives and should be added as such in the execution proceeding. To this the appellants raised various objections, but we are concerned only with one of them, namely that they should not be added as judgment-debtors in the execution proceeding. The objections were disallowed and the appellants were added as judgment-debtors as representatives of the original judgment-debtors. They have appealed against the order.

During the course of the execution in which the appellants purchased the property the decree-holder of this case applied that his charge upon the property in question should be notified. This was ordered to be done, but somehow or other it was not notified. The appellants however knew of it. No question has therefore been raised before us that the appellants had no notice of the charge of the decree-holder on the property which they had purchased. The only question involved in this appeal is whether the decree-holder respondent is entitled to proceed with his execution against the hypothecated property in the presence of the appellants. The decision of the issue depends upon the determination of the nature of execution of a simple money decree for the satisfaction of which security has been given under the provisions of the Code of Civil Procedure. Mr. Mullick appearing on behalf of the appellants has contended that if the hypothecated property can at all be sold in execution of the decree, that property cannot be treated as if it is a mortgaged property. As such it cannot be sold without institution of a fresh suit as provided in O. 34, R. 14. But if the decree be executed as a simple money decree without any reference to the fact that the property sought to be sold is hypothecated to the decree-holder, the appellants cannot be treated as representatives

1. Krishna Prasad v. Pratap Narayan, 1934 Pat 608=153 I C 821=13 Pat 387=15 P L T 754.

of the judgment-debtors and cannot legally be brought on the record. The learned advocate for the respondents has, however, contended that the principle of O 22, R. 10, applies in this case and the suit must be treated as pending till the decree is satisfied. He contends that when a property is given in security for the satisfaction of a simple money decree the decretal debt thereby becomes a charge upon the property and the charge can be enforced in execution of the decree itself, and a transferee of the hypothecated property being the representative of the judgment-debtor the decree-holder is entitled to have him added as a party to the execution proceeding in order to give him an opportunity of redemption.

The first question to be considered is whether the hypothecated properties can be sold in execution of the decree. So far as this Court is concerned it seems to be settled that if the decree is not for a claim arising out of the mortgage the hypothecated property can be sold in execution of the decree and a fresh suit is not necessary. It was held in 2 P L J 55 (2), that the effect of Rr. 14 and 15, O. 34, Civil P. C., read with S. 100, T. P. Act, is that where immoveable property has been made security for payment of money and the beneficiary has obtained a decree for the payment of money so secured he shall not be entitled to bring the property to sale otherwise than by instituting a suit for sale in enforcement of the security. But the immoveable property must have been made security for payment of the money before the decree was obtained, otherwise the provisions do not apply. Chapman, J., held that in order to attract the provisions of O. 34, R. 14 the claim must arise out of the mortgage, but when security is given after the decree was passed this rule has no application. This was a case in which the decree, which was for maintenance, created a charge upon some property and the objection was that the property could not be sold without a suit under S. 67, T. P. Act. In a later decision in 2 P L J 197 (3), the same learned Judge, Chapman, J., held that the property given in security by a surety could be sold in execution of the decree if the judgment-creditor has exhausted all remedies against the judgment-debtor. There are, however, observations to the effect that the sale would not be of the mortgaged property and the judgment-creditor ran the risk of the right of redemption being subsequently held to remain alive, otherwise there was no objection to his proceeding in this manner. These two cases, in my opinion, clearly lay down that if a property is given in security for the satisfaction of a decree subsequent to the decree or in the decree itself the property can be sold without recourse to a fresh suit. In 4 Pat 693 (4), it was held that when a decree created a charge for maintenance it could be executed without a separate suit and the decree-holder could bring to sale the property charged through the agency of the executing Court without first having resort to a suit under the provision of S. 67, T. P. Act. It was further held that where the claim arose out of a money decree the provisions of O. 34, R. 14, which prohibits the enforcement of a mortgage except in the manner provided by the Code did not apply. To the same effect is the decision in 8 Pat 801 (5). Mr. Mullick appearing on behalf of the appellants has drawn our attention to the case of 1 Pat L W 69 (6), where a property was given in security by the defendant before the decree was passed. It was held that the property could not be sold without a fresh suit. But Roe, J., while agreeing with the judgment of the late Jwala Prasad, J., said as follows :

> The mortgage being prior to the compromise decree the debt arises out of the mortgage. Therefore under O. 34, R. 14, Civil P. C., the mortgaged property cannot be sold.

In the present case the security was given after the decree was passed, or at any rate the security was taken as a condition of the decree being an instalment one. There was some difference of opinion in Calcutta, but the majority of the decisions seem to be in favour of the view that the property given in security for the satisfaction of a decree can be sold without having recourse to a separate

2. Braja Sunder Deb v. Sarat Kumari, 1916 Pat 252=38 I C 791=2 Pat L J 55.
3. Ganga Deo Narayan Singh v. Joti Lal Sahu, 1917 Pat 596=39 I C 648=2 P L J 197.
4. Hari Shanker Rai v. Mt. Tapai Kuer, 1926 Pat 31=88 I C 923=4 Pat 693=6 P L T 802.
5. Tata Iron and Steel Co. v. C. J. Smith, 1930 Pat 108=124 I C 90=8 Pat 801.
6. Gokul Nath Jha v. Pranmal Marwari, 1916 Pat 61=37 I C 397=1 Pat L W 69.

suit. In the case of 51 Cal 150 (7), it was held that properties covered by a security bond given for stay of execution of a decree could be proceeded against without instituting a suit under S. 67, T. P. Act. There is in principle no difference between a security bond given to secure a stay of execution and a bond given to secure the decree being made an instalment one. The same view has been taken by the Allahabad High Court in 45 All 649 (8), by the Rangoon High Court in 7 Rang 352 (9) and by the Madras High Court in the case of 41 Mad 327 (10), a case which was relied upon in the Calcutta case already referred to. Sir John Wallis, the then Chief Justice of the Madras High Court, observed :

> It would be a most mischievous state of law if such a thing were necessary and it would fetter the discretion of the Court in accepting immoveable property as security for the execution of the decree.

His Lordships relied upon the decision of the Judicial Committee in 2 I A 219 (11) and held that the matter is one for decision in the execution proceeding. This case was followed in 92 I C 497 (12). The principle seems to have been accepted by their Lordships of the Judicial Committee in 46 I A 228 (13). In that case a third party had given security for due performance of a decree. The decree-holder filed an application for ascertainment of mesne profits and their realisation from the hypothecated properties making the sureties parties to the execution proceedings. Their Lordships held that it was permissible. This case, in my opinion, lays down two principles: one is that hypothecated property can be proceeded against in execution of the decree itself without having recourse to a separate suit, and secondly that the surety can be made a party to the execution proceedings. These cases leave no manner of doubt in my mind that the properties given as security by the judgment-debtor can be sold without a separate suit. The next question is whether the execution of a decree can be as if it was a simple money decree without having regard to the fact that the property sought to be sold was hypothecated for the satisfaction of the decree, or whether the property can be proceeded against as if it was subject to a charge. The bond in the present case seems to me to be similar to the bond which was before their Lordships in the case above referred to. In this bond nobody has been named as a mortgagee. The judgment-debtor simply said that he was mortgaging the property for the satisfaction of the decree and promised that till the decree was satisfied he would not mortgage or in any way encumber it. Under similar circumstances their Lordships held that such a bond created a charge on the property hypothecated and that it could be sold in execution of a decree by making the surety party to the execution proceeding and giving him time to redeem. In the case before us the judgment-debtors themselves have given security.

If the contention of the learned Advocate for the appellants be accepted that in such a case the execution can only proceed as if the decree was a simple money decree without having any regard to the fact that the decretal-amount was a charge upon .the property sought to be sold, a number of complications will arise. In this particular case no property is left in the judgment-debtors. Their right, title and interest in the property whatever it was has been sold in execution of a simple money decree and has been purchased by the appellants. If the contention of the appellants be accepted the property cannot be sold at all. We shall therefore be landed into this position: that if a property be given in security for the satisfaction of a decree under the provisions of the Code of Civil Procedure, it can only be proceeded against as long as it is with the judgment-debtor or with the surety, but as soon as the property is transferred to a third party it cannot be proceeded against in execution of the decree and a suit will become necessary. This position, as pointed out by Sir John Wallis in the Madras case, will be a very

7. Jyoti Prakash Nandi v. Mukti Prakash Nandi, 1924 Cal 485=81 I C 734=51 Cal 150.
8. Beti Mahalakshmi Bai v. Badan Singh, 1924 All 105=74 I C 927=45 All 649=21 A L J 604.
9. Daw Ohn Bwin v. U Bah, 1929 Rang 126=118 I C 632=7 Rang 352.
10. Subramanian Chettiar v. Raja of Ramnad, 1918 Mad 442=43 I C 187=41 Mad 327=34 M L J 84.
11. Sadasiva Pillai v. Ramalinga Pillai, (1876) 2 I A 219=24 W R 193=15 Beng L R 383=3 Sar 519 (P C).
12. The Official Receiver, Tanjore v. Nagaratha Mudaliar, 1926 Mad 194=92 I C 497=49 M L J 643.
13. Raghubar Singh v. Jai Inder Bahadur Singh, 1919 P C 55=55 I C 550=46 I A 228=42 All 158 (P C).

mischievous one. Security for due performance of a decree is taken to facilitate the realization of the decree, and not to make its realization more difficult. The decree-holder is entitled to have his decree realized by the easiest method known in law. If a property given in security by the judgment-debtor can only be sold in execution of the decree as long as it is in his possession, there is no object in taking security as the property of the judgment-debtor can always be sold in execution of a simple money decree. The only advantage will be to convert the decree into a claim and necessitate a fresh suit and thus prolong the litigation. In my opinion, there is nothing in any provision of the Code which makes it necessary to institute a fresh suit when the hypothecated property has passed out of the hands of the judgment-debtor or the surety. The second difficulty will be this. If the execution be in all respects as that of a simple money decree though against a hypothecated property an attachment will be necessary. This Court has however held in 8 Pat 801 (5), already referred to, that where a judgment-debtor executes a mortgage bond as security for due performance of a decree, the bond is enforceable in execution proceedings and the decree-holder may realize the properties given in security without attaching them or instituting a suit under S. 67, T. P. Act. This case lays down three propositions (1) that a suit is not necessary, (2) that the security bond can be enforced and the security property can be realized and (3) that an attachment is not necessary. The first proposition has already been dealt with. The second lays down that it is not only the money decree which is executed but the security bond is enforced and that can only be enforced against the property and the decree-holder can follow the property wherever it may be. The third position makes it clear that the property shall be deemed to be attached from the time the security bond was given and an attachment in the course of execution is not necessary. Das, J., when dealing with this topic, said:

> The second point is that attachment is a necessary preliminary to an execution proceeding. This is undoubtedly so ; but we must find out a reason for the rule which requires a decree-holder to attach properties as a preliminary to taking execution proceedings. There is no doubt whatever that the whole object of attachment is to prevent an alienation and to make a particular fund available to the decree-holder ; but this fund was available to the decree-holder as soon as the security bond was executed. It was impossible for the judgment-debtor after executing the security bond to alienate the property covered by the security bond to the embarrassment of the decree-holder. This has been dealt with by Wallis, C. J., in 41 Mad 327 (10), and I entirely agree with his conclusion.

Wort, J., agreed with this decision, and while sitting with my brother Varma again took the same view in this very case in 13 Pat 387 (1). A purchaser at an auction sale in execution of a simple money decree purchases nothing more than the right, title and interest of the judgment-debtor, but when he purchases a property which has already been given in security for the satisfaction of a decree he purchases it subject to the charge of this decree and he is bound by that charge; and when this charge is enforced it can be enforced even when the property is in his hands. In 41 Mad 327 (10), just referred to above, Wallis, C. J., speaking of the execution proceedings observed :

> The effect of immoveable property being given as security is something more than an attachment, because it makes the property applicable solely in discharge of the judgment-debt and not liable to rateable distribution among other judgment-creditors. But the realisation by the Court of such security in execution is of the same nature as sale by the Court of the immoveable property attached, that is to say, it transfers the right, title and interest of the judgment-debtor who has given security.

In 92 I C 497 (12), already referred to in connexion with the necessity of a suit, it was also held that the executing Court was not bound to stop the sale of the property on receiving notice of the insolvency of the judgment-debtor under S. 52, Insolvency Act, as the decree-holder who was proceeding against the property given in security for the satisfaction of his decree was a secured creditor. This finding clearly shows that when a money decree is being executed against a property given in security for the satisfaction of a decree it is not being executed as a simple money decree but as a decree against the property on which it is a charge. There are observations in this case to the effect that the decree-holder when he has received a security for his decree becomes a secured creditor and is to be treated as such. This proposition can also be deduced from the decision of the Allahabad High Court in

92 I C 348 (14). There a property which was subjected to a charge for the satisfaction of a decree was subsequently purchased by a third party and the sale of the property in execution of the decree was set aside at the instance of this purchaser. The decree-holder brought the suit for a declaration that he could sell this property in execution of his decree. This was allowed. I shall presently show that a suit for this purpose is unnecessary and the question can be dealt with in the execution proceeding itself.

The next question for consideration is whether the appellants, who have purchased the hypothecated property in execution of their simple money decree, can be added as judgment-debtors to the execution proceedings. Once we come to the conclusion that the security given for the satisfaction of a decree by the judgment-debtor can be enforced in execution proceedings it follows that if the hypothecated property has been transferred subject to the charge the transferee, whether he be a purchaser at an auction in a simple money decree or by a voluntary transfer, can as a representative of the judgment-debtor be made a party to the execution proceedings; otherwise, as I have said, the property cannot be sold because the judgment-debtor has no saleable interest left in it. The learned Subordinate Judge has referred to the two decisions, one of the Allahabad High Court and the other of the Calcutta High Court, 26 All 447 (15) and 24 Cal 62 (16), which lay down that the transferee from a judgment-debtor is his representative. Mr. Mullick appearing on behalf of the appellants has contended that those decisions refer to the execution of a mortgage decree and not to that of a simple money decree. But the execution of a simple money decree against a property given in security for the satisfaction of that decree partakes of the nature of an execution of a mortgage decree. I see no necessity that in order to enforce the decree against a transferee of the hypothecated property the decree-holder should be compelled to bring a separate suit. S. 146, Civil P. C., says that, except as otherwise provided in the Code or any other law, where any proceeding may be taken against any person, then the proceeding may be taken against any person claiming under him.

It cannot be disputed that the appellants claim the hypothecated property through the judgment-debtors. Though O. 22, R. 10, may not strictly apply, but there is no reason why the same principle should not govern the execution proceedings. The present execution which was started against the judgment-debtors can be continued against the transferees of the hypothecated property. Any question, which may arise between the decree-holder and the transferee, can be dealt with under S. 47, Civil P. C., being a matter relating to the execution and satisfaction of the decree. S. 47 of the Code should be liberally construed and the decree-holder should get his relief as expeditiously as possible. Their Lordships of the Judicial Committee in 19 Cal 683 (17), at p. 689, observed :

> It is of the utmost importance that all objections to execution sales should be disposed of as cheaply and as speedily as possible. Their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of S. 244 (present S. 47).

Following this decision a wide and liberal construction has always been placed upon this section. In 41 Mad 327 (10) Sir John Wallis referring to S. 244 of the old Code (now S. 47), said :

> If we look at the question on principle and independently of authority, it is difficult to see how the realisation of the security given to the Court pursuant to an order of the Court, for the purpose of satisfying the decree-holder can possibly be said to be a matter not relating to the execution, discharge or satisfaction of the decree, or not to be a question arising between the parties to the decree.

Sir John Wallis referred to a very old decision of their Lordships of the Judicial Committee in 2 I A 219 (11). This was a case under the Code of 1861. The question was whether a defendant who had given a security bond for subsequent mesne profits could be proceeded against in execution proceedings. It was held that it could be done. In this case the appellants are bound so far as the property in question is concerned by the hypothecation of the judgment-debtors. I have already referred to the case of 46

14. Mahadeo Prasad v. Anandi Lal, 1925 All 60=92 I C 348=47 All 90=22 A L J 887.
15. Gulzari Lal v. Madho Ram, (1904) 26 All 447=1904 A W N 61=1 A L J 65.
16. Ishan Chandra Sarkar v. Madhab Sarkar, (1897) 24 Cal 62=1 C W N 36 (F B.)
17. Prosunno Kumar Sanyal v. Kali Das Sanyal, (1892) 19 Cal 683=19 I A 166=6 Sar 209 (P C).

I A 228 (13), where the sureties were proceeded against, and their Lordships definitely ordered by amending the decree of the lower Court that the hypothecated property was liable and not the sureties themselves, and pointed out that the proper course would have been to order that the property charged be sold unless before a day named the sureties find the money. In a Full Bench decision of the Madras High Court in 54 I C 209 (18) it was held that a purchaser from a decree-holder purchaser under a money decree was the representative of the judgment-debtor for the purpose of enquiry into a question relating to the execution of a distinctive decree affecting the same property and the term "representative" in S. 47, Civil P. C., was not to be identified with "legal representative" in S. 2 (11) of the Code In 6 Lah 544 (19), it was held that a purchaser of a property after it was attached was a representative of the judgment-debtor. I have discussed this point in detail as the question is of some importance, but, so far as this Court is concerned, the matter is concluded by a decision of a Division Bench (Courtney Terrell, C. J. and Scroope, J.) in Misc. Appeal No. 227 of 1930 (20). The facts were exactly similar to the facts of the present case. The judgment-debtor had given some property as security for the satisfaction of the decree. The Benares Bank purchased it in execution of a simple money decree. Its previous attachment before judgment was ineffective. It was held that the property could be proceeded against in execution of the decree in the presence of the Benares Bank in order to give it an opportunity of redemption.

The learned Chief Justice observed that the real question was one of execution of the decree, and not whether the decree was a mortgage one or a simple money decree. In the present case the judgment-debtors themselves gave property in security and the appellants, who are transferees of the property subject to the right of the decree-holder, can, in my opinion, be proceeded against. The lower Court should fix a period not exceeding six months for the payment of the decree and order that the properties given in security will be sold unless redeemed by the date fixed. Subject to this direction I would dismiss this appeal with costs.

Varma, J.—I agree.

K.S./R.K. *Order accordingly.*

18. Veyindra Muthu Pilla v. Maya Nadan, 1920 Mad 324=54 I C 209=43 Mad 107=38 M L J 32 (F B).
19. Ishar Das v. Parma Nand, 1926 Lah 134=93 I C 30=6 Lah 544.
20. Nagar Mal v. Benares Bank, Misc. Appeal No. 227 of 1930, decided on 22nd December 1931.

A. I. R. 1936 Patna 295

MACPHERSON, J.

Commissioner of Income-tax, Bihar and Orissa—Petitioner.

v.

Dhakeshwar Prasad Narain Singh of Amawan—Opposite Party.

Misc. Judicial Case No. 122 of 1933, Decided on 29th March 1935, from order of Commissioner of Income-tax, Bihar and Orissa, D/- 13th October 1933.

(a) Income-tax Act (1922), S. 66 (2) — Scope.

Section 66 (2) is indifferently framed : 1929 *All* 819, *Foll.* [P 296 C 1]

(b) Income-tax—Assessment— Accounting —Method of accounting not normal but used regularly by assessee — If profits can be deduced from such method, application of S. 13 proviso is not valid.

Where a method of accounting, though perhaps not a normal one, has been regularly employed by the assessee himself from which the profit of the business can properly be and has been deduced proviso to S. 13 does not apply. [P 299 C 1]

(c) Income-tax—Questions of law — High Court can under S. 66 (2) decide only question of law raised by case stated— Computation of profits under proviso to S. 13 whether can be on accrued interest held not question of law.

The function of the High Court is to decide not the question set out in the application under S. 66 (2) but questions of law raised by the case stated. The question whether under proviso to S. 13 the computation of profit can legally be on the basis of the accrued interest with or without modification was held to be not one of law. [P 299 C 1]

Manohar Lal—for Petitioner.

Sultan Ahmad, P. R. Das, K. P. Jayaswal, S. N. Ray, Hiralal Das and *G. P. Sahi*—for Opposite Party.

Judgment. — The assessee, besides being a leading landholder, conducts a money-lending business upon which he has been assessed to income-tax (as a Hindu undivided family). He made an application on 28th November 1931, requiring the Commissioner of Income-tax to refer to the High Court the question of law:

Whether it is open to the Income-tax Officer to regard interest unrealised as taxable income, alleged to arise out of the appellate decision under S. 31, Income-tax Act, 1922, of the Assistant Commissioner, dated 7th November 1931, and the Commissioner has made the present reference of 13th October 1933 (not within sixty days but after nearly two years) purporting to be under S. 66 (2) of the Act formulating the question for opinion as:

Whether in the circumstances of this case, the assessee is liable to be taxed on his income from money-lending on the mixed cash and accrued basis which has been followed in his assessments of previous years?

(partly perhaps because their Lordships of the Judicial Committee deprecate the statement of a question of law in an abstract form and divorced from the facts of the particular case and partly for other reasons which will later appear), and expressing his own opinion that the answer is in the affirmative. As is well known, S. 66 (2) is indifferently framed: see also 1929 All 819 (1). The Commissioner's statement of the case (which is to be read with the decisions of the Income-tax Officer and of the Assistant Commissioner which are his Annexures A and B) also is obscure. A rather full expcsition of the position is thus required as to ascertain what "the circumstances of the case" are. In the years previous to the year of assessment, which is 1931-32, the assessee submitted with his return of income two statements in support or explanation which are designated A and B. Statement A purported to show the interest which had accrued during the year on loans to borrowers from whom no realisation had been made during the year and against whom no suit had been filed; and statement B purported to show the realisations from those borrowers from whom full or part realisation had been made during the year. From the aggregate realisation shown in statement B the assessee deducted so much as had been shown as accrued interest in statement A furnished in previous years and so had then been taxed, and the aggregate of the balance so arrived at, and of the accrued interest shown in the statement A for the year was the sum which he showed in his return as his profit for the year liable to income-tax. The profit so shown was accepted as a correct computation under S. 13 after scrutiny of his books of account and other documents, the alternations being usually unimportant (except apparently in respect of 1930-31 where the interest accruing during the year on a debt then under suit, was, as will appear later, also, assessed).

The method of accounting employed by the assessee during some fifteen years for computation of his profit is thus a combination of the cash (actual realization) basis and the accrual (otherwise called the mercantile or commercial) basis, or as it is expressed in the question propounded, the "mixed cash and accrued basis."

For the year 1931-32, however, the assessee filed only statement B and made the claim that he should be assessed on the cash basis only, the same deduction being made as in previous years, (that is to say, of interest realized in the year under assessment on which tax had in previous years been realized on the accrual basis as being included in the statement A of those years). The income from interest which he showed was Rs. 222-15-9 as against over Rs. 11,000 shown in 1930-31 (apart from rupees 15,669-8-0 mentioned below) and over Rs. 30,000, shown in 1929-30. The Income-tax Officer thereupon took action under S. 23 (2) and S. 22 (4) and the assessee caused to be produced the evidence and documents on which he relied in support of his return, and upon an examination of the assessee's accounts which admittedly exhibited no change of system from previous years, and his documents, the Income-tax Officer calculated therefrom "the assessable income" (or profits, as defined in "Spanish Prospecting Company") of the year by taking the state of the business at the end of 1336-F (1929-30) and at the end of 1337-F (1930-31) and comparing the assets of the business at the two dates. Finding from Ex. A the total investment up to the end of 1337-F., he deducted therefrom the aggregate of the total investment up to the end of 1336-F., and of the new loans advanced in 1337-F., and held as follows:

In the income return the assessee showed only Rs. 222-15-9 as income from interest on the basis of actual realization (cash basis), whereas the previous records show that the assessee's method of accountancy has all along been mercantile (accrued basis). The assessee's

1. Shiva Prasad Gupta v. Commissioner of Income-tax, 1929 All 819=124 I C 467.

own accounts show that he calculates accrued interest in all cases in accordance with the stipulation in the bond and goes on raising the principal from year to year by the addition of accrued interest in the Lahna Bahi. So his method of accountancy is clearly mercantile, which has been rightly followed in the past and there is no justification to change the method of accountancy in the current year."

There is thus a definite finding that the assessee follows the mercantile system of accounting and the last sentence is reminiscent of 3 I. T. C. 435 (2). The assessee's petition of appeal has been printed, but the order in appeal is only intelligible in the light of a further petition filed on the day before judgment was delivered. It is there pointed out that the argument on his behalf was that he did not keep his accounts on the commercial basis, his cash books showing only his cash receipts, and alternatively that if he was assessed on the accrued basis, he was at least entitled to deduction of Rs. 15,885-14-0 of which Rupees 15,669-8-0 was accrued interest of 1929-30 taxed in 1930-31 in the account of Ramprasad Singh while under suit in the civil Court. The decision in appeal sets out, first, that it was admitted that the computation of profits if it was to be made on the accrued basis, was correct, subject to the deduction of the said sum of Rs. 15,669-8-0 on which tax had actually been deducted in the previous year, and subject to another deduction which is here immaterial. It then goes on to say that the assessee next claimed that he ought not to be assessed on the accrual basis at all. On this plea the Assistant Commissioner sets out that the assessee's money-lending accounts consist of the personal accounts of his debtors wherein entry is made of the accrued interest from year to year and of the amount actually realized in each case, but neither the accrued nor the realized interests are totalled or accounted for in an interest account and no profit and loss is computed, and though there is a cash book in which the actual realizations are shown, there is no interest ledger, and he then states his conclusion thus:

> Clearly therefore the assessee has not computed his profits at all, and no particular method of accounting can be said to be regularly employed by him. The Income-tax Officer had therefore to make the computation of profit upon such basis and in such manner as the Income-tax Officer may determine and he decided to adopt the accrued basis which was also followed in previous years without objection on the part of the assessee.

The Assistant Commissioner then negatived the contention on behalf of the assessee that the proviso to S. 13 of the Act did not entitle the Income-tax officer to compute the profits on the accrual basis, the basis of which contention was that the accrued interest not actually received is not "income, profits, or gains" within the meaning of the Income-tax Act. What he failed to observe was that the Income-tax Officer had not proceeded under the proviso. In the result he maintained the computation of income and held it as assessable subject to the deductions mentioned.

It was in consequence of the rejection of the contention mentioned that the application was, as already stated, made under S. 66 (2), to refer the question whether the Income-tax Officer was entitled to regard interest unrealised as taxable income. The argument on behalf of the assessee was that as the assessee does not, as the Assistant Commissioner found, employ any regular method of accountancy that can be accepted by the department (and the accrual basis is such a method) for computing the profits of his money-lending for purposes of income-tax (this is a paraphrase of "no particular method of accounting can be said to be regularly employed by him"), the substantive portion of S. 13 which is:

> Income, profits and gains shall be computed, for the purposes of Ss. 10, 11 and 12 in accordance with the method of accounting regularly employed by the assessee

does not apply and so the proviso to that section which is:

> Provided that, if no method of accounting has been regularly employed, or if the method employed is such that, in the opinion of the Income-tax Officer, the income, profits and gains cannot properly be deducted therefrom, then the computation shall be made upon such basis and in such manner as the Income-tax Officer may determine,

must apply if anything does, and the assessee's profits cannot, under the terms of the proviso itself, be computed on the accrual basis.

The point is now stated as being that even though in an assessment under the substantive portion of S. 13 the accrued basis may be adopted where the assessee has himself treated the accrued interest as income of the year under assessment, still as accrued interest is

---

2. Foster v. Commissioner of Income-tax, (1929) 3 I T C 435.

only notional income, the computation under the proviso to S. 13 must be of actual and not of notional income. In short the Income-tax Officer, it is contended, took the accrued (and unrealised) interest to be income, profits and gains of the year, whereas, it is contended, it is not so in law unless the assessee has so treated it in his accounts.

The Commissioner of Income-tax (as it happened, the same officer who was the Assistant Commissioner, had become the Commissioner) being of opinion that the question of law, as formulated by the assessee, did not cover all the facts of the case, substituted the question quoted above and referred it for decision purporting to do so under S. 66 (2).

Actually the question referred may be expanded as follows :

> Whether in the circumstances of the case the assessee is liable to income-tax for 1931-32 on profits and gains from money lending of 1930-31 on the aggregate of (a) the amount of interest accrued in 1930-31 when no interest has been realised; and (b) the amount of interest realised in 1930-31 less the amount thereof previously assessed to income-tax.

The above statement of the facts expands what the Commissioner of Income-tax has said by the application of his annexures A and B and the other papers.

In the statement of the case he then goes on to affirm that "as a matter of fact the assessee has been assessed neither on strictly cash basis nor on accrual basis." Computation of income in the year under assessment had, he points out, been made on the same lines as had been adopted at the instance of the assessee himself in previous years : for certain reasons (which are set out but which are irrelevant) he had in 1931-32 claimed assessment of the cash basis under deduction of interest included in the cash realisation of the year where that interest had already been taxed on the accrual basis in the previous years. The Commissioner had in fact come to realise the inapplicability of some of the observations in the appellate judgment in which the computation of profit by the Income-tax Officer had been affirmed on a ground different from that on which it had been made. What he means appears to be that whatever the theory applied, in fact computation had been on the same lines as in previous years, as is indicated above, to wit on the method of accounting (not a pure mercantile or a pure cash method of accounting but a mixture of these methods) which the assessee himself regularly employed, and not under the proviso to S. 13 : such are "the circumstances of the case," and the observations, obiter or even erroneous in the course of the appellate decision do not, it is implied alter the fact that the assessment is under the substantive part of S. 13.

Then comes para. 6 in which, apart from the affirmation above-mentioned, he gives his own opinion on the case in which the High Court is consulted. It is that in fact the computation of the assessee's profits and gains has, as always hitherto, been made under the substantive portion of S. 13, that is, in accordance with the method of accounting regularly employed by him. He bases this opinion on the following: the assessee had shown no ground for discarding his previous method of accounting; no doubt the appellate finding that no regular (particular) system of accounting has been followed by the assessee, is right in the sense that the assessee's books do not furnish a basis for an inference that either of the two well-known methods is followed, but it is not necessary that the method of accounting regularly followed be purely cash or purely mercantile, that is to say, it may be a mixture of the two systems and in fact the system which the assessee has actually adopted for computation of profits, (to wit, the mixed system shown in the returns *A* and *B* is a method of accountancy within the meaning of S. 13, and it is on that methed that the computation of profit was made in previous years and in the year in controversy. His point is that in spite of observations in the appellate decision the computation has actually been made under the substantive part of S. 13. Finally he argues that even if (contrary to his view on the facts as stated by him) it is the proviso that is applicable to the case, the assessment is nevertheless valid as being made on a basis and in a manner such as the Income-tax Officer is authorised to determine, which, it is implied, may be the accrual basis (with necessary modification); there is apparently no question that in the circumstances of this assessee, as disclosed by himself and his accountant, the profit of the year may safely be computed, as it has always been by him-

self, as equal to the full interest (less remission shown which has accrued within the year.)

Thus the assessee's contention is that the legitimacy of the principles of computation applied by the assessee is a question of law and that the accrued interest debt due to him cannot be taxed as profits unless he treats it as such, while the case for the Commissioner is that what has been held liable to income-tax is not the unrealised accrued interest but the profit of the business computed on the assessee's own method of computation, though it happens to be of the same amount (subject to the assessee's remissions and the deductions mentioned) as the accrued interest. But the case stated implies that the assessee has treated the accrued interest as received by him (so that in the eye of the law it is a receipt) and subject to deductions which are not in controversy) as profits of his business during the year. It would thus appear that the assessee's point is not here in controversy since in spite of the requisition of the assessee under S. 66 (2), the reference of the Commissioner cannot be said to include it; the reference definitely states the case as one in which a method of accounting, though perhaps not a normal one, has been regularly employed by the assessee himself from which moreover the profit of the business can properly be and has been deduced, and in such circumstances the proviso to S. 13 does not come in at all. The function of the High Court is to decide not the question set out in the application under S. 66 (2), but questions of law raised by the case stated, of which the question whether under the proviso to S. 13 the computation of profit can legally be on the basis of the accrued interest (with or without modification) is here not one.

Manifestly what happened is this. On considering the assessee's application under S. 66 (2), the Commissioner found himself, as already indicated, in disagreement with his order as Assistant Commissioner where he had held in error of fact that the Income-tax Officer had applied the proviso to S. 13; two courses must have seemed open, either to review that order under S. 33 or to refer the larger question so that there might be tested the validity of the assessment whether under the substantive part of S. 13 or under the proviso thereto; if however he passed an order under S. 33 substituting reasons of his own for those of the Assistant Commissioner there was, until the first proviso to S. 66 (2), was inserted by Act 18 of 1933, no provision for a reference under S. 66 (2), against his order; (though that proviso came into operation on 11th September, the correction slip did not arrive until after the requisition had been considered); and thus the reference made on 13th October 1933, though nominally under S. 66 (2), is actually one which would more appropriately be made under S. 66 (1), since though the case stated accepts the order under S. 31 in so far as that order dismissed the appeal it rejects the grounds on which that order is made, and accepts the basis on which the Income-tax Officer computed the profit assessable (with modification in detail bringing it within the previous mixed cash and accrual basis): in fact the case stated is that the resultant computation of profit for the purpose of S. 10 is made on the method of accounting regularly employed by the assessee which though no doubt a mixed system, is one from which his profits can properly be and have been deduced.

I am accordingly constrained to the view that on the statement of the case referred for opinion it must be held that the computation of profit for assessment to income-tax has, as it stands, been genuinely made under the substantive part of S. 13, that is to say, on the method of accounting regularly employed by the assessee, and that accordingly no point of law arises thereon for decision under S. 66 (5). A reference back to the Commissioner under S. 66 (4) has not been suggested and it would probably not be helpful at this stage. I shall deal briefly with two incidental contentions for the assessee. The first of these is that "in the circumstances of the case" the assessee in fact employs no method of accounting within the meaning of S. 13 so that a computation of profit thereon is not possible. But though it may be unscientific, a method of accounting is certainly, regularly employed by him, which, moreover, he has himself utilised for over fifteen years to ascertain from it the sums on which he was in his own view liable to income-tax as profit of his business. The second contention is that the mere fact that hitherto the assessee has permitted himself to be assessed on sums,

to wit, unrealised interest, which are really debts due to him and not profits of his business, does not involve a continuance of the method of accounting under which that was done, with a consequent continuance of unwarranted taxation. That would be so, but it is not the position here. What has to be ascertained is the 'profits and gains' of his business as a whole—how much it has improved in the year and that is exactly what has been done.

The assessee has indicated that in his view the accrued interest is a good asset at its face value and the computation of improvement has here been made on his own method of accounting in which he takes his unrealised interest as profit of the business. I agree with the view of Agarwala, J., in this regard and particularly that the decision in (1924) A C 508 (3), and the argument founded thereon are by no means favourable to the assessee in the circumstances of this case. It is not necessary to express an opinion on the argument of Mr. Manohar Lal as to the proviso to S. 13 though it is attractive. His first claim, which, as indicated, is that it does not apply, is good on the case stated, but as a last line of defence he was prepared to maintain that if the substantive part of S. 13 is held inapplicable, and there is no method of accounting regularly employed by the assessee on which computation can be made or from which profits and gains can properly be deduced, the assessing authority is nevertheless entitled to utilise as the best rough and ready way available, the method of accounting employed, even though ex hypothesi, the "profits and gains cannot properly be deduced therefrom." The reference in the form in which it has been made, I would answer in the affirmative. It is not implied that a reference is not possible on future materials in which the question originally submitted by the assessee might not properly arise for decision under S. 66 (5). As the reference has not been made in a satisfactory manner, with resultant trouble to all concerned, I would direct the parties to bear their own costs.

B.D./R.K. *Reference answered.*

3. St. Lucia Usines & Estates Co., Ltd. v. Colonial Treasurer of St. Lucia, (1924) A C 508.

A. I. R. 1936 Patna 300

WORT AND ROWLAND, JJ.

Kallar Choudhury and *others*—Plaintiffs—Appellants.

v.

Mt. Kamod Choudharain and *another*—Defendants—Respondents.

Appeal No. 818 of 1932, Decided on 9th January 1936, from appellate decree of Dist. Judge, Darbhanga, D/- 10th September 1931.

Deed—Construction—Compromise decree—Reference to property not subject of dispute in compromise — Operative part of decree not dealing with such property but dealing with subject matter of dispute only—Compromise operates as bare agreement.

Where the operative portion of a compromise decree dealt with the property in dispute in the suit in which the decree is made, and omitted the other property to which that suit did not relate but was dealt with in the compromise, it cannot be deemed that the decree or compromise creates any title in any party under the compromise, with regard to that other property, and the compromise at its best operates as a bare agreement in contra-distinction to a document creating a title: 1919 *P C* 79; 22 *Mad* 508; 1931 *P C* 79 and *Walsh* v. *Lonsdale*, 21 *Ch D* 9, *Ref.* [P 301 C 2; P 302 C 1]

S. M. Mullick and *K. K. Banerji*—for Appellants.

B. C. De and *K. Dayal*—for Respondents.

Wort, J.—This appeal relates to a dispute with regard to title to 2 annas 18 gandas in a tauzi numbered 14660. The plaintiffs are the appellants before this Court. The property was admittedly that of one Nainan Chaudhury who adopted the plaintiffs' father, and in 1872 executed what has been described as a deed of gift granting the property first to his own widow and then, after her death, to Nainan Chaudhury. The defendants also claimed title to this property, and in the following circumstances: Subsequent to the deed of gift there was litigation between the defendants' father (who incidentally was a member of the same family as Nainan Chaudhury, that is to say he descended from the same ancestor) and the plaintiffs' father, and that litigation related to property other than the property in dispute in this action. The action was compromised, and by the compromise not only the property then in dispute in that action was dealt with but also the property in dispute in this action. To repeat, both parties were subject to the terms of the

compromise; but this is to be noticed that when the matter came before the Court to record the compromise, the operative part of the decree pronounced related only to the property which was the subject-matter of the dispute in that action. Then in 1910 the widow of Nainan Chaudhury accelerated the interest of the plaintiffs' father by executing a deed of relinquishment in his favour. Now it is in these circumstances that this action arose. I should have added that the cause of action stated in the plaint in this action was that the defendants had got their names entered in the Land Registration records. There was this further fact to be noted that the widow of Nainan Chaudhury survived until the year 1928 wich was after the date on which this action was brought.

The plaintiffs in the action claimed a declaration of their title to the property and, included in that prayer, they asked the Court to hold that the defendants had no interest in the property. They claimed also a decree for what has been described as confirmation of possession. The learned Judge in the trial Court came to a conclusion, which in no way has been affected by the decision of the lower appellate Court, to the effect that from the date of relinquishment by the widow in 1910 the plaintiffs have been in possession. The learned Judge of the Court below proceeded to deal with the case on these lines: he came to the conclusion, as I have said, that the plaintiffs were in possession and then came to consider the question of the title of the defendants. In so doing, one of the matters with which he dealt was the question of whether he was entitled to take into consideration matters which had arisen after the date upon which the suit was brought, holding that he was so entitled. He recognized the fact that the widow of Nainan Chaudhury had died and that by her death the defendants were entitled to possession of the property having a title thereto, and in those circumstances he dismissed the plaintiffs' suit.

In my judgment the question of whether the death of the widow can be taken into consideration in this case does not arise. The short question to be determined is, in my opinion, what was the effect of the compromise entered into by the members of the family by which the 2 annas 16 gandas was disposed of in the manner in which I have stated. The argument addressed to us by Mr. De on behalf of the defendants is that the compromise was by way of being a family arrangement, and by that family arrangement the defendants' title to the property was declared. That argument is based in my judgment on the assumption that in every case of a family arrangement title to the property, the subject-matter of the arrangement, does not pass to persons who are parties to that arrangement but that their title is merely recognized; and this assumes that each party to this family arrangement has some sort of title to the property, or what has been described in one of the authorities as 'fighting title' to the property. It is true that in Cl. (2), of the compromise petition it is stated that there was a dispute with regard to the 3 annas 6 gandas 2 kauris odd of the property of Nainan Chaudhury; but I have no doubt in my mind that in the circumstances of the case at the date of the compromise the title to the property in dispute in this action which is 2 annas 18 gandas of the 3 annas odd was undoubtedly in the plaintiffs' father. In those circumstances it is impossible to hold that this compromise can be looked upon as not giving the defendants title but merely declaring their title. If the defendants' title is based on the compromise for the reasons which presently appear they would be met with the objection that the compromise is not registered.

There is therefore a further matter which has to be considered in this connexion. I have already said that the operative portion of the compromise dealt with the property in dispute in that action and ommitted the property in dispute in this action. It cannot therefore be said that any title was created in the defendants by the decree itself. In this connexion O. 23, R. 3, Civil P. C., must be considered which provides :

> where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit.

This matter was considered by their Lordships of the Judicial Committee of the Privy Council in the case of 46 I A

240 (1). That case also considered a previous decision of the Privy Council in 26 I A 101 (2). Lord Buckmaster then commenting on that decision stated that it decided merely that the compromise therein being dealt with was admissible in evidence and did not decide what effect the document had upon the property to which it referred ; and the main question which came before their Lordships for consideration in *Hemanta Kumari Devi's* case (1) also was whether the compromise in a previous suit was admissible in evidence. They in the first instance decided that the compromise in question was not a lease and therefore did not come within the mischief of the first part of S. 17, Registration Act. Lord Buckmaster goes on to point out that by S. 17 (1) (b), it was provided that "other non-testamentary instruments which purport or operate to create, whether in present or in future, any right, title or interest, vested or contingent, of the value of Rs. 100" required registration subject to the exception that a decree or order of the Court did not so require registration. Now it is obvious from the reasoning of Lord Buckmaster that their Lordships of the Privy Council considered the compromise then before them operated to create a future right to hold what was embodied in the decree founded upon the compromise ; although not included in the operative portion of the compromise it came within the exception in sub-s. (2) of S. 17, and therefore did not require registration. In my judgment the only view that is possible to take in this case of the compromise is that it created a contingent right in the defendants to this property after the death of the widow of Nainan Chaudhury and that it was a bare agreement in contradistinction to creating a title in the defendants.

The position therefore shortly is this. The plaintiffs, as I have said, have been found to be in possession. The defendants have an agreement upon which in an action for specific performance they might rely in order to obtain a title to the property. Their right to obtain specific performance of the agreement contained in the compromise arose in the year 1928 on the death of the widow. Now the question in those circumstances is whether this Court in its discretion should grant the plaintiffs the declaration which they seek. As I have stated it was a claim for a declaration of title and a declaration that the defendants have no interest in the property in suit. In 58 I A 91 (3), their Lordships of the Privy Council held that the defendant in possession of property under an oral agreement was not entitled to rely upon the doctrine laid down in 21 Ch D 9 (4), as the circumstances which would so entitle him to rely upon that decision were not present. Lord Russell of Killowen in delivering the decision of their Lordships of the Judicial Committee made this observation :

> The respondent (that was the defendant in possession of the land on an oral agreement) was not in a position to obtain specific performance of the agreement for a lease from the same Court and at the same time as the relief claimed in this action. Had he been so entitled the position would be very different for then the respondent could claim to have executed in his favour by the appellant an instrument in writing which he could duly have registered, the appellant's ejectment action being stayed in the meantime.

The short point which comes to be determined in this case is whether in the circumstances the defendants were in a position to obtain relief by way of specific performance. Clearly from any point of view the defendants' right to specific performance is barred by limitation, the widow upon the death of whom their title vested having died in the year 1928. In these circumstances it seems to me that there is no reason why the plaintiffs should not be entitled to the declaration which they sought in the suit. For those reasons I would hold that the decision of the learned Judge in the Court below was erroneous, that judgment would be reversed, that of the Munsif restored and the appeal allowed with costs.

Rowland, J.—I agree. The suit was for a declaration of title and confirmation of possession on the allegation that the plaintiffs were in possession of the property notwithstanding that in 1926 the defendants had got mutation of their names in the Collectorate Land Regis-

1. Hemanta Kumari Debi v. Midnapur Zamindari Co., 1919 P C 79=53 I C 534=46 I A 240=47 Cal 485 (P C).
2. Pranal Annee v. Lakshmi Annee, (1899) 22 Mad 508=26 I A 101=7 Sar 516 (P C).
3. Ariff v. Jadunath Majumdar, 1931 P C 79=131 I C 762=58 I A 91=58 Cal 1235 (P C).
4. Walsh v. Lonsdale, (1882) 21 Ch D 9=52 L J Ch 2=31 W R 109=46 L T 858.

tration Registers by expunging the names of the plaintiffs. The plaintiffs assert a title founded as follows. The property had belonged to Nainan Choudhury. Nainan had adopted Nandlal, the father of the plaintiffs, and had in 1872 executed a deed of gift by which his widow Santokhman Chaudhurain was on his death to enjoy this property for her life, and thereafter Nand Lal should be absolute owner On 11th June 1910 Santokhman surrendered her life interest to the plaintiffs' father who came into possession. At the date of the institution of the suit Santokhman was alive and the plaintiffs were in possession of the property. All these allegations of the plaintiffs have been found by both the Courts to be true in spite of the denial by the defendants of the title and possessions of the plaintiffs. The Courts below have held that on the date of the suit the plaintiffs were in possession and were in possession with title. During the pendency of this litigation, however, the widow Santokhman died; and the District Judge allowed the appeal and dismissed the suit, holding that after the death of Santokhman the plaintiffs had no subsisting title and that on the death of Santokhman the title of the defendants became perfected. This, in his view, was the effect of a compromise petition and decree inter partes in suit No. 98 of 1889. The property now in suit was no part of the subject-matter of that litigation, but the litigation was set at rest by an agreement which besides disposing of the matter directly in suit mentions in para. 2, that there was a dispute between the parties with regard to the share "left by Nainan Chowdhury" regarding which no suit has been instituted. Para. 5 of the compromise says :

> It was decided that after the death of Mt. Santokhman Chaudhrain, widow of Nainan Chodhury, the defendant 1st party, namely Nandlal and Babu Lal will give 14 gandas, 1 k. 1 kr. to the plaintiff (i. e. to the present defendant.)

This clause in the compromise was construed by the Munsif to be an agreement covenanting at a future date to transfer the property it refers to, and the District Judge has said that the clause in the compromise literally translated means "that the plaintiffs' father agreed to give the disputed share to the defendants' father." The District Judge, however, reasons in what appears to me a somewhat speculative manner, as to the intention of the parties and comes to a conclusion opposite to what he himself had said was the plain meaning of the words used. I think that the Munsif was right and that the compromise should be read according to the plain meaning of its language, and I think that the compromise is an agreement to convey and is nothing else. As to the admissibility in evidence of such an agreement to convey there is no difficulty. A similar agreement was admitted in evidence and allowed to be made the basis of a suit for specific performance in 46 I A 240 (1). If I am right as to the question what the agreement amounts to, there is likewise no doubt that its effect is not to transfer any title in land : see 58 Cal 1235 (4). In that case the person entitled to get a lease in pursuance of the agreement had slept on his rights and they had become barred by time; but their Lordships have clearly stated what would have been the nature of his appropriate remedy had he been in time. Lord Russell says :

> Then the respondent could claim to have executed in his favour by the appellant an instrument in writing which he could duly have registered, the appellant's ejectment action being stayed in the meantime. In these circumstances the respondent would obtain complete protection, but consistently with and not in violation of the provision of the Indian Statute.

That being so, the Munsif, I think was perfectly correct in observing: "The Court cannot grant any relief to the defendant unless he chooses to enforce the agreement according to law." Mr. De's attempts to persuade us to regard the compromise in a different sense—to treat it as a family arrangement declaring the existing rights but not creating rights—fail on examination of the contents of the document itself. Therefore I entirely agree that the appeal should be allowed, the decision of the District Judge set aside and the decision of the Munsif restored.

V.B./R.K. *Appeal allowed.*

---

* A. I. R. 1936 Patna 303

MOHAMMAD NOOR AND ROWLAND, JJ.

Bilat Rout—Plaintiff—Appellant.

v.

Mahbub Safi and *others*—Respondents.

Appeals Nos. 54 and 55 of 1933, Decided on 18th February 1936, from appellate decree of Sub-Judge, Muzaffarpur, D/- 10th August 1932.

(a) Mortgage—Suit on, against mortgagor and puisne mortgagee—No personal decree can be passed against puisne mortgagee.

In a suit on the basis of a mortgage, against the mortgagors and against puisne mortgagees, only decree that a Court can pass against a puisne mortgagee is a decree to the extent of his interest in the mortgaged property. A personal decree cannot be passed against him.

[P 305 C 1]

* **(b) Execution — Decree binding—Mortgage—Decree against puisne mortgagee personally behind his back, when no prayer for personal decree in plaint—Objection to executability of decree is competent.**

A puisne mortgagee against whom a personal decree has been passed, behind his back, when there was no prayer for a personal decree in the plaint, can in execution take an objection to the executability of such a decree under S. 47, within 30 days of the sale of the property of the puisne mortgagee, and relief cannot be refused to him.

[P 305 C 1]

G. P. Shahi—for Appellant.

A. K. Ray and *S. K. Ray*—for Respondents.

Rowland, J.—These appeals arise out of two suits brought by the same plaintiff against the same defendants. The facts are stated in some detail in the judgment of the Courts below and it is sufficient here to mention that the principal defendants Mahbub and others had brought two mortgage suits, Nos. 2 and 3 of 1929, impleading (a) Gopal the mortgagor, now defendant second party, and (b), Bilat, puisne mortgagee, now plaintiff. Mahbub's claim was to recover possession of the mortgage property or in the alternative to have mortgage decrees charged on the properties for the amount of his dues. In the plaints of those suits there was no prayer for a personal decree against any of the defendants. Gopal put in appearance ; Bilat did not. Mahbub compromised with Gopal who consented to a personal decree. A personal decree was drawn up in each suit against "the defendants." Each of these decrees was executed by Mahbub against the personal properties of Bilat. From this point the history of each case requires to be traced separately. The points of difference do not appear clearly in the judgments of the Courts below.

In the execution arising out of mortgage suit No. 2 Mahbub put up for sale some property of Bilat which was actually sold on 15th April 1930. Bilat did not object in the execution department or apply to have the sale set aside but instituted title suit No. 61 on 7th May 1930, praying for a declaration that nothing was due from him to Mahbub; that Mahbub had no right to get a decree for money against him ; that the decree and sale are null and void and inoperative and for any other appropriate relief. This suit gives rise to second appeal No. 54. In the execution arising out of mortgage suit No. 3 property of Bilat had been attached and he objected on the ground among others that there was no decree capable of being executed against him. The objection was entertained under S. 47, Civil P. C., and was decided adversely to Bilat. To save his property from sale he paid up the decretal amount Rs. 147. He then brought title suit No. 74 which gives rise to second appeal No. 55. The declarations claimed are similar to those in the other suit and he asks for repayment of the sum that he was forced to pay. The Courts below have agreed in dismissing both the suits. Bilat had alleged suppression of processes but both Courts decided that the summons and processes were not suppressed. The Courts have held that Bilat, was not personally liable to pay the mortgage money and that the decrees which were framed as personal decrees against him as well as the mortgagor were wrong in law; but that the plaintiff cannot get a remedy in these suits. The view taken by the Courts below was that money decrees were passed against Bilat erroneously, but those decrees must stand as they were passed with jurisdiction and cannot be attacked in a separate suit. The proper remedy for Bilat was to appeal from the decrees or to apply for rehearing under O. 9, R. 13, or to move the Court in review.

In appeal it is argued that the Courts should have examined the decrees with reference to the pleadings and should have held on a construction of the decrees that they were intended to be decrees executable against the mortgagors personally and against the mortgagee only to the extent of his interest in the mortgage property. The decree, as I have stated above, was in each suit expressed to be against "the defendant," and the argument is that this must be read to mean only those defendants against whom a money decree was claimed or could be claimed in a mortgage suit, as the Subordinate Judge has pointed out:

It is clear that as the plaintiff was only a subsequent mortgagee no money decree could be passed against him.

It may be added that no claim for a money decree was made in the plaints of the mortgage suits. Therefore if the decrees are read as intended to operate as money decrees against Bilat personally, this means reading them as giving a relief which it was not only erroneous to grant if it had been claimed but which had not even been claimed. There are cases in which it has been held that a junior member of a Mitakshara family against whom a decree has been passed for a debt incurred by the karta can in execution take an objection that there is no decree capable of execution against him personally and that the decree is to be read as being passed against him to the extent only of his interest in the family property on the principle that unless a contrary intention is unmistakably expressed a Court will not be presumed to have intended the passing of an illegal decree. On the same principle I think that Bilat, was entitled to object that there was no decree capable of execution against him and was entitled to succeed in such an objection. But the further point is taken for the respondents that these suits will not lie because under S. 47 such an objection ought to be raised by an application in execution proceedings and not by a separate suit. The answer to this is in sub-s. (2) of S. 47, which provides that a proceeding under S. 47 may be treated as a suit or a suit may be treated as a proceeding. These suits can therefore be treated as proceedings between the parties subject to limitation and disposed of on merits. In suit No. 74, giving rise to second appeal No. 55, the respondent raises the further point that an objection under S. 47 was actually taken in the execution proceeding on the ground that there was no decree capable of execution against Bilat. That point succeeds. The decision of the executing Court in the objection under S. 47 bars Bilat from agitating the same matter in a second proceeding or suit. Second appeal No. 55 must therefore be dismissed with costs.

In execution of the decree in mortgage suit No. 3 giving rise to title suit No. 61 and second appeal No. 54, Bilat did not take such an objection in the execution proceeding. Therefore his case that there was no decree capable of execution against him can be entertained as an application. It was presented within 30 days of the sale, that is to say, within the period prescribed for an application to set aside a sale and there is no other ground on which relief can be refused to him. I would, therefore, allow this appeal with costs throughout giving him a declaration that there is no decree operative against him personally or capable of execution against his property other than his interest in the mortgage property and that the sale dated 15th April 1930, in execution case 1030 of 1929 is void and inoperative against him.

Mohamad Noor, J.—I agree.

V.B./R.K. *Order accordingly.*

A. I. R. 1936 Patna 305

SAUNDERS, J.

Dhanoo Lal—Petitioner.

v.

Sardapat and *another* — Opposite Parties.

Civil Revn. No. 5 of 1936, Decided on 31st January 1936, against order of Sub-Judge, First Court, Patna, D/- 9th December 1935.

Res judicata—Order in execution proceedings affirmed by High Court—Party to proceedings cannot question that order.

A party to a proceeding before the execution Court cannot be allowed to question an order passed by that Court in those proceedings as not being in accordance with law, after such an order has been affirmed by the High Court.

[P 306 C 1]

Baldeo Sahay and *K. Dayal*—for Petitioner.

K. Husnain and *Pande Nawal Kishore Sahay*—for Opposite Parties.

Order.—In a partition suit in the Second Subordinate Judge's Court at Patna one Chandipat Sahay was appointed receiver of the properties to be partitioned, and being discharged after the suit had been compromised delivered possession of the properties to the defendants in accordance with the terms of the compromise. He subsequently made an application to the Court for the payment of a sum of money which he had spent as receiver and an order was passed by the Court in his favour in June 1933. In the meantime the properties of the defendants in the partition suit had been sold in execution of a decree in another suit and had been purchased by the

decree-holder in that suit. After the satisfaction of the decree there was a sum of Rs. 47,000 in deposit to the credit of the judgment-debtors. A number of other decree-holders applied to the execution Court which was the First Subordinate Judge's Court at Patna for rateable distribution of this sum among themselves. In August 1933 Chandipat Sahay applied for execution of the order made in his favour by the Subordinate Judge, Second Court and an attachment was accordingly made of the money standing to the credit of the judgment-debtors in the execution case. An objection was taken by one of the decree-holders that the receiver was not entitled to priority, but the objection was dismissed and an application by that decree-holder to the High Court for revision of the order was also dismissed, the petitioner being a party to those proceedings. The order could not be executed because proceedings started by the judgment-debtors under O. 21, R. 90, Civil P. C., were pending, and before that matter had been finally decided Chandipat died. In November 1935 an application was made by his heirs to the execution Court for payment of the money to them. The petitioner, who is another person holding a decree against the same judgment-debtors, made an application to the execution Court objecting to the payment of the money to Chandipat's heirs and on the date fixed for the hearing of this objection made an application for time which the execution Court rejected. The present application is for revision of that order.

It is contended on behalf of the petitioner that the order made by the execution Court in favour of Chandipat was not in accordance with law, but I agree with the learned Subordinate Judge that he could not be permitted to question the order after it had been affirmed by the High Court in a case in which he himself was a party. It is, however, contended that, even if the order in Chandipat's favour be taken to be a valid order, the petitioner was entitled to object to the payment of the money to Chandipat's heirs on the ground that they were not entitled to make the application because the execution case had come to an end on the death of their father and that therefore they ought to have made a fresh application for execution. This objection was not taken in the lower Court nor in the present application. But apart from this consideration it has, in my opinion, no substance. It appears that the previous execution case had been dismissed on full satisfaction, but, as I have said, the money could not be paid to Chandipat until the final disposal of the judgment-debtors' application to set aside the sale made under O. 21, R. 90, Civil P. C. As soon as that case had been decided Chandipat's sons were entitled to claim payment of the money which the execution Court had found was payable to their father. The application is accordingly dismissed with costs. Hearing fee two gold mohurs. The order of stay is discharged.

V.B./R.K. *Application dismissed.*

A. I. R. 1936 Patna 306

MOHAMAD NOOR AND ROWLAND, JJ.

Amal Krishna Rai and *others*—Plaintiffs—Appellants.

v.

Kedarnath Banerjee and *others*—Defendants—Respondents.

Appeal No. 1349 of 1932, Decided on 7th February 1936, from appellate decree of Dist. Judge, Manbhum, D/-17th June 1932.

Lease—Construction—Rent made charge on property—Rent payable to lessors half to one party and half to another—Suit by one party for his demand joining other party as defendant—Decree for charge on whole property is lawful.

Where the terms of a lease contain a clear stipulation that the rent is a charge on the property and the lease further stipulates that half rent shall be paid to one party and half to the other, decree for charge attaching to whole property in respect of the demand of one party cannot be refused merely because the party has not joined as plaintiffs and are impleaded as pro forma defendants. [P 306 C 2; P 307 C 1]

Subal Chandra Mazumdar—for Appellants.

Rowland, J.—It seems that grounds on which the Subordinate Judge and the District Judge have held that the plaintiffs are entitled only to a money decree against defendant 1 and not to a charge decree against the property in the presence of defendants 1, 2 and 3 cannot be supported. The terms of the lease as stated in the judgments of the Courts contain a clear stipulation that the rent is a charge on the property. There is also a stipulation that half the rent was

payable to the plaintiff's predecessor and half to the predecessor of the pro forma defendants. This does not prevent the charge attaching to the whole property in respect of each of the demands on it. The Courts below seem to think that the charge decree should be refused because defendants 4 and 8 have not joined as plaintiffs. When the plaintiffs have sued bringing these defendants on the record I do not think that there is any defect in the frame of the suit. I would allow the appeal and give the plaintiffs a charge decree as prayed for.

Mohamad Noor, J.—I agree.

V.B./R.K. *Appeal allowed.*

---

* A. I. R. 1936 Patna 307

COURTNEY-TERRELL, C. J.
AND DHAVLE, J.

R. B. Forsyth—Petitioner—Appellant.

v.

B. N. Railway Co.—Opposite Party—Respondent.

Appeal No. 155 of 1934, Decided on 5th December 1935, from original order of Deputy Commissioner, Singhbhum, D/- 5th March 1934.

***(a) Workmen's Compensation Act (1923), Ss. 10 and 13 proviso—Whether facts found constitute reasonable delay is question of law.**

Although the facts must be found by the first tribunal the question whether such facts do or do not constitute a reasonable cause for making the delay is a matter of law: *Shotta Iron Co., Ltd.* v. *Fordyce*, 1930 *A C* 503 and 1933 *Bom* 197, *Foll.* [P 308 C 1]

(b) Workmen's Compensation Act (1923), S. 10—Accident to workman—Leave granted—Long correspondence and finally informed that he could not be re-employed as being unfit—Claim for compensation 2 years after such final order held barred by time.

A workman who met with an accident in the course of his employment was given leave, and as he was found unfit for the work was informed that he could not be re-employed. There was a long correspondence and he was finally informed that he could not be re-employed. Even after this final order, he bombarded the employers with several letters and two years after the final order made a claim for compensation under the Act:

Held: that the delay up to the final order could be exempted but that the subsequent delay for nearly two years could not be justified, and as such the claim was barred.

[P 308 C 2]

B. C. De and *N. N. Ray*—for Appellant.

S. M. Mullick and *S. N. Bose*—for Respondent.

Courtney-Terrell, C. J.—This is an appeal from a decision of the Commissioner for workmen's compensation in Singhbhum by one Forsyth who was a driver in the employment of the Bengal Nagpur Railway Company. An accident occurred on 1st February 1929, and the claimant received injuries. He was given injury leave up to 18th April 1929, and thereafter privilege leave until 18th June 1929. He resumed duty on 19th June 1929, and continued until the 7th October 1929. Then he had several alternative periods of duty and leave until he was finally discharged from the service of the Railway Company on 24th May 1931.

His claim for compensation is dated 7th August 1933, that being the first occasion on which he claimed compensation under the Act and his claim took the form of a proceeding under the Workmen's Compensation Act before the Commissioner. The Commissioner had to consider two points: firstly whether the notice of claim by the claimant was within time, having regard to S. 10, Workmen's Compensation Act, and the second point that he had to consider was whether on the merits the claimant was entitled to compensation. He decided that the workman, notwithstanding that he had filed his claim more than two years after the accident, had reasonable cause within the terms of the proviso to sub-s. (1), S. 10. He then proceeded to consider the merits of the case and decided against the claimant. The claimant has appealed from the decision of the Commissioner to us. The respondents have supported the decision of the Commissioner but have supported it for reasons other than those advanced by the Commissioner and the substantial part of the respondent's case is that the Commissioner should have held that the delay in the making of his claim by the appellant was without reasonable cause and that he should not be considered to be protected by reason of the proviso. The proviso to S. 30, sub-s. (1) of the Act states that "no appeal shall lie against any order unless a substantial question of law is involved in the appeal." The question therefore before us was whether the decision of the Commissioner holding that the facts constituted a good and reasonable cause for the delay in making the claim involves a question of law or merely a question of fact. That question has been agitated in previous cases and

the leading authority upon the matter is the English case of 1930 A C 503 (1) decided by the House of Lords. There their Lordships held that although the facts must be found by the first tribunal, the question of whether such facts do or do not constitute a reasonable cause for making the delay is a matter of law. That case has been followed under the Indian Act, notably in 144 I C 648 (2) by the High Court of Bombay.

We therefore must first consider this question of law. The facts are clear and simple. The accident, as I have said, took place on 1st February 1929, and it is true that the claimant did his best to come back into the employ of the Railway Company, but stated that he was not fit to drive a locomotive and the Medical Officer of the respondent Company concurred in that opinion. He had already been given a considerable amount of leave and in February 1931 the Medical Officer stated that there were indications that he was in a nervous condition and that he had made up his mind that he was unable to work as a driver, and therefore the Doctor thought that he, the claimant should not be put back on the footplate. On the claimant making an application for light employment, especially for employment as Trial Inspector, he was informed on 30th July 1931, that that application could not be entertained firstly because there was no vacancy in the post which he sought and secondly that he was not considered suitable and he was told that it was necessary for him to retire from the service. He nevertheless continued to bombard the authorities of the Railway with requests that his case should be reconsidered. On 24th August 1931, the Chief Mechanical Engineer reminded the claimant that though he had asked for re-examination by the Medical Officer for fitness as a driver on the main line, he had failed to follow up that application and he was reminded that he could not be given employment on a light job but that if he persisted in his wish to be re-examined as a driver he would so be re-examined. However nothing appears to have been done and the Chief Mechanical Engineer wrote to him on 10th September 1931, in reply evidently to further letters from the claimant, that a final reply would be given to him in a couple of days. As a matter of fact, on 5th December 1931, the matter received the attention of the Agent, who is the highest authority in these matters of the Railway. The Agent had been appealed to by the appellant with a view to a revision of the Chief Mechanical Engineer's orders. The Agent's reply was very distinct and of a final nature stating:

> I am not prepared to interfere with the orders issued in your case. This is final and further correspondence will be of no avail.

Notwithstanding this however the appellant continued writing and it was not until the Agent of the Railway had replied that he, the Agent had nothing to add to the previous correspondence that the appellant on 7th August 1933 made his application to the Commissioner for compensation. Nor indeed was any application for compensation sent to the Railway Company itself before that date. Now the delay up to 5th December 1931 may perhaps have had some justification but the delay from 5th December 1931, until the application for compensation on 7th August 1933 cannot be justified, and the mere fact that he was continuing to worry the authorities of the Railway Company to review their decision is not in my opinion a reasonable cause within the meaning of the Act. The claim is therefore barred by reason of limitation. It is not in the circumstances necessary to go into the merits of the claim itself upon which arguments of a forcible character were addressed to us. It is possible that had it not been for the question of limitation we should have sent the case back for further hearing before the .Commissioner in order that he might consider the evidence and give a decision in accordance with law. The Railway Company offered considerately, without prejudice, to settle the matter of the dispute by giving a substantial sum to the claimant. We adjourned the case in order that the claimant might have the benefit of the advice of his legal advisers in the matter of accepting the sum so offered. Today however on the matter being called on again for hearing, the learned Advocate on behalf of the appellant told us that he had had per-

---

1. Shotts Iron Co. Ltd. v. Fordyce, 1930 A C 503=99 L J P C 101=46 T L R 354=74 S J 400=143 L T 200.
2. Halemabi v. Ardeshir B. Cursetji, 1933 Bom 197=1933 Cr C 607=144 I C 648=35 Bom L R 293.

emptory instructions that the offer was not to be accepted and that he preferred a decision of the Court. His failure in this matter has been the cause of his losing a substantial sum of money. We cannot force people to settle. The appellant must bear the result of his stupidity.

The appeal will therefore be dismissed and the appellant must pay the costs.

Dhavle, J.—I agree.

K.S./R.K. *Appeal dismissed.*

A. I. R. 1936 Patna 309

WORT, J.

Bhairo Mahto and *others*—Defendants—Appellants.

v.

Rajkishore Singh and *others*—Plaintiffs—Respondents.

Appeal No. 1188 of 1932, Decided on 7th February 1936, from appellate decree of Addl. Sub-Judge, Hazaribagh, D/- 18th May 1932.

(a) Libel—Privilege— Petition to Manager of Court of Wards and Deputy Commissioner held gave only at best qualified privilege.

Libellous statements contained in petitions to the Manager of Court of Wards and Deputy Commissioner give only qualified privilege : 1933 *Pat* 35; 1926 *Mad* 521 and 1914 *Mad* 472, *Disting.* [P 310 C 1]

(b) Libel— Privilege — Qualified — Person claiming should prove first privilege.

In a case of qualified privilege, the onus is in the first instance to prove that the privilege exists. [P 310 C 1]

(c) Practice—New plea—Action for libel—Defendant taking plea of qualified privilege at appellate stage—Plea should not be upheld as plaintiff had no opportunity of proving that such privilege was not properly used.

Where in an action for libel, the defendants plead qualified privilege at the appellate stage, their plea should not be allowed to succeed even if they are entitled to have such privilege, as plaintiff has no opportunity of proving that though the occasion was one of qualified privilege, the defendants have not used that occasion in a proper way. [P 310 C 1, 2]

Bindeshwari Prasad—for Appellants.

Kamla Sahay—for Respondents.

Judgment.— In my judgment this appeal fails. It arises out of an action for libel consisting in two petitions, one addressed to the Deputy Commissioner and the other addressed to the Manager of the Court of Wards. At the appeal stage of the case for the first time the pleader for the defendants took the point that the circumstances disclosed a case of absolute privilege. The learned Judge overruled that contention ; and referring to an authority upon which the defendants relied he observed :

> Evidently the principle enunciated therein has no bearing on the present case because the petition (Ex. 2) cannot, by any stretch of imagination be considered to be a complaint addressed to a Magistrate.

He then proceeded to say that the question had not been raised in the written statement and that "their prayer . . . was apparently for private (Khophia) enquiry," and that "the criminal law as administered in this country did not entertain any private enquiry." Now the authority upon which reliance was placed in this Court is the decision in 11 Pat 693 (1) where the learned Chief Justice sitting with Kulwant Sahay, J. without stating in detail the facts, states that the petition there was addressed to a Magistrate making allegations against the plaintiff of oppressive treatment as a landlord. If an application is addressed to a Magistrate, then on the authorities in India, that would be a privileged occasion. But it must be remembered that the application must be addressed to the Magistrate as such and must be in the nature of an information which is the initial stage of a criminal prosecution. Such is the case reported in 49 Mad 315 (2) where it was held by a Bench of Judges of the Madras High Court that an occasion of that kind was absolutely privileged. Another authority is found in 37 Mad 110 (3), but that is of no assistance in this case because the learned Judges were there dealing with a criminal prosecution for libel or defamation specifically and not for a civil proceeding. As has been pointed out so many times and as is obvious, the considerations in the two different classes of case are quite different.

The difficulty if any, which arises in this case, is owing to the fact that the parties raised this question at a very late stage of the hearing. But I am bound by the decision of the Court below on the question of fact, and the learned Judge decides that this was not a complaint

---

1. Ram Kirat v. Biseswar Nath, 1933 Pat 35=141 I C 133=11 Pat 693=14 P L T 279.
2. Sanjivi Reddy v. Koheri Reddi, 1926 Mad 521=93 I C 8=49 Mad 315=50 M L J 460.
3. Re M. Naidu v. Emperor, 1914 Mad 472=14 I C 757=13 Cr L J 293=37 Mad 110.

addressed to a Magistrate but addressed to the Deputy Commissioner and also as already stated a petition to the Manager of the Court of Wards. Now taking the best view one can of those circumstances having regard to the statement by the Judge in the Court below, the most that could be said is that it was a case of qualified privilege. Now in a case of qualified privilege, the onus is in the first instance, (and it has so often been stated to be an onus which is very easily discharged) to prove that the privilege exists. This could have been proved in the circumstances of this case by showing that there was a common interest between the Deputy Commissioner and the tenant-defendants and also a common interest between the Manager of the Court of Wards and the tenants again. But the fact is that they did not raise that in their written statement, nor did they have the Judge of the trial Court to settle any issue on this point. Now if I were to hold that this was a case of qualified privilege in the circumstances, I should also be obliged to hold that the plaintiff had not discharged the onus upon him to prove that although the occasion was an occasion of qualified privilege the defendants did not use that occasion in a proper way; in other words they acted maliciously. That sometimes is a very difficult point to establish. I could hold in this case that there must be judgment for the defendants on the ground that the plaintiff had not discharged the onus which lay upon him. But in my judgment, to come to such a conclusion having regard to all the facts of the case would be absolutely unjust. It would be stating that the plaintiff had not discharged the onus when he had never been called upon to discharge such an onus, the defendants having been (as we now know) throughout upon the defence that what they stated was true. It has been found that the defence is false. I think the matter is concluded by the finding of the Judge in the Court below that it was a complaint addressed to the Deputy Commissioner and the Manager of the Court of Wards asking these two officials for a private enquiry into the matter. It would appear although perhaps it has no bearing on the decision of this appeal, that the defendants were not entirely sure of their own ground. To repeat myself even if I hold that the occasion was an occasion of qualified privilege, it would be unfair to allow the defendants to succeed as this question was not raised and the plaintiff never had the opportunity of proving what he ought to have proved. In those circumstances it seems to me that the appeal fails and it must be dismissed with costs.

K.S./R.K. *Appeal dismissed.*

A. I. R. 1936 Patna 310

MOHAMAD NOOR AND VARMA, JJ.

Jadunandan Singh and *others*—Defendants—Appellants.

v.

Shankar Sahu and *another*—Plaintiffs—Respondents.

Appeal No. 142 of 1935, Decided on 7th February 1936, from original order of Sub-Judge, Bhagalpur, D/- 18th April 1935.

(a) Review—Order rejecting plaint for non-compliance with order for payment of Court-fee—Review is permissible.

Where a plaint is rejected for non-compliance with the order for payment of Court-fee a review of that order is permissible and the Court has discretion to restore the suit: 1925 *Pat* 435; 1926 *Pat* 27; 1923 *Pat* 354; 1922 *P C* 112 and 1934 *P C* 213, *Ref.* [P 311 C 1, 2]

(b) Civil P. C. (1908), O. 47, R. 7—Order granting review—Appeal when competent.

When a review is granted an appeal is permissible only on the specified grounds and they are if the order contravenes the provision of R. 2 or R. 4 of O. 47, or if the application for review is barred by limitation. [P 311 C 2]

Bhuvaneshwar Prasad Sinha—for Appellants.

P. C. Manuk, *Ishwarinandan Prasad* and *Ragho Sharan Lal*—for Respondents.

Mohamad Noor, J.—This appeal is directed against an order of the Subordinate Judge of Bhagalpur, dated 18th April 1935, granting review of his order, dated 28th March 1935, by which he rejected a plaint for insufficiency of Court-fee. On 28th January 1935 the respondents presented a very insufficiently stamped plaint of a suit valued at Rs. 7,018-8-0. The learned Subordinate Judge ordered that the deficit Court-fee be paid by 27th February 1935. This was not done, and he extended the time upto 28th March 1935. On that day there was an application for further extension of time which was rejected and Court-fee was ordered to be paid in the course of the day. This was not done,

and the learned Subordinate Judge rejected the plaint. Thereafter, on 1st April 1935, the respondents applied for review of the order. The ground was that on account of the unavoidable absence of the plaintiffs from Bhagalpur the order rejecting the further extension of time could not be communicated to them. The review was granted and the suit was restored. The plaintiffs were directed to pay the deficit Court-fee on that very day. This was done, and the suit proceeded. The defendants have preferred this appeal against the order granting the review.

So far as the orders previous to the rejection of the plaint are concerned, namely the orders giving the plaintiffs time to pay the deficit Court-fee, they were within the discretion of the learned Subordinate Judge. He had full power to do so under O. 7, R. 11 and S. 148, Civil P. C. Those orders are not questioned in this appeal. The grievance of the appellants however is that the plaint having been rejected for non-compliance with the order of payment of the deficit Court-fee the learned Subordinate Judge had no power to grant a review. The learned Advocate appearing on their behalf contended that the words "sufficient reasons" mentioned in O. 47, R. 1 mean reasons analogous to those specified immediately previously. He relied upon the decisions of the Privy Council in 49 I A 144 (1) and 39 C W N 1 (2). These decisions lay down the proposition contended for by the appellants, but as pointed out in several decisions of different High Courts the distinction is a fine one. Whether a particular reason is or is not analogous to the reasons specifically mentioned in O. 47, R. 1 is difficult to lay down by any hard and fast rule. I am not prepared to hold that if a plaint be rejected for non-compliance with the order of payment of Court-fee a review of that order is not permissible. In fact the learned Advocate for the appellants conceded that there might be cases of orders rejecting a plaint for non-payment of Court-fee which could be reviewed, but he contended that this was not the case of such a nature.

In this Court in 2 Pat 504 (3), it was held that when the plaintiff failed to make good a deficit in the Court-fee due on the plaint and the plaint was rejected the order was open to review though S. 151, Civil P. C., was not applicable. In the case of 4 Pat 180 (4), where the plaint was rejected for non-payment of Court-fee on account of the fraud of the kapardaz, it was held that the Court could restore the suit on proper application whether the application be deemed to be one under Ss. 148, 149, 151 or O. 47, R. 1, read with S. 114, Civil P. C. In another case of 4 Pat 704 (5), it was held that if an appeal has been dismissed for failure to deposit the printing costs a review lay and that the words "for any other sufficient reason" covered such cases. I see no difference between a failure to pay Court-fee and a failure to pay printing costs. Now when a review is granted an appeal is permissible only on the specified grounds and they are, if the order contravenes the provision of R. 2 or R. 4 of O. 47, or if the application for review is barred by limitation. R. 2 has no application as it was granted by the very officer who had passed the order of rejection of the plaint. R. 4 refers to notice to the opposite party and places restrictions upon a review being granted on the ground of discovery of new and important matter of evidence, namely that there must be strict proof that the new evidence was not within the knowledge of the applicant, or could not be produced at the hearing. In this case no doubt no notice was issued on the defendant appellants, but in my opinion the learned Subordinate Judge has rightly held that as no summons was issued upon the defendants there was no opposite party at that stage. At that stage the matter was between the Court and the plaintiffs. I do not think the order contravenes either R. 2 or R. 4 of O. 47. The learned Subordinate Judge has exercised his discretion, and I do not think any interference will be justified. I would therefore dismiss this appeal; but as the plaintiffs had made a default in the pay-

1. Chhajju Ram v. Neki, 1922 P C 112=72 I C 566=49 I A 144=3 Lah 127 (P C).
2. Biseshar Pratap Sahi v. Parath Nath, 1934 P C 213=151 I C 41=56 All 634=39 C W N 1 (P C).
3. Rameshwardhari Singh v. Sadho Saran Singh, 1923 Pat 354=72 I C 629=2 Pat 504 =4 P L T 261.
4. Aditya Prasad Singh v. Ramharak Ahir, 1925 Pat 435=91 I C 213=4 Pat 180.
5. Ananta Potedar v. Mangal Potedar, 1926 Pat 27=91 I C 483=4 Pat 704=7 P L T 292.

ment of Court-fee I would make no order for costs.

Varma, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1936 Patna 312

WORT, J.

Kesho Ram—Defendant—Appellant.

v.

Ram Lal Sahu — Plaintiff — Respondent.

Appeal No. 446 of 1933, Decided on 5th February 1936, from appellate decree of Dist. Judge, Gaya, D/- 22nd September 1932.

Transfer of Property Act (1882), S. 76 (c) —Mortgagee in possession paying municipal taxes—Rent agreed to be set off against principal and interest—Mortgagee is entitled to set off municipal taxes in mortgage account.

Where the mortgagee in possession pays municipal taxes, and there is an agreement between the mortgagee and the mortgagor that the rent was to be set off against the principal and interest, he is entitled to set off the amount paid as municipal taxes in the mortgage accounts so that he can remain in possession till the liquidation of the sum paid as taxes.

[P 313 C 1]

Sarju Prasad—for Appellant.

Rajkishore Prasad—for Respondent.

Judgment.—This is an appeal from the decision of the District Judge in an action for redemption. The only question which arises is whether the mortgagee is entitled to set off certain sums in the mortgage account. The Judge in the Court below has held that on the state of affairs as it existed the mortgagee should have given up possession of the property which was a house on 9th August 1930. It is unnecessary to state the very complicated facts relating to the matter, and I content myself with referring to the fact that the mortgagee who is the appellant before this Court was a second mortgagee, there having been a previous mortgage of the property by the proprietor to one Sukni Kuer. Sukni Kuer's mortgage was paid off, it would appear, by the mortgagor respondent borrowing from the present mortgagee appellant. In those circumstances the mortgagee in the Court below contended that he was entitled to a set off in the mortgage account in respect of three items amongst others and with these three items I am concerned in this case.

Sukni appears to have sued the mortgagee for rent. I should have stated that one of the terms of the mortgage bond in this action was that as regards the principal and interest the rent of Rs. 45 per month should be set off by the mortgagee. The rent approximately was something in excess of Rs. 500 a year, that is, Rs. 45 a month and the interest on Rs. 2,000 borrowed amounted to Rs. 240. We therefore see that there was a balance after the interest had been liquidated and this balance was to be set off as against the principal. The three items mentioned are first, costs of the mortgagee who was ultimately successful in a certain litigation as regards rent; secondly, the sum of money which was advanced by the mortgagee to Ramlal who claimed to be entitled to this property under the will of Radhika Debi, his wife. This sum of money was advanced for the purpose of enabling Ramlal to take out Letters of Administration with the will annexed.

The third was an item of Rs. 73 odd paid by the mortgagee in possession for municipal taxes. I will deal with the items in the order reverse to that I have mentioned them. As regards Rs. 73 odd paid for municipal taxes there is no question that the mortgagee is entitled to set this off. The only question is whether he is entitled to set off in the account which will eventually be taken in an application for mesne profits by the mortgagor or whether he should set it off in the mortgage account; by that I mean whether he was entitled to remain in possession for a period longer than that decided by the learned District Judge in the case.

The contention of Mr. Sarju Prasad is this: that if he (the mortgagee) is entitled to set off in the mortgage account as he set off the rent, he would be entitled to remain in possession longer, exactly what period I need not at this moment state. I cannot quite see how it is possible in the circumstances to decide that he is entitled to set this off having regard to the admitted provisions of the mortgage bond where it is only provided that the rent of Rs. 45 is to be set off as against principal and interest. On first impression I came to the conclusion that the mortgagee was not entitled to set off as I have stated; but when the argument is examined it is difficult to meet; S. 76, T. P. Act, is relied upon in

this connexion. Sub-cl. (c), part 1, S. 76, provides :

When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, he must, in the absence of a contract to the contrary, out of the income of the property, pay the Government revenue, all other charges of a public nature and all rent accruing due in respect thereof during such possession, and any arrears of rent in default of payment of which the property may be summarily sold.

I come to the conclusion on the whole that the mortgagee was entitled to set off this Rs. 73 odd in the account, that is to say, that he is entitled to remain in possession until that sum was liquidated. Exactly what period that may be will be decided by the Court taking the account. As regards the other items I am quite clearly of the opinion that if the mortgagee likes to advance money to the mortgagor he may do so, and there is an implied contract therefore by the mortgagor to repay, but the mortgagee was in no sense obliged to advance the money and therefore whatever the object of the advance was, it cannot possibly be taken into account in the mortgage account. As regards the costs of the rent action I am of the same opinion. If the mortgagee was entitled to set off these costs he will also be entitled to set off the costs of any action which any person who had nothing whatever to do with the property might have brought against him for rent. It is quite clear that, so far as the rent up to 10th May 1924 was concerned, that was the date of the deposit when Sukni Kuer was the landlord, and she was entitled to rent prima facie as against the mortgagee who was her tenant. The litigation in the case before the Court of appeal ended in the mortgagee's favour, and, as I understand, partly on the ground that the rent had been paid for the period during which Sukni Kuer was liable, and, as regards the remainder, for that period Sukni Kuer had no title. In my judgment the learned Judge in the Court below was right as regards these matters, and his judgment will be affirmed subject to the modification that as regards Rs. 73 odd paid for municipal taxes the mortgagee will be entitled to remain in possession for a period in proportion to the amount which will carry interest. In the circumstances I think there should be no order as to costs of the appeal.

V.B./R.K. *Decree modified.*

A. I. R. 1936 Patna 313

WORT, J.

Bhagwat Sahay — Judgment-debtor— Appellant.

v.

Ram Sukrit Ram — Decree-holder — Respondent.

Appeal No. 304 of 1935, Decided on 24th January 1936, from appellate order of Dist. Judge, Shahabad, D/- 14th September 1935.

(a) Limitation—Application for transferring decree to another Court—Order on such application is step-in-aid of execution.

An order made on application for transferring the decree for execution to another Court, is a step-in-aid of execution and gives a fresh start to the decree-holders under Art. 182 (5) : 1922 *Pat* 301, *Foll.*; 1927 *P C* 73 and 1934 *Pat* 662, *Disting.* [P 313 C 2; P 314 C 1]

(b) Limitation Act (1908), Art. 182 (5)—Art. 182 (5) contemplates judicial order on application by decree-holder.

What is clearly contemplated by Art. 182 (5) is that a judicial order is to be made on an application by the decree-holder, being a step-in-aid of execution and in order that an application for transfer should benefit the decree-holder it must be in essence in continuation : 34 *All* 396, *Ref.*; 1922 *Pat* 301, *Doubted.* [P 314 C 2]

D. N. Varma—for Appellant.

K. P. Sukul—for Respondent.

Judgment.—This is an appeal from a decision of the District Judge dismissing summarily an appeal preferred before him which raised a question relating to execution. I am surprised that the learned Judge so acted having regard to the rather important question of law which arose. Shorn of all unnecessary details, the decree-holder obtained a decree on 7th June 1931 and made this application in execution on 5th July 1935. It is clearly seen from these dates that the application in execution would be barred but for the contention by the decree-holder that an order made on 8th July 1932 was made in aid of execution and thus saved limitation under Art. 182, Cl. (5) of Col. 3. Without authority I should have very little hesitation in coming to the conclusion that the application for transferring the decree from one Court to another and the order thereon of 8th July 1932 was not in fact a step in aid of execution. But I am met with a decision of a Division Bench of this Court in 3 P L T 298 (1). I had occa-

1. Ramchandra Marwari v. Krishna Lal Marwari, 1922 Pat 301=65 I C 332=1 Pat 328=3 P L T 298.

sion to refer to this authority, and there came to the conclusion that the decision of their Lordships of the Privy Council in 54 I A 129 (2) in effect overruled the decision of this Court to which I have referred. But it must be noticed that in 1934 Pat 662 (3), although coming to the conclusion just stated, it was unnecessary to decide the point for the reason that the case went off on another question. I should have found myself in some difficulties had it not been otherwise.

The position is this: that in 54 I A 129 (2) their Lordships of the Privy Council were considering Art. 183, Limitation Act, and whether a decree had been revived within the meaning of Col. 3 of that Article. Their Lordships of the Privy Council, in the opinion expressed by Lord Phillimore, came to the conclusion that an order made on the original side of the Calcutta High Court transmitting the decree or order for execution to a subordinate Court was a ministerial act and therefore could not be considered to have revived the decree within the meaning of the article under consideration. Now, I must say that in the decision of my own to which reference has been made I was much pressed by the view stated by their Lordships of the Privy Council, and it seemed to me that the inevitable conclusion to be derived from that decision was a conclusion contrary to that arrived at by this Court in 3 P L T 298 (1) to which I have referred. But I must not forget that the decision of their Lordships of the Privy Council was on Art. 183 and not on Art. 182, Limitation Act, and, therefore, on the fundamental principle upon which the authorities have to be considered, the decision cannot be considered as a decision on the Article which I have now under consideration. I must confess that the case before me seems to be a fortiori and for reasons which I shall in a moment state; but in the meantime I content myself with saying that whatever my view may be, and however strongly it may be held, I am met with the Division Court decision of this Court which is binding upon me.

As this case will go further, and I hope it will, I wish to express my view shortly. In this case we are considering para. 5 of Col. 3 in Art. 182. Now, Sir Dawson Miller, if I may be allowed to say so with respect, treated the matter (and I should like to say that I have often been tempted to treat the matter in the same way) that para. 5 of the Article gave a fresh start to the decree-holder from the date on which he took some step in aid of execution. Now that is contrary to the Article. The Article does not speak of an application in aid of execution but speaks of an order made on an application as a step in aid of execution. Para. 5 of the Article provides " where the application next hereinafter mentioned has been made the date of (and then the parenthesis) the final order passed on an application made in accordance with law to the proper Court for execution of the decree or order."

What is clearly contemplated by the Article is that a judicial order is to be made on an application by the decree-holder being a step in aid of execution: in other words, the date from which a fresh start is given is the date upon which the judicial order is made on the application as a step in aid of execution. Whether it is to be looked at from that point of view, or whether it is to be looked at as the learned Judges of the Allahabad High Court looked at it in 34 All 396 (4), the same conclusion in my judgment results. Karamat Husain, J., and Tudball, J., there considered that in order that an application for transfer should benefit the decree-holder it must be in essence in continuation: or, to put it more accurately, an application for execution cannot be considered to be in continuation of an application for transfer. Between the application for transfer made in this case on 8th July 1932 and the application for execution made on 5th July 1935 there was a gap which was fatal. There is the authority of the Allahabad High Court of later date than the one to which I have referred, but in that case no reference was made to the case of which I have made mention. The matter, however, as I have said, so far as I am concerned, is concluded by the decision

2. Banku Behari v. Naraindas Dutt, 1927 P C 73=101 I C 24=54 I A 129=54 Cal 500 (P C).
3. Gopal Tewari v. Ramdhari Pandey, 1934 Pat 662=152 I C 987.
4. Khetpal v. Tikam Singh, (1912) 34 All 396=14 I C 172.

of this Court in 3 PLT 298 (1), whatever view I may hold of the matter.

Therefore, the only conclusion I can come to is that the appeal fails and must be dismissed with costs. But as the matter is of great importance and the point frequently arises, I give leave to appeal under the Letters Patent.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1936 Patna 315

WORT, J.

Surpat Singh and *others*— Plaintiffs— Appellants.

v.

Gena Jha and *another*—Defendants — Respondents.

Appeal Nos. 1120 and 634 of 1933, Decided on 24th February 1936, from appellate decree of Sub-Judge, Purnea, D/- 29th May 1933.

(a) Evidence Act (1872), S. 32 (7)—Before admitting documents under S. 32 (7), document must be admissible under S. 32.

Where there is no evidence entitling certain documents to be admitted under S. 32, the documents cannot be considered as relevant under S. 32 (7). [P 316 C 1]

(b) Landlord and Tenant—Rent— Non-payment of.

Mere non-payment of rent for a period of 12 years or more is not sufficient to establish a rent-free grant. [P 316 C 1]

(c) Record of Rights— Entry in Record of Rights is not proof of rent-free grant — It is not document of title—Tenant must prove it.

The Record of Rights is not a document of title; it is simply an evidence of fact. When it is once shown upon fundamental principles, that the landlord is entitled to rent unless the tenant shows some contract or settlement which allows him to hold the land rent-free, the tenant is bound to prove that ; it will not be proved by mere entry in Record of Rights : 1922 *P C* 272, *Rel. on* ; 12 *M I A* 282 (*P C*), *Ref.* [P 316 C 2]

J. C. Sinha—for Appellants.

D. L. Nandkeolyar and *Nawal Kishore* —for Respondents.

Judgment. — These two appeals by the plaintiffs arise out of actions for assessment of fair rent. The defence was that the lands were granted rent-free and in each case reliance was placed by the defendants upon the Record of Rights together with other evidence. So far as Second Appeal No. 1120 of 1933 is concerned, it is admitted by the learned advocate appearing on behalf of the plaintiff-appellants that 7½ bighas out of 9 bighas are governed by a recent judgment of mine in this Court and the appeal is pressed only as regards 1½ bighas which is the difference between 9 bighas the area of the holding and 7½ bighas. The appeal is not pressed with respect of 7½ bighas as the learned Judge has identified the land in suit with certain sanad granted to the defendant's ancestors, and, the contract being established between the landlords and the original tenants, the learned Judge is justified in giving judgment to the effect that the land was rent-free. The contention on behalf of the plaintiff-appellants now is that they are entitled to assessment of fair rent so far as 1½ bighas are concerned. The learned Judge in the Court below has dealt with the matter in this way. He has identified the whole of the 9 bighas with the original sanad and has come to the conclusion that the difference between the 9 and 7½ bighas was merely by reason of a different standard of measurement. In my judgment the learned Judge was entitled to come to that conclusion if he was so minded. The decision of the learned Judge in the Court below that the whole of the land in dispute and the land which was the subject-matter of the original grant being the same the plaintiffs' claim failed, being a decision on fact is binding on me in second appeal. Appeal No. 1120 of 1933 is therefore concluded by the finding of fact aforesaid and fails.

As regards Second Appeal No. 634 of 1933 different considerations arise. The area of the land in this case was much larger, but I am not much concerned with that particular matter. I am concerned with the evidence upon which the learned Judge in the Court below relied for the purpose of coming to the conclusion favourable to the defendants. First the Record of Rights was relied upon and the learned Judge found that the plaintiffs failed to rebut the entry thereof which was in favour of the defendants. The learned Judge also relied upon documents of title and documents between persons not parties to the action for the purpose of identifying the land in suit, and very little need be said with regard to that matter. But the learned Judge in the Court below has relied upon certain kobalas for the purpose of deciding that this land was rent-free. A recital to that effect is contained in Exs. A and A-1 which are documents of title and in

Ex. 4 which is a document between persons not parties to the suit. Now it is urged on behalf of the defendant-respondents that the decision of the learned Judge in the Court below is supported by S. 32 (7), Evidence Act, which provides :

'When the statement is contained in any deed, will or other document which relates to any such transaction as is mentioned in S. 13, Cl. (a) (3),' is made by a person who is dead, or who cannot be found or who has become incapable of giving evidence . . . it is by itself a relevant fact.

It is contended by Mr. Nandkeolyar in the first instance that the Judge was entitled to look at the documents because the persons were dead, and, as the recitals came under S. 13 they were relevant. But the fact is that there was no evidence whatever which fell to be considered under S. 32. The kobalas were simply introduced in the case without any evidence entitling them to be admitted under S. 32, Evidence Act. Had there been such evidence I should have held very reluctantly that it came under Cl. (7), S. 32 read together with S. 17 of the Act. But I need not express my own view in the matter, as their Lordships of the Privy Council have decided that the application of the section is to be extended to corporeal rights as well as incorporeal rights. I am quite clearly of the opinion that the learned Judge was not entitled to look at either of these documents (and certainly Ex. 4) for the purpose of establishing the rent-free nature of the defendants' grant. At this point I should state that in this case there was no sanad or document of title or contract of any kind proved by the defendants and therefore they were forced to rely upon these kobalas plus the entry in the Record of Rights. Now the learned Judge has stated that apart from the kobalas the Record of Rights could be relied upon as the plaintiffs did not rebut the entry thereof.

In the view that I take of the case, the only evidence the defendants could rely upon was the Record of Rights. Mere non-payment of rent for a period of 12 years or more is not sufficient as has been laid down by their Lordships of the Privy Council in a number of cases, and if I may be allowed to say so, the proposition itself is evident. The defendants were therefore forced to rely upon the Record of Rights. In this connexion the well-known decision in 2 Pat 38 (1), a decision of the Privy Council, is relied upon. The proposition stated by Mr. Ameer Ali is that the Record of Rights, in the circumstances such as existed in this case, that is to say where a rent-free grant is claimed, is rebutted the moment the plaintiff establishes that he is the zamindar or the proprietor. This proposition is no doubt based on the well-known decision in 12 M I A 282 (2), at page 331, which is to the effect that:

The zamindar has a prima facie title to the gross collections from all the mouzahs within his zamindari.

This is clearly based on the fundamental principles that if a person claims any right over any portion of the proprietor's land, he must establish that right by proving some sort of agreement between him and the landlord. The decision to which I referred to in the first instance has been explained, as I pointed out in a recent judgment in 11 P L T 444 (3). Not only is there that explanation, but I think there is a further explanation. The Record of Rights is not a document of title; it is simply an evidence of fact. When it is once shown, as it was in this case, upon fundamental principles, that the landlord is entitled to rent unless the defendant showed some contract or settlement which allows him to hold the land rent-free, the defendant is bound to prove that. Now, can the defendants prove it by producing the Record of Rights? It is impossible to hold that the proposition laid down in 2 Pat 38 (1) is in any way limited, although it is true that in that case there was an elaborate discussion on an examination of evidence upon which the defendants relied in order to establish their rent-free grant.

In my judgment the authority in 2 Pat 38 (1), governs this case and that the learned Judge in the Court below was wrong in holding that the defendants' right to rent-free grant was established by an entry in the Record of Rights. The defendants being no longer entitled to

1. Jagdeo Narain Singh v. Baldeo Singh, 1922 P C 272=71 I C 984=49 I A 399=2 Pat 38 (PC).
2. Rajah Sahib Perhlad Sein v. Doorga Persad Tewaree, (1867-69) 12 M I A 282=12 W R 6 =2 Beng L R 111=2 Suther 225=2 Sar 429 (PC).
3. Stonewigg v. Kameshwar Narain Singh, 1923 Pat 340=71 I C 1022=11 P L T 444.

rely upon that entry, and the defendants also not being entitled to rely upon the three kobalas, to which I have made more particular reference, the plaintiffs should have been allowed to succeed. For those reasons the plaintiffs' appeal No. 634 succeeds and is allowed with costs. Leave to appeal under the Letters Patent in respect of appeal No. 634 of 1933 is granted. Second Appeal No. 1120 of 1933 is, as I have already said, dismissed with costs.

K.S./R.K. *Order accordingly.*

A. I. R. 1936 Patna 317

COURTNEY-TERRELL, C. J. AND DHAVLE, J.

(*Babui*) *Dhaneshwari Kuar*—Plaintiff—Appellant.

v.

Chandradhari Singh and *another*—Defendants—Respondents.

Appeal No. 117 of 1931, Decided on 1st October 1935, from original decree of Sub-Judge, Gaya, D/- 20th May 1931.

Bengal Tenancy Act (8 of 1885), S. 22 (2) —One of co-sharers purchasing holding in execution of rent decree in presence of other co-sharers—Such lands are not liable to partition.

Where a co-sharer purchases a raiyati in execution of a rent decree in presence of the other co-sharers, such lands purchased by him are not liable to partition. He is entitled to have possession of the lands even after partition. [P 318 C 2]

The partition does not put an end to that right or make a present of it to the co-proprietors who purchased nothing. What is really available for partition is not the land itself but the rent that would have been paid for the land by the occupancy raiyats whose place has now been taken by the purchasing co-proprietor, with the result that he becomes liable until partition to pay a proportionate share of the rent to the other co-proprietor or co-proprietors. These rents would be taken into account in the partition, but not the land purchased by him: 1925 *Pat* 547, *Rel. on*; *Case law discussed.* [P 318 C 2; P 319 C 1]

Janak Kishore and *D. L. Nandkeolyar*—for Appellant.

S. M. Mullick and *B. N. Rai*—for Respondents.

Dhavle, J.—This is an appeal by the plaintiff in a partition suit. The plaintiff's share was four annas, that of defendant 1 eight annas, and that of defendant 2, who was the sister of the plaintiff, the remaining four annas. During the pendency of the appeal defendant 2, who was on the record as respondent 2, died and a question arose between the appellant and the sons of defendant 2 as regards who was to take the place of the deceased respondent for the purposes of this appeal. That matter has been settled between the disputing parties, and the sons of the deceased respondent have now withdrawn their opposition. The result is that the appellant is entitled not only to her original share of four annas but also to the four annas share in respect of which her sister had been impleaded in the suit. As to this, respondent 1, the owner of the other eight annas, raises no objection and the partition will have to be carried out in the light of the altered circumstances.

The only point urged on behalf of the appellant relates to lands in the possession of defendant 1 on account of purchases made by him in rent executions. The issue was whether these lands were liable to be partitioned, and the lower Court answered it in favour of the defendant. The learned advocate for the appellant does not seriously contend that that particular answer is wrong on the authorities, but he does urge, and urge very strenuously, that the reason given by the lower Court for answering the issue in that particular way will lead to many difficulties in future and is incorrect. This reason is that as defendant 1 purchased raiyati land in execution of rent decrees in presence of the other co-sharers, namely the plaintiff and defendant 2, he is, under S. 22, Cl. 2, Ben. Ten. Act, entitled to hold the lands subject to the payment of rent to his co-sharers. Upon this the learned advocate points out two things. He says, in the first place, that the clause in question deals with or provides for payment to co-proprietors, and urges that after the partition there can be no co-proprietors at all. He also points out that under S. 158-B, Ben. Ten. Act, under which a holding sold in execution of a decree for arrears of rent is to pass to the purchaser, this effect is expressly subject to the provisions of S. 22. The contention of the learned advocate thus is that S. 22, Cl. 2 of the Act does not entitle defendant 1, with his present eight annas in the tauzi, to hold the raiyati lands purchased by him in rent executions subject to the payment of rent as mentioned in Cl. (2), S. 22 after he has ceased to be a co-proprietor by reason of the partition. This particular contention has been be-

fore the Court on several occasions, some of which are referred to in 7 P L T 170 (1). Ross, J., who delivered the judgment of the Court in that case, first dealt with the observations of their Lordships of the Judicial Committee in 51 Cal 631 (2), that:

> Even if the Midnapore Company purchased any jote rights in lands held in common by the co-sharers, such a purchase would in law be held to have been a purchase for the benefit of all the co-sharers,

on which the learned advocate for the appellant has laid a good deal of stress. The learned Judge then pointed out that this general statement of the law must be read subject to the provisions of S. 22 (2), Ben. Ten. Act. That section, as he observed, confers a privilege on the purchasing co-sharer which is in derogation of the common law right of the other co-sharers, and there does not seem to be anything in a partition to take away that privilege. "On the contrary," said the learned Judge:

> It would appear that the partition only removes the necessity for the limitation on the effect of the purchase and would set free the holding to be operated upon by the ordinary provisions of the law.

The stress laid by the learned advocate on the word "co-proprietors" in the clause under consideration was also noticed by Ross, J., along with the observation in 7 P L T 87 (3), by Kulwant Sahay, J., that the status created by S. 22, Cl. (2) is a peculiar status which attached to the co-sharer so long as he remained a co-sharer on which also stress has been laid before us. But as Ross, J., pointed out, Kulwant Sahay, J., himself said in the last cited case that in the decisions in which it had been held that on partition the purchasing co-sharer was entitled to retain possession of the land recorded in his name under S. 22, Cl. 2, "the interest of the co-sharer who had purchased the holding did not cease. He continued to be the proprietor after the partition and hence it was held that he was entitled to retain possession." That the particular point urged before us by the learned advocate has been decided against him in this Court in a number of cases is not disputed, but he has urged that those decisions overlook the effect of the words "subject to the provisions of S. 22" in S. 158-B, and he has laid stress on 4 P L W 428 (4) in which Jwala Prasad, J., with whom the late Chief Justice concurred, had observed that a co-proprietor who had purchased certain raiyati lands, was entitled under Cl. 2, S. 22, to hold them on payment of rent to the co-proprietors so long as the village was held jointly by all the proprietors, but that on partition of the lands he had no right as co-proprietor to claim possession under the section. But this dictum was explained away by Jwala Prasad, J., himself in 2 P L T 163 (5) which he, sitting with Das, J., followed in 3 P L T 13 (6), and both these cases were followed in 7 P L T 170 (1). The words in S. 158-B, on which the learned advocate has laid so much stress, do not really introduce any new consideration, for they only take us back to S. 22, and as Ross, J., pointed out, undue stress must not be laid on the word "co-proprietors" occurring in sub-s. (2) of this section. As my Lord the Chief Justice pointed out during the course of the argument, what the learned advocate for the appellant has endeavoured to do is to read into the affirmative proposition contained in Cl. 2, S. 22, a negative provision that the purchasing co-sharer will have no right at all to the land as soon as he ceases to be a co-sharer by reason of the partition. But it is only as long as there are others interested in the land as co-proprietors that it is necessary to deal specially with the purchasing co-sharer's right to hold the land.

The partition does not put an end to that right or make a present of it to the co-proprietors who purchased nothing. What is really available for partition is not the land itself but the rent that would have been paid for the land by the occupancy raiyats whose place has now been taken by the purchasing co-proprietor, with the result that he becomes liable until partition to pay a proportionate share of the rent to the

1. Jhapsi Sao v. Mt. Bibi Aliman, 1926 Pat 263 =93 I C 1001=5 Pat 281=7 P L T 170.
2. Midnapore Zamindary Co. Ltd. v. Naresh Narayan Roy, 1924 P C 144=80 I C 827= 51 I A 293=51 Cal 631 (P C).
3. Bambahadur Lal v. Gungra Kuar, 1925 Pat 547=89 I C 232=7 P L T 87.
4. Stonewigg v. Dwarka Singh, 1918 Pat 422= 45 I C 706=4 P L W 428.
5. Babu Ram Prasad v. Munshi Gopal Chand, 1921 Pat 341=62 I C 72=2 P L T 163.
6. Nand Kishore Singh v. Mathura Sahu, 1922 Pat 193=65 I C 586=3 P L T 13.

other co-proprietor or co-proprietors. These rents would be taken into account in the partition, but not the land purchased by the respondent. I can see no reason why S. 22 (2) should be read in the manner contended for or why we should not follow the express decisions of the Court in 7 PLT 170 (1), and other cases cited in it.

In this view I would dismiss the appeal with costs. The hearing fee will be the usual proportion not of the value of the appeal but of Rs. 3,000.

Courtney-Terrell, C. J.—I agree.

K.S./R.K. *Appeal dismissed.*

A. I. R. 1936 Patna 319

WORT, J.

Mithu Pandey—Plaintiff—Appellant.

v.

Suraj Kumar Lal and *another*—Defendants—Respondents.

Appeal No. 844 of 1933, Decided on 26th February 1936, from appellate decree of Addl. Sub-Judge, Arrah, D/- 6th March 1933.

Hindu Law—Joint family—Decree against coparcener—Burden of proof—Decree against junior member of family personally—Burden of proof on decree-holder to show that judgment-debtor was sued as managing member of family—Burden not discharged—Decree not binding on family.

A member of the joint Hindu family was sued and decree obtained against him personally. The decree was sought to be executed against the family property, of which the judgment-debtor was a junior member. Other members raised an objection under O. 21, R. 58, Civil P. C., that the decree was not binding on them as the judgment-debtor was not sued in a representative capacity. There was no evidence to show that the judgment-debtor was sued in representative capacity :

Held : that the burden of proof was on the decree-holder to show that judgment-debtor was sued in a representative capacity as a managing member of family. This burden of proof not being discharged by the decree-holder, the decree was not binding on the other members of the family. [P 320 C 2]

B. P. Sinha—for Appellant.

Mahabir Prasad and *Phulan Prasad Varma*—for Respondents.

Judgment.—The only point in this appeal arises out of finding by the learned Judge in the Court below to this effect :

> There is no evidence on the record to show that defendant 2 was the managing member of the family of the defendants or that he was sued in that capacity in the suit for the recovery of the arrears of thica rent by the plaintiff. Therefore the decree obtained by the plaintiff against defendant 2 alone for the recovery of the arrears of thica rent cannot be binding on defendant 1.

Defendant 2 had executed a thica lease on behalf of the family consisting at the time of defendant 2 himself and defendant 1, his uncle. This transaction in itself arose out of a zarpeshgi entered into by the grandfather of defendant 2 in consideration of a loan of Rs. 2,200. Under the thica lease the family got back into possession of the property. In those circumstances two actions were brought for rent, in the second of which defendant 2 alone was impleaded as defendant. Property other than the subject matter of the thica lease was put up for sale in execution of the decree. Defendant 1 entered an objection under O. 21, R. 58. Civil P. C., which was allowed. The property being released the plaintiff brought this action. The substance of his claim is that he was entitled to execute against the property which had been thus released. The defence to the action was that defendant 2 and defendant 1 were separate and that the property, being the property of defendant 1, could not be sold in execution. If the matter rested there, on the findings of the Judge in the Court below there could be no doubt that the plaintiff would be entitled to succeed, as the Judge has found that the defendants were in fact joint and that the thica transaction was entered into by the defendant on behalf of the joint family. Now the learned Judge, by the passage I have read, has come to the conclusion that in spite of these findings of fact in the plaintiff's favour, the decree was not binding on the family in the sense that the family property could not be taken in execution as the decree in the rent suit was against defendant 2 personally and not as representative of the family.

It is contended by Mr. Sinha, who appears on behalf of the appellant, that the learned Judge in the Court below misunderstood the case and misunderstood the principle of law which was to be applied, and as it is disclosed by the statement I have read that the Judge appears to be under the impression that unless the defendant was the karta of the family and sued as such, or to use the expression of the Judge, the managing member of the family, the decree could

not be binding upon the joint family. In those circumstances I called for the judgment and decree in the rent suit for the purpose of endeavouring to understand exactly what the learned Judge meant by saying that "the defendant was not sued as the managing member of the family." It appears that the judgment of the rent suit was not in evidence before the Judge in the Court below; in other words, there was no evidence at all as to whether defendant 2 had been sued as representing the family. Before I proceed with the matter, I would like to state the proposition of law which applies to a case of this kind. It is best stated in the words of Sir Dinshah Mullah in Edn. 7 of his Hindu law at p. 289 in S. 252:

> A decree passed against the manager of a joint family as representing the family for a debt contracted by him for family necessities, or for the family business, or in respect of family properties, operates as res judicata under the Code of Civil Procedure . . . and is binding upon all members of the family including minors.

That, if I may say so, is a principle of law which has been well established by the authorities, and as I understand the argument of Mr. Sinha, he does not seriously contend that that is not so. But his argument is that when once it is shown that defendant 2 acted as representative of the family when the thica transaction was entered into, it must be presumed in this case as a matter of law that the plaintiff sued defendant 2 as representing the family and that the family property was bound by the transaction. Now, if the principle which I have stated applies to the case of a karta or managing member of the family, it applies even with more force in a case of this kind where the transaction was entered into, not by the managing member of the family but by a junior member of the family. Although it might be sufficient to state merely that the plaintiff was suing the karta as such, but in the case of suing a member other than the karta, I should have imagined it would be necessary to prove that he was being sued as a person who represented the family in the transaction upon which the claim rested. Now, assuming that the learned Judge was wrongly under the impression that, unless the defendant was sued as the managing member, that is to say, karta of the family, there was no obligation or liability upon the family property, even so the question arises, was it necessary in this case for the plaintiff to establish the fact that the defendant in the rent action was sued in his representative capacity? In my judgment on the well established principle of law, it was. Now it is quite clear from the pleadings of the parties in this case that the plaintiff never set out to prove that fact. He stated that defendant 2 represented the family in the thica transaction and that is the reason why he was sued. The learned Judge in the Court below finds that there was no evidence that defendant 2 was in fact sued in his representative capacity and that a decree was obtained against him in that capacity. That being so, it seems to me that the onus which was clearly upon the plaintiff in this section was not discharged by him; and, if the onus was upon him, as I have said it was, and it has not been discharged, his action was bound to fail. The learned Judge in the Court below was therefore right in stating that defendant 2 was not sued as the managing member of the family. The manner of his expression might be open to some misunderstanding; but, even so, when the pleadings and the issues are noticed, it is clear that the plaintiff failed entirely to show, as he was bound to show in this case, that the decree was binding against the family property; that is to say, the family property was liable to sale in execution of that decree by reason of the fact that it was a decree against defendant 2 as representing the family.

At first I took a very strong view against that which I have just expressed as it appeared to me in the first instance that the learned Judge had misunderstood the position. But once having decided that the onus was on the plaintiff, and it being quite clear, as I have already said more than once, that there was no attempt on the part of the plaintiff to discharge that onus, the matter becomes perfectly clear. For those reasons I think the appeal fails and must be dismissed with costs. Leave to appeal under the Letters Patent is granted.

M.D./R.K. *Appeal dismissed.*

A. I. R. 1936 Patna 321 (1)

COURTNEY-TERRELL, C. J.

Berry Mahapatra—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 42 of 1935, Decided on 3rd January 1936.

Motor Vehicles Act (8 of 1914), S. 11 — Patna Rules, R. 46, Para. 7—'Plying' bus means 'to ply for hire and not merely travelling or driving.'

The word 'ply' in para. 7 of R. 46 of permit means plying for hire, that is to say it means that the person driving a vehicle stops to take up or put down the passengers for reward. A person merely driving his vehicle cannot be said to be plying his vehicle.

[P 321 C 1]

P. C. Chatterji—for Petitioner.

C. M. Acharyya—for the Crown.

Order.—In this case the petitioner was convicted under the Motor Vehicles Act of an alleged offence, the offence being that he had broken one of the Motor Vehicle rules, that is to say R. 46. The rule is as follows :

Permit.—No public motor vehicle shall be let or plied for hire in any local area or along any public road in the province unless its owner possesses a special permit in form *H* granted by the District Magistrate, and every such vehicle shall at all times, whether actually plying for hire or not be subject to the conditions prescribed in such permit

The relevant condition in form *H* is said to be prescribed by para. 7 of the permit which is as follows :

The vehicle in respect of which this permit (p. 2) is granted shall not, except with the sanction of the District Magistrate duly endorsed thereon, ply in any areas or along any roads other than the undermentioned areas and roads.

The finding of fact by the Magistrate is that there is no evidence upon which he can hold that the bus concerned took up any passenger outside the prescribed area and that, therefore, there was no plying for hire outside the prescribed area. Nevertheless the Magistrate convicted the accused evidently under the impression that the word "ply" in R. 7 of the permit means to travel. The word "ply" on the other hand has exactly the same meaning as to ply for hire, that is to say it means that the person driving a vehicle stops to take up or put down passengers for reward. A person merely driving his vehicle cannot be said to be plying the vehicle. The argument addressed to me in support of the conviction was frankly based upon the construction of the word "ply" as equivalent to the word "drive," but I cannot support that contention. If this argument were accepted the mere existence of a vehicle outside the prescribed area would be an offence against the rules. In default of a finding of fact that passengers were taken up outside the prescribed area, the conviction cannot be supported and must be set aside. The fine, if paid, will be refunded.

M.D./R.K. *Conviction set aside.*

A. I. R. 1936 Patna 321 (2)

VARMA, J.

Gobind Ojha and *others*—Appellants.

v.

Sita Ram Ojha and *others*—Respdts.

Appeal No. 861 of 1933, Decided on 20th February 1936.

Limitation—Suit for declaration of exclusive title of plaintiff and entry in record of rights to be wrong—Plaintiffs in exclusive possession of property—Suit after six years—Suit held not barred.

The plaintiffs filed a suit for the declaration of their exclusive title to property and also prayed that the revisional survey entries in record of rights were wrong. The suit was filed after six years. The plaintiffs were in exclusive possession of the property :

Held : that the suit was not for the correction of record of rights but for declaration of plaintiff's exclusive title; and was not time-barred : 1916 *Pat* 408, *Disting.* [P 322 C 1]

G. P. Singh—for Appellants.

S. N. Dutt—for Respondents.

Judgment.—This appeal is concluded by findings of fact. The plaintiffs filed a suit for a declaration of their exclusive title to khewat No. 3/13 to realise the entire rent from khata Nos. 228 to 231, and they also prayed for a declaration that the Revisional Survey entries with regard to khewat No. 3/13, recording defendants 1 to 10 as joint, were wrong. The trial Court was of opinion that the suit was time barred, as it was not proved by the plaintiffs that they were in exclusive possession of the property for the prescribed period. The trial Court was also of opinion that the suit was not maintainable in the form in which it was filed and also found that the entry was correct. On appeal the lower Court has held that the plaintiffs were in exclusive possession of the holdings in suit. It was also found that by private arrangement there was a partition and the lower appellate Court took pains to point out that the entry in the khewat, so far as it included defendants 1 to 10, was inequitable and he has referred to various details from which he concludes that

they could not have been joint with the plaintiffs. Mr. Gaindhari Prasad Singh for the defendant-appellants has urged that the suit is barred by limitation and referrred to 1 Pat L J 73 (1). No doubt a suit filed for the correction of the Survey record of rights ought to have been filed within six years. But here, on the findings of the lower appellate Court, this question does not arise because the lower appellate Court has found that the plaintiffs were in exclusive possession declaring their title to the holdings in dispute and therefore holds that the entry in the Survey record of rights is incorrect.

The suit is not for a correction of the record of rights, but for a declaration that the plaintiffs have got an exclusive title in respect of the property. Then the other point urged is that the finding that defendants 1 to 10 were in joint possession with the plaintiffs has not been upset by the lower appellate Court. But from a perusal of the judgment of the lower appellate Court, it is clear that, if the lower appellate Court has done anything, it has upset that finding. I would therefore dismiss this appeal with costs.

M.D./R.K. *Appeal dismissed.*

1. Amiruddin v. Saidur Rahman, 1916 Pat 408=35 I C 433=1 Pat L J 73.

A. I. R. 1936 Patna 322

COURTNEY-TERRELL, C. J.

Lachminarayan Das — Plaintiff—Appellant.

v.

Chairman, Cuttack Municipality — Defendant—Respondent.

Appeal No. 60 of 1933, Decided on 16th January 1936.

(a) Bihar and Orissa Municipal Act (7 of 1922), S. 377—Suit for declaration that alteration in assessment is illegal and injunction for levying same—S. 377 does not apply.

Section 377 is for the purpose of protecting a public authority from suits in respect of acts bona fide purporting to have been performed under the aegis of a lawful act but in which in spite of the bona fides of the public authority the law has been overstepped and a tort has been committed. It is not intended to apply to suits for the recovery of sums of money other than damage for tort which are lawfully recoverable either under statute or at Common Law. It does not apply to a suit for a declaration that an alteration in assessment is illegal and for injunction preventing the Municipality for levying such assessment. [P 323 C 1]

(b) Bihar and Orissa Municipal Act (7 of 1922), S. 107 (2)—One month's notice is condition precedent to alteration of assessment—Merely because objection is considered by commissioners on merits is no bar to suit.

The effect of sub-s. (2) of S. 107 is to make the issue of at least one month's notice of the proposal to make an alteration a condition precedent to the making of the alteration itself. Where no such notice has been given, the fact that the Municipality had already gone into the matter of the merits of the objection to the increased assessment is not a bar to the plaintiff's suit for consideration of validity of such assessment on merits. [P 323 C 1]

S. K. De—for Appellant.

S. C. Chatterji—for Respondent.

Judgment.—This is a second appeal from a decision of the District Judge reversing the decision of the Munsif, who decreed a suit in the following circumstances: The plaintiff is a person who lives in the town of Cuttack and has a house there. Under the provisions of the Bihar and Orissa Municipal Act, the commissioners desired to increase his assessment on the ground that he had extended the building in question by making additions or alterations to it. The Act makes provision by S. 107 for such increase of assessment. Sub-s. (1) of S. 107 states the alterations of assessment which may be made in the list. Sub-s. (2) provides as follows:

> The commissioners shall give at least one month's notice to any person interested of any alteration which they propose to make under Cls. (a), (b), (c) or (d) of sub-s. (1) and of the date on which the alteration will be made.

The commissioners, without giving any such notice, as is provided by this sub-section, in fact proceeded to make an alteration in the plaintiff's assessment and then proceeded to collect the increased tax. The plaintiff complained that he had received no notice and said that in any case the increased assessment was not justifiable on its merits. It would appear, although there is no direct evidence on the point, that the commissioners proceeded to entertain the plaintiff's objection and ultimately dismissed it. In this suit, however, he says that he is entitled, notwithstanding the circumstances of the rejection of his objection by the commissioners, to claim a declaration firstly that the commissioners, not having issued the required notice, are not entitled to make the alteration which they did in fact make, and he asked for an injunction to restrain them from levying the increased assessment. Since the suit has been brought

the assessment has been in fact levied from the plaintiff. The defendant has argued that sub-s. (2) does not have the effect of making the issue of the notice therein mentioned a condition precedent for making the required alteration, and an objection was further taken, that under S. 377 of the Act the suit is not maintainable by reason of the fact that the plaintiff did not before his suit issue the notice provided by that section. As to the last objection, I agree with the learned District Judge and with the learned Munsif that S. 377 has no application to cases of this sort. S. 377, like the English Public Authorities Protection Act and similar legislation in India, is for the purpose of protecting a public authority from suits in respect of acts bona fide purporting to have been performed under the aegis of a lawful act but in which, in spite of the bona fides of the public authority, the law has been overstepped and a tort has been committed. It is not intended to apply to suits for the recovery of sums of money other than damages for tort which are lawfully recoverable either under statute or at Common law.

This view of the matter was taken by this Court in a recent decision (First Appeals Nos. 83, 84 and 85 of 1932) in which plaintiff sought to recover a statutory amount of compensation which the public authority had refused to pay over to him. I therefore think there is no bar to the suit. On the merits of the suit itself, it seems to me that the meaning of sub-s. (2) of S. 107 is to lay down a condition precedent to the alteration of an assessment. It is conceded that the increased taxation cannot be recovered until the alteration of the list has been made as a condition precedent. Similarly the effect of sub-s. (2) is to make the issue of at least one month's notice of the proposal to make an alteration a condition precedent to the making of the alteration itself. On behalf of the Municipality a further point has been argued that the plaintiff in any case had the merits of his objection entertained by the commissioners and it is suggested that in that case he can hardly claim to have the benefit of the notice which was only intended to give him an opportunity to have his case considered. To my mind this is no answer at all to the plaintiff's claim. We know little or nothing of the actual proceedings that took place before the commissioners, but in any case the plaintiff cannot be prejudiced by the fact that, in default of the commissioners considering his objection on the ground of want of notice, he fell back upon a defence of the merits of his case in the matter of the assessment.

The learned Munsif decreed the suit. The District Judge, whilst supporting the Munsif on the question of the protection afforded to the Municipality by S. 377, considered that the fact that the Municipality had already gone into the matter of the merits of the objection to the increased assessment was a bar to the plaintiff's suit, and he considered that the plaintiff was at fault in not setting forth in his plaint and in not producing before the Court the proceedings before the commissioners. Now the papers relating to the proceedings before the commissioners are in possession of the Municipality, and if such papers were relevant, and I think they were not to the question to be tried, it was for the Municipality to produce them, it was no fault of the plaintiff that he did not produce them. In my opinion the judgment of the learned District Judge was erroneous and should be set aside. The appeal will be allowed, the declaration asked for will be granted, and inasmuch as the increased taxes have been collected from the plaintiff, they will be returned by the commissioners and the commissioners will pay the costs throughout.

K.S./R.K. *Appeal allowed.*

A. I. R. 1936 Patna 323

MOHAMAD NOOR AND SAUNDERS, JJ.

Kanhya Lal Missir—Plaintiff—Appellant.

v.

Mt. Hira Bibi and *others*—Defendants—Respondents.

Appeal No. 161 of 1931, Decided on 2nd October 1935, from original decree of Sub-Judge, Patna, D/- 7th April 1931.

(a) Limitation Act (1908), Art. 125—Art. 125 does not apply if possession is by virtue of grant, transfer inter vivos, or bequest.

Article 125 applies only when possession is that of a Hindu or Mahomedan female as such, that is to say by virtue of her being Hindu or Mahomedan, and does not apply if her possession is by virtue of a grant or transfer made inter vivos or by virtue of a bequest or in other

words when her possession is irrespective of her being a Hindu or Mahomedan female. It is inconceivable that the legislature, would have provided periods of limitation depending solely upon the sex of the parties or upon their religious persuasions irrespective of the nature of the property involved in the suit or of the nature of the possession: 23 *Cal* 645, *Ref.*; 1927 *Lah* 198, *Dissent.* [P 331 C 1]

(b) Limitation Act (1908), Art. 128— Art. 128 does not apply if claim independent of status of parties.

The article refers to cases in which the claim of a Hindu is based upon his right as a Hindu to avoid an alienation by a female who is in possession as a Hindu and does not apply to cases where the possession and the claim are independent of the status of the parties: 23 *Cal* 645, *Foll.* [P 331 C 2]

(c) Limitation Act (1908), Art. 120— Suit by Hindu against Hindu female holding estate under bequest for declaration that alienation by her did not bind him falls under Art. 120.

A suit by a Hindu for a declaration that the alienations made by a Hindu female holder of a life estate in possession by virtue of a grant, transfer inter vivos, or by virtue of a bequest, are void and are not binding on him, falls under the residuary Art. 120, and the period of limitation for such a suit will be six years from the time right to sue accrues, i. e. the date of transfer. [P 331 C 1; P 332 C 1]

(d) Limitation—Suit to declare mortgage void barred—Sale held under mortgage gives fresh right to sue.

Where the property is sold in execution of the decree on the basis of a mortgage, even though a suit for declaration that the mortgage is void be barred by limitation, sale held under the mortgage gives a fresh right to sue provided the declaration is sought against those who purchase the property in execution sale: 1930 *P C* 270, *Foll.* [P 332 C 2]

(e) Will—Construction—Court should read will as whole, and importance should not be attached to isolated expressions—Words repugnant to clearly expressed intention have to be discarded.

It is always dangerous to construe the words of one construction of more or less similar words in will by a different will, which was adopted by a Court in another case. What is needed is that the Court should read the will as a whole and consider all the clauses and the circumstances and find out the intention of the testator and give effect to it as far as the law permits. Importance should not be attached to isolated expressions. If there are words here and there which are repugnant to words by which an intention is clearly expressed they have to be discarded: 1922 *P C* 63, *Foll.* [P 333 C 1]

(f) Will—Construction—Bequest in favour of paternal cousin's wife, after her death her daughter and her children successively one after the other—Daughter's son if one, to be treated absolute owner — Will held creating absolute estate in daughter and her children.

Where a will, made with the avowed purpose of making arrangement for maintenance and preservation of name, fame, prestige and custom of the family, bequeathed the testator's estate to his sister-in-law (paternal cousin's wife) as his legal heir and after her death to her daughter named in the will and to her (sister-in-law's daughter's) children successively one after the other as legal heiress (Wo unki aulad silsilewar yake bad digare warisa qarar pate jayenge) and provided that in case the said daughter gives birth to a son, the son (grandson), shall be treated as heir to and absolute owner of all the moveable and immoveable properties left by the testator, the testator cannot be deemed to have created perpetual successive life estates, each child or each generation taking an independent bequest from the testator, nor is there any distinction in the character of bequests in favour of daughter of sister-in-law and her daughter and son, and all that is indicated is that on the event of a son being born to the daughter, he would take the properties at once even during the lifetime of the sister-in-law, and the words "and her children successively one after the other" were the words of inheritance prescribing the course of succession technically called words of limitation and were not words of purchase: *I A Sup Vol.* 47 (*PC*); 30 *All* 84 (*P C*); 33 *Cal* 23 (*P C*); 24 *Cal* 834 (*P C*) and 29 *Cal* 716 (*P C*), *Ref.* [P 333 C 2]

(g) Words and Phrases—"Aulad"

Word "aulad" does not necessarily mean children. It means descendants and progeny as well. [P 334 C 1]

(h) Words and Phrases — "Waris" or "warisa" in reference to bequest indicate absolute estate.

Words "waris" or "warisa" in references to a bequest denote that the person so described is to get an absolute estate unless a contrary intention appears from the text of the will: 1930 *P C* 239, *Ref.* [P 334 C 1]

(i) Words and Phrases—"Silsilewar" means "serially."

Serially is one of the meanings of "silsilewar." [P 334 C 2]

(j) Succession Act (1925), S. 95— "Absolute estate."

No word of limitation is necessary to convey an absolute estate. [P 334 C 2]

(k) Will— Construction —Will of Hindu— Rule in 2 I. A. 7 at 14 is not of universal application.

The proposition, that in construing the will of a Hindu, it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property, and that it may be assumed that a Hindu generally desires that an estate, specially an ancestral estate, shall be retained in his family, and that it may be assumed that a Hindu knows that as a general rule at all events women do not take absolute estates of inheritance which they are unable to alienate, is not of universal application: 2 *I A* 7 (*P C*), *Ref.* [P 335 C 1]

S. M. Mullick, *S. N. Bose*, *S. K. Bose* and *S. Mustafi*—for Appellant.

K. P. Jayaswal, *K. Husnain*, *J. Rahman*, *Harians Kumar*, *A. H. Fakhruddin*, *Janak Kishore*, *Chaudhury Mathura Prasad* and *C. P. Sinha*— for Respondents.

Judgment.—This appeal arises out of a suit instituted by the plaintiff appellant who claims to be the sister's son of one Madan Mohan Lal for a declaration that the alienations of Madan Mohan Lal's properties by defendants 1 to 6 are not binding on him. Madan Mohan Lal, who was the treasurer of the Patna Branch of the Bank of Bengal (now incorporated with the Imperial Bank), died on 30th January 1882, leaving a will, dated 21st December 1881, of which probate was obtained by Baijnath Prasad Sarma, defendant 6, the executor named in the will. By this will Madan Mohan Lal bequeathed his estate to Mt. Ratan Kuar, widow of his paternal cousin Ghanshyam Das Missir, for her life and after her death to her daughter Mt. Hira Bibi (defendant 1) and her "children (aulad) successively one after another". There was, however, a proviso that in case a son was born to Hira Bibi he would take the estate absolutely. It is not disputed that only a life estate was given to Ratan Kuar and that a son of Hira Bibi was to get an absolute estate, but the nature of the estate given to Hira Bibi and her children if she had no son is one of the matters of controversy in the suit.

The plaintiff's case is that the will does not give more than a life estate to her and that the bequest in favour of her children failed on account of her having had no child during the lifetime of the testator; that therefore there will be an intestacy on the death of Hira Bibi and as he, being the sister's son of Madan Mohan Lal, got a vested interest in the estate on Madan Mohan Lal's death subject to any life estate created by the will, he will succeed to the estate on the death of Hira Bibi. He alleges that Hira Bibi, her sons and her husband, defendants 1 to 6, have made various transfers of the properties, a list of which has been given in Sch. 2, of the plaint, and he seeks a declaration that these transactions will not be binding upon him when he will succeed to the estate of Madan Mohan Lal on the termination of the life estate of Hira Bibi. Defendants 7 to 18 are the transferees against whom the declaration is sought. Though it is not in the pleadings it was also contended by Mr. Mullick for the plaintiff appellant as an alternative case that even if any daughter or daughters of Hira Bibi was or were in existence at the time of the testator's death, she or they also will take only a life estate and there will be an intestacy thereafter, as only a son of Hira Bibi was to get an absolute estate.

Though written statements were filed by defendants 1, 3, 4 and 5, the main contest was on behalf of defendants 7 to 10, 11, 12, 14, 17 and 18 who are transferees of the disputed properties. Defendants 15 and 16 compromised the suit and it was dismissed as against them. The defences with which we are concerned in this appeal are: (1) that the plaintiff is not the sister's son of Madan Mohan Lal and has no right to his estate; (2) that Hira Bibi gave birth to a son (Anant Prasad, defendant (2), during the lifetime of the testator and that he took an absolute estate under the will and therefore the plaintiff has no right to question the transfers; (3) that by the will Hira Bibi was given an absolute estate and, therefore, the plaintiff has no right to the estate even if Hira Bibi had no son at the time of the death of Madan Mohan Lal, and (4) that the plaintiff's suit in respect of some of the transactions is barred by limitation under Art. 125, Sch. 2, Lim. Act. The transferee defendants further allege that the plaintiff whose daughter was admittedly married to Basant Prasad (defendant 3), a son of defendant 1, has been set up by defendants 1 to 6 to lay claim to the properties in order to regain them after they had transferred them.

The learned Subordinate Judge has held that the plaintiff is the sister's son of Madan Mohan Lal and that Hira Bibi had no son during the lifetime of Madan Mohan Lal. On the construction of the will, however, he has held that Hira Bibi was given an absolute estate and he has therefore dismissed the plaintiff's suit. He has also held that the suit in respect of some of the transactions was barred under Art. 125, Lim. Act. The plaintiff has preferred this appeal. Defendants 1, 7 to 10, 12, 14, 17 and 18 are represented in this appeal, but there is no appearance on behalf of defendants 2 to 6, 11 and 13. There is no appearance also on behalf of defendants 15 and 16 against whom, as we have stated, the suit was dismissed. The contesting defendants have questioned before us the findings of the learned Subordinate Judge that the plaintiff is the nephew of Madan Mohan Lal and that Hira Bibi did not

give birth to a son during the lifetime of Madan Mohan Lal.

We shall first deal with the two issues concerning the relationship of the plaintiff with Madan Mohan Lal and the birth of a son to Hira Bibi during the lifetime of the testator which were decided by the learned Subordinate Judge in favour of the plaintiff. The evidence given by the plaintiff to establish his relationship with Madan Mohan Lal consists of his own testimony and that of three witnesses Palakdhari Tiwari, Bindeshwari Dutt Shukul and Chaturbhuj Tiwari, and some letters. We shall take the oral evidence first. The plaintiff, who stated his age to be 69 years when he was examined in 1931, deposes that he is the nephew of Madan Mohan Lal, being the son of his sister Hito Bibi. But there are inherent improbabilities in his story. He says that Madan Mohan Lal acquired extensive properties. In the plaint they have been valued at about one lakh of rupees. If the plaintiff is his nephew he was his next heir in case of intestacy. His home is in Benares and he is in the service of the Gwalior State, but he deposes that he came to Patna within a month of Madan Mohan Lal's death and found Ratan Kuar in possession of his properties as malik (proprietress). He also came to Patna on other occasions during the lifetime of Ratan Kuar. Curiously enough, however, he does not seem to have made any enquiry whatsoever as to the claim of Ratan Kuar to succeed to the properties. From the letters produced by the plaintiff, with which we shall deal later, it appears that there was constant correspondence between Madan Mohan Lal and the plaintiff's father, and therefore the plaintiff and his father must have known that Madan Mohan Lal was possessed of properties of considerable value. The natural conduct of the plaintiff then would have been to ascertain the circumstances in which Ratan Kaur, who was not an heiress of Madan Mohan Lal, came to take possession of his properties. He came again to Patna about one month and a half after Ratan Kuar's death, which took place in 1903, 21 years after the death of Madan Mohan Lal, and even then he did not make any attempt to claim the properties which he found in possession of Hira Bibi as malik, the reason as he says being that there was a will. He says that he came to know of the will after Ratan Kuar's death, but he does not recollect whether he had heard of it before that, though as we have said, he came to Patna after Madan Mohan Lal's death and also subsequently during the lifetime of Ratan Kuar and stayed with her as her guest. He was astonished to hear of the will as he was the heir, but still he made no attempt even to take a copy of it or in any other way to make himself acquainted with its terms. He says that he did not know that the will was in favour of the children of Hira Bibi. He had no talk whatsoever either with Hira Bibi or with Ratan Kuar about the will. Up to the date of his deposition he did not know whether a copy of the will had been taken on his behalf. The will had not even been read over to him till then. The indifference he thus displayed throughout a long period, and his omission to assert his claim on the two occasions, the death of Madan Mohan Lal and the death of Ratan Kuar when dispositions made in the will were given effect to, would not be natural in the case of a man who was, and knew himself to be, the next heir to a valuable estate. It was urged that the plaintiff allowed Hira Bibi to remain in possession of the estate on account of the marriage of his daughter to her son, but the marriage took place, according to the plaintiff, in 1960 or 1961 Sambat (corresponding to 1903 or 1904), that is about the time when Ratan Kuar died. If the plaintiff had had any intention to claim the estate he would have been expected to take some interest in the management of it. He appears to have taken none. There was litigation in 1900 between Ratan Kuar and defendant 6 and some of his sons regarding succession to the estate and there were mortgage suits in one of which an appeal was preferred to His Majesty in Council. The bulk of the estate was being alienated and there was an acquisition of land by the Government for which a sum of Rs. 36,000 was paid. Yet the plaintiff, if he is to be believed, had no knowledge of any of these transactions until he was told about them by his nephew at the end of 1927.

The next witness is Palakdhari Tiwari who claims to be the priest of Madan Mohan Lal's family. In cross-examination he betrays ignorance with regard to the family of Madan Mohan

Lal. His evidence is not at all convincing. He says that he officiated as priest at the marriages of Hira Bibi and Madan Mohan Lal. In 1931 he stated his age to be 75 years. Madan Mohan Lal's age at the time of his death in January 1882 was, according to the plaintiff, about 50 years and according to the plaintiff's witness Chaturbhuj 60 to 65 years. If he was only 50 years of age when he died, he was born about the year 1832 and must have been about 24 years older than Palakdhari Tiwari if the latter has stated his own age correctly. As Hindus are married early, it is probable that Madan Mohan Lal was married long before this witness was born. Even if he married very late in life, say at the age of 25 or 30 years, this witness could not have officiated as priest at the marriage. He claims also to have celebrated the marriage of Hira Bibi's father Ghanshyam Missir when he could not have been more than three years old, for he stated that he is about four years older than Hira Bibi. We are unable to believe this witness. The next witness is Bindeshwari Shukul, who is a practising pleader at Siwan in this Province. He never saw Madan Mohan Lal but heard of him at about the time of an incident to which he referred. He says that he saw the plaintiff at Benares, about 29 years before he gave his evidence, at the house of his relative Mathura Tiwari who introduced the plaintiff to him as a nephew of Madan Mohan Lal, the treasurer of Patna, and the son of Paryag Dutt Missir of Benares, and stated that he too was related to Madan Mohan Lal though he did not say what the relationship was. Mathura Tiwari, according to this witness, died about three years later. We are not at all impressed by his evidence. It does not seem natural that Mathura Tiwari should introduce the plaintiff to him by mentioning his relationship with Madan Mohan Lal who had died 20 years earlier and with whom the witness had not been acquainted. To a question put to him whether he made any enquiry in order to satisfy himself that the information given to him by Mathura Tiwari was correct he gave a reply that indicates that he is not an unbiassed witness. The reply to be expected from a disinterested witness would have been that he did not try to get the information verified as it was not a matter that concerned him, for he had met the plaintiff only once or twice since then. But the reason he assigned for not having made any enquiry was that he had full confidence in Mathura Tiwari. He stated that when he received a summons he did not know what evidence he would be called upon to give though he suspected that he would be asked about the relationship of the plaintiff with Madan Mohan Lal. This shows that the witness is not truthful. Nobody cites a witness without first ascertaining from him what he was going to depose. It is difficult to believe that the plaintiff himself remembered that 29 years earlier he had been introduced to Bindeshwari Dutt Shukul as the nephew of Madan Mohan Lal, and impossible to believe that he was sufficiently sure of Bindeshwari Shukul's recollection of so trivial an incident so as to cite him as a witness of it without asking him whether he remembered it. A grandson of the plaintiff has been married to a granddaughter of a cousin of this witness.

The third and last witness is Chaturbhuj Tiwari. He only says that the plaintiff used to address Madan Mohan Lal as "mama" (maternal uncle). This does not prove much. Among the Indians even a mother's distant cousin is addressed as "mama." The learned Subordinate Judge has however disbelieved this witness. The documentary evidence consists of eleven letters purporting to have been sent by Madan Mohan Lal to Paryag Dutt Missir, father of the plaintiff, one letter (Ex. 3) supposed to have been written by Gobindram Missir, an uncle of the plaintiff, to Paryag Dutt Missir and another letter (Ex. 4) is supposed to have been written by Gopinath Missir, a cousin of Madan Mohan Lal, to the same Paryag Dutt Missir. There is no reason to doubt the genuineness of these letters except, two to which we shall refer later. Of these 13 letters only three have any value as evidence of any relationship between the family of Madan Mohan Lal and the father of the plaintiff. The rest only show that Madan Mohan Lal and Paryag Dutt Missir were friends and regular correspondents. Far from proving relationship they seem to us to indicate that none existed, or if it did exist it was not a close relationship. Madan Mohan Lal did not in any of them address Paryag Dutt Missir as an Indian

would address a near relation. In none of them is there any enquiry, as is usual among the Indians, about his sister and the children. No respects or blessings are conveyed to them. In fact they are not referred to at all. The plaintiff however relied upon four letters. They are Exs. 3, 2 (f), 2 (h) and 2 (j). Ex. 3 is a letter purporting to be from Gobindram, uncle of Madan Mohan Lal, to Paryag Dutt Missir.

It is dated Pous Badi 1, 1896 (21st December 1839). The letter informs Paryag Dutt Missir of the illness of a lady described as "your wife, my niece" and says that he has been doing everything he could do for her and with it is sent her horoscope which he asks Paryag Dutt to show to the Brahmins at Benares. According to the horoscope she was born in 1815. The letter, if it is genuine would be about 96 years old, but its appearance does not satisfy us that it is so old. The paper is not as brittle as the paper of other letters and the ink has not faded. It was produced late and not with other letters. According to the genealogy given by the plaintiff Gobindram had no niece other than Hito Bibi, the plaintiff's mother, who was the wife of Paryag Dutt Missir. Therefore the additional designation of the lady as "your wife" was superfluous and the double description seems unnatural. On the other hand it was essential if the letter was to be of value to the plaintiff. There is another reason for doubting the genuineness of this letter. The date of the birth of Hito Bibi, according to the horoscope given in the letter, is 1815 A D. The plaintiff deposing in 1931 gave his age as 69 years. He was present in this Court and did not appear to be older than that. If he stated his age correctly he must have been born about the year 1862 when, if the horoscope is genuine, Hito Bibi was about 47 years old, a somewhat advanced age for an Indian lady to give birth to a child.

The next letter on which the plaintiff relies is Ex. 2 (j) which shows that Madan Mohan Lal sent Rs. 15 as a wedding present for clothes when the plaintiff and his elder brother were about to be married. This letter does not prove anything useful to the plaintiff. The sending of presents does not show that there was any relationship, for friends as well as relations send presents on such occasions. Much less does this letter show the plaintiff to be the sister's son of Madan Mohan Lal.

There remain two letters, Exs. 2 (h) and 2 (f). One of them (Ex. 2-h) has been relied upon by the learned Subordinate Judge. At the end of this letter there is this message: "Please convey the blessings of Buaji to Jiji". 'Buaji' is a term by which aunts are addressed, and 'Jiji' is the mode of addressing an elder sister. An aunt of Madan Mohan was sending her blessings to her "sister". It is not clear whether they were being sent to her own sister or to his sister. The genealogy does not show that Madan Mohan Lal had any aunt, and it has not been explained who was the lady to whom she was sending the blessings. It is, however, curious that while Madan Mohan Lal was sending the blessings of his aunt to somebody spoken of as 'Jiji' he was not sending his own respects to Hito Bibi if "Jiji" referred to her as suggested by the plaintiff. In our opinion this letter does not improve the plaintiff's case. The other letter relied upon by the plaintiff is, as we have said, Ex. 2-(f). This refers to a contemplated marriage of some girl in the family of Madan Mohan Lal. It is suggested that the girl to be married was Hira Bibi. Perhaps it was so. The words relied upon by the plaintiff are: "Send Hito Jiji," and it is urged that Madan Mohan Lal referred to Hito Bibi as "Jiji," a term as we have said applied to an elder sister. But this term can equally be applied to a cousin, as there is no special word for cousin among Indians. Cousins are all referred to as brothers and sisters. We have examined this letter and we find that the letters 'to' of the word "Hito" look very suspicious. The ink is thicker and they appear to have been superimposed on other letters.

The official translator has put a mark of interrogation after this word in the translation. It would be remarkable if it is merely by chance that a suspicious appearance is presented by the only word in the entire letter to which any importance attaches. But even if there has been no interpolation, the letter does not prove that Hito was the full sister of Madan Mohan Lal. If she was related to him at all she may have been a cousin by distant relationship, perhaps through Madan Mohan Lal's maternal family of

which we know nothing for no witness was able to give the Court any information in this connection. If Ex. 3 is genuine and Hito Bibi was born in 1815, the plaintiff might have been a son of Paryag Dutt Missir by another wife. Having regard to all the circumstances, we are of opinion that whatever the relationship of the plaintiff with Madan Mohan Lal may have been, he has failed to establish that he is the sister's son of Madan Mohan Lal. We are not in a position to declare positively that the plaintiff is not his nephew. We can only say that the evidence adduced is not of such a quality as to convince us that he is so related. The learned Advocate for the appellant has urged that this being a question of fact, and the learned Subordinate Judge having held that the relationship has been established, we should be reluctant to upset that finding. We appreciate the force of this contention, but unfortunately the learned Subordinate Judge has not scrutinised critically either the oral or the documentary evidence on which he based his finding. No doubt the evidence adduced by the defendants to rebut the plaintiff's evidence with regard to relationship is not at all satisfactory, but it must be borne in mind that the contesting defendants are strangers to the family. Some of them are purchasers at the auction sale. The plaintiff on the other hand has not brought any of his relations to give evidence for him nor has their absence from the witness-box been explained. The plaintiff's home is in Benares. He must have some relations there. The fact that Madan Mohan Lal ignored the plaintiff in his will is also a point against him. Disinheriting his own sister's son in favour of a cousin's daughter and her children is not a very natural act. If cognatic relations had to be chosen the plaintiff on his allegation was nearer to him.

It is an admitted fact that the plaintiff's daughter was married to defendant 3, a son of Hira Bibi. The girl is now dead. This fact is relied upon by the defendants as showing that the plaintiff could not have been the sister's son of Madan Mohan Lal, as in that case his daughter was within the prohibited degrees of matrimony. It cannot be disputed that if the genealogy given by the plaintiff is correct this marriage was within the prohibited degrees under the strict shastric rules; but the learned Subordinate Judge has not attached weight to this consideration for the reason that the rule so far as cognatic relations are concerned is not strictly observed and sanadh brahmans, to which community the plaintiff belongs, being few in number, intermarriage is inevitable. This may be so and by itself the degree of relationship of the plaintiff's daughter to defendant 3, would not be a ground for rejecting his claim to be the nephew of Madan Mohan Lal; but as the evidence of the latter relationship is not satisfactory, it is a consideration that cannot be left altogether out of account. The conduct of the plaintiff in this litigation has not inspired us with confidence in his honesty in bringing the suit. The contesting defendants urge that the plaintiff has been set up by defendants 1 to 6 to claim the properties of Madan Mohan Lal for their benefit and it is an attempt to regain the properties that have been lost. There seems to us to be a good deal of force in this suggestion. The plaintiff has been reticent with regard to important facts. Though the plaint mentions that Hira Bibi bore no son during the lifetime of Madan Mohan Lal, it is silent about the birth of any daughter. Even according to the plaintiff, if there was any daughter or there were daughters of Hira Bibi living at the time of the testator's death, she or they took a life interest in the estate of Madan Mohan Lal.

Therefore, a clear statement about daughters was necessary. As we have said, there is no reference to daughters in the plaint. The plaintiff and his witnesses in their depositions contented themselves by simply saying that there was no daughter of Hira Bibi born in the lifetime of the testator; but it seems that during the hearing of the suit in the lower Court the plaintiff conceded that there were at least two daughters who were born during Madan Mohan Lal's lifetime and the learned Subordinate Judge seems to have decided the case on that assumption. It is clear from his judgment that he took it for granted that there were daughters living then. It seems that during the course of argument in the lower Court reliance was placed on behalf of the plaintiff upon S. 115, Indian Succession Act, prior to its amendment in 1929 and it was contended on his behalf that as the bequest to the

daughters of Hira Bibi was a bequest to a class and as some of them were not born during the testator's lifetime the bequest was wholly void and the learned Subordinate Judge referred to the amendment of 1929 which was to the effect that the bequest will be void in regard to those persons only who were not born then and not in regard to the whole class. The grounds of appeal to this Court also assume that there were daughters born during the lifetime of the testator (see grounds Nos. 12, 13, 14, 15 and 19); but curiously enough up till now we have no definite case as to the number of daughters of Hira Bibi now living and which of them was born during the lifetime of the testator. Daughters were carefully kept out of the picture. They were not made parties to this suit, which is virtually a suit for construction of the will, a will in which those at any rate of the daughters of Hira Bibi, who were born during the lifetime of the testator, were vitally interested. The plaintiff's witness Chaturbhuj has clearly stated that at least one daughter of Hira Bibi is living whose name is Lali Bibi. According to Hira Bibi she had two daughters living.

There is no reason to disbelieve her in this respect. The contesting defendants suggest that the daughters have been purposely left out so that in case the plaintiff fails in his suit there may be a second litigation on their behalf, and that this has been done in the interest of Hira Bibi and her children. It seems to us that this suggestion is not without foundation. It cannot be a matter of indifference to a true heir that another life estate will intervene between an existing life estate and his own succession; yet by omitting to implead the daughters of Hira Bibi he has run the risk of one or more of them succeeding in establishing in another suit a right to succeed to the estate on Hira Bibi's death. The next question to be considered is the defence of the contesting defendants that Hira Bibi gave birth to a son during the lifetime of Madan Mohan Lal. The defendant's evidence in this connection is not at all satisfactory. It consists of the testimony of defendants' witnesses Gur Bakhsh Lal and Gurprasad Lal. They depose that defendant 2, Anant Prasad, was born about fifteen days before the death of Madan Mohan Lal. The learned Subordinate Judge has rightly disbelieved this story. It will be recalled that the will was executed by Madan Mohan Lal only about six weeks before his death.

Madan Mohan Lal had the clearest intention of giving an absolute estate to a son of Hira Bibi, and if therefore the birth of a child had been imminent one would have expected a reference in the will to the expected event, or the execution of the will might have been delayed till the child was born, or at any rate the will would have been changed after the birth of a son. The most competent witness on this point would of course have been Hira Bibi herself who was examined on her own behalf, but her evidence is unfortunately very unsatisfactory. Either she was not speaking the truth or old age has impaired her intellect. In her examination in chief she said that Anant Prasad was born two or three years after the death of Madan Mohan Lal and that she had only a daughter at that time. Later, in cross-examination, she stated that she had altogether four daughters, two of whom were dead, that one of the two daughters who died was older and one was younger than Anant Prasad, and that the younger was an infant in arms when Madan Mohan Lal died, implying by that statement that Anant Prasad was born during the lifetime of Madan Mohan Lal. Then she said that she had three daughters when Madan Mohan Lal died. She again stated that the daughter which she had in her lap when Madan Mohan died was younger than Anant Prasad. The question was repeated three times and she gave the same answer each time. She was examined in 1917 and then she stated that Anant Prasad was born during the life time of Madan Mohan.

It is difficult, therefore, to place any reliance upon her evidence, as she has made so many contradictory statements. The real fact seems to be that during the later part of the life of Ratan Kuer in about 1901 a dispute arose between her on the one hand and Hira Bibi and her husband, defendant 6, on the other, and at that time Baijnath Prasad Sarma, defendant 6, put forward a claim that his son Anant Prasad, defendant 2, was born during the life time of Madan Mohan Lal. The learned Subordinate Judge has rightly pointed out that if Anant Prasad was born during the lifetime of Madan Mohan, according to the terms of the will, the

properties would have been recorded in his name and Ratan Kuer would not have been allowed to succeed. Be that as it may, the onus of proving the birth of Anant Prasad during the lifetime of Madan Mohan was upon the defendants and they have not been able to discharge it. The next question for consideration is the plea of limitation. The learned Subordinate Judge has applied Art. 125, Sch. 2, Lim. Act, and has held that the claim for a declaration in respect of the ijara of 17th August 1906, and the mortgage dated 7th March 1912, was barred by limitation. The article may at first sight seem to support the view taken by the learned Subordinate Judge. It runs thus :

> Suit during the life of a Hindu or Mahomedan female by a Hindu or Mahomedan who, if the female died at the date of instituting the suit, would be entitled to the possession of land, to have an alienation of such land made by the female declared to be void except for her life or until her re-marriage.

It was contended on behalf of the defendants that the present suit comes within the four corners of this article as the plaintiff is a Hindu who claims a right to succeed on the death of a Hindu female and seeks a declaration that the alienations made by her are void. In our opinion, however, this article applies when the possession is that of a Hindu or Mahomedan female as such, that is to say by virtue of her being a Hindu or Mahomedan, and does not apply if her possession is by virtue of a grant or transfer made inter vivos or by virtue of a bequest, or, in other words, when her possession is irrespective of her being a Hindu or Mahomedan female. It is inconceivable that the legislature would have provided periods of limitation depending solely upon the sex of the parties or upon their religious persuasions irrespective of the nature of the property involved in the suit or of the nature of the possession. For instance, we may suppose that either by grants or bequests one life estate has been created in favour of a Hindu or a Mahomedan female, another in favour of a Christian female and a third in favour of a male person, the remaindermen being persons professing different faiths. If the contention of the defendants be accepted, the result would be that there would be varying periods of limitation for suits to avoid alienations that may have been made by the several life estate holders on the same date and the period in each case would depend upon the sex and the religions of the plaintiff and of the alienor. Thus, if the suit be by the remainderman who is a Hindu male, to avoid alienations by the Hindu female, this article will apply; but if the suit be by the same Hindu to avoid the alienation by the Christian female, this article will not apply nor will it apply if the plaintiff is not a Hindu but the alienation sought to be avoided was by the Hindu female holder of the life estate, nor if the life estate holder is a male of whatever religious persuasion.

The result too would be that a change of religion by any of these persons might entail a change in the period of limitation applicable to the case. We are supported in this view by a decision of the Calcutta High Court in 23 Cal 645 (1), in which Art. 128, providing a period of limitation for a suit by a Hindu for arrears of maintenance, was interpreted. It was held that the word "Hindu" in that article must be taken to mean a person claiming under the Hindu law. We are of opinion that this article also refers to cases in which the claim of the Hindu is based upon his right as a Hindu to avoid an alienation by a female who is in possession as a Hindu, and does not apply to cases where the possession and the claim are independent of the status of the parties as is the case here. It is purely accidental in this case that the life estate holder is a Hindu female and the plaintiff is also a Hindu. The learned Advocate for the defendants has relied upon a decision of the Lahore High Court in 8 Lah 215 (2), where religion and sex were taken to be the sole factors determining the application of the articles. With the greatest respect to the learned Judges of the Lahore High Court we must differ from them. The reason on which the decision was based was that though a Hindu female takes an estate according to the Hindu law, a Mahomedan female does not do so under Mahomedan law, and therefore, if the interpretation which was sought to be put on the article in that case which is in accordance with the view that we take, the word "Mahomedan" would be superfluous. It was not consi-

1. Girijanund Datta Jha v. Sailajanund Dutta Jha, (1896) 23 Cal 645.
2. Mt. Nandan v. Wazira, 1927 Lah 198=100 I C 84=8 Lah 215.

dered, however, that among the Mahomedans also those who are governed by customary laws (as in some cases in the Punjab and the cases of Mahomedans who are governed by the Hindu law as for instance the Khojas of Bombay), females do take a life interest in the property of their husbands and that it was in order to bring the law into conformity with the law governing the Hindus that the word "Mahomedan" was added by the Act of 1877.

In our opinion, therefore, Art. 125 does not apply, and as no other article applies we have to fall back upon the residuary Art. 120, Sch. 2, Lim. Act, under which the period of limitation will be six years from the time when the right to sue accrued. Now the question is when did the cause of action accrue in this case? The plaintiff wants declarations in respect of various mortgages and also in respect of the sales held under some of them and also in respect of some private sales. The alienations are described in Sch. 2 of the plaint. No date has been given in Sch. 2 in respect of the sale deeds in favour of Kishun Gope and Sugembar Gope, defendants 15 and 16. This however is immaterial as the plaintiff compromised the suit with them and it has been dismissed so far as they are concerned. There is an omission of the date also in respect of the two sale deeds mentioned in the schedule in favour of Mahadeo Missir, defendant 13. This defendant did not put in a written statement or appear in the suit and as the date of the sale in his favour cannot be ascertained from the record, we are unable to say whether or not the plaintiff's suit in respect of these two properties is barred by limitation. It is however again immaterial as the entire suit has been dismissed on other grounds and we also propose to dismiss the appeal. There remain those transactions of which the dates have been given. In the view we have taken, the plaintiff's suit in respect of the ijara, dated 17th August 1906, in favour of Ramdhan Lal, is obviously barred by limitation. The remaining transactions are as follows :

(1) A mortgage, dated 17th August 1906, in favour of Ramdhan Lal under which a sale took place on 17th May 1926 ; (2) a mortgage, dated 17th August 1906, in favour of the same Ram Lal in execution of which a sale took place on 17th May 1926 ; (3) security deeds, dated 9th May 1923, and 7th May 1925, in favour of Ram Hari Lal in which sales took place on 16th May 1927 ; and (4) a mortgage dated 7th March 1912, in favour of Rai Bahadur Haribar Prasad in which sales took place on 21st June 1928 after the institution of the suit which necessitated the adding of defendants 17 and 18 as parties to the suit : see Ex. A-13.

In three of these cases the plaintiff's suit for a declaration that the mortgages are void is barred by limitation, but it has been contended on his behalf that the sales held under those mortgages are within six years of the date of institution of the suit and that these sales gave the plaintiff a fresh right to sue. We agree with this contention. The plaintiff's right to sue accrued not only when the properties were mortgaged but also when the mortgagees brought them to sale and the sales, in our opinion, gave the plaintiff a fresh cause of action. In 57 I A 325 (3) their Lordships of the Judicial Committee observed :

> There can be no 'right to sue' until there is an accrual of the right asserted in the suit and its infringement, or at least a clear and unequivocal threat to infringe that right, by the defendant against whom the suit is instituted.

The plaintiff seeks declaration against those defendants who have purchased the property in the execution sale and therefore his right to sue against them accrued when they purchased it. We are therefore of opinion that, though the plaintiff's suit in respect of the three mortgages themselves is barred by limitation, the suit in respect of the sales held on 16th and 17th May 1926 and 21st June 1928 are not barred by limitation. The most important question is whether the will gave an absolute estates to Hira Bibi. The plaintiff's contention is that it gave her only a life estate and further that if she had any daughters born during the lifetime of the testator, they also took a life estate and that there will be intestacy either on the death of Hira Bibi or on the death of such of her daughters as were born while the testator was alive. The case of the contesting defendants, on the other hand, is that upon a true construction of the will Hira Bibi took an absolute estate.

3. Bolo v. Koklam, 1930 P C 270=127 I C 737 =57 I A 325=11 Lah 657 (P C).

We have already noted that the daughters of Hira Bibi have not been made parties to the suit, though two appear to be living, and the plaintiff seems to have conceded before the lower Court that two were born before the death of Madan Mohan Lal. They clearly ought to have been joined as parties when the decision of the case mainly depended on the construction of a will in which they were interested, though the suit cannot be dismissed on this ground.

In support of their respective interpretations of the will, the learned advocates of the parties have relied upon a number of decisions of the Judicial Committee in which their Lordships construed the particular wills before them. Some of these will be noticed later, but we do not propose to examine all of them. In 49 I A 25 (4) their Lordships of the Judicial Committee observed that :

> It is always dangerous to construe the words of one will by the construction of more or less similar words in a different will, which was adopted by a Court in another case.

> What is needed is that the Court should read the will as a whole and consider all the clauses and the circumstances and find out the intention of the testator and give effect to it as far as the law permits. Importance should not be attached to isolated expressions. If there are words here and there which are repugnant to words by which an intention is clearly expressed they have to be discarded. Now it is clear from the will that the testator wanted to give the properties to Hira Bibi and her children or descendants. Even if the plaintiff was his nephew, he does not seem to have had any regard for him. This position has been conceded by the learned advocate for the appellant. But he contended that the intention of the testator to be gathered from the language he used was that in case Hira Bibi should not give birth to a son, the property was to remain tied up in her family and that he wanted to create successive life estates unknown to the Hindu law. The bequest, therefore, in favour of such of the children of Hira Bibi as were not born in the lifetime of the testator is void. Let us now examine the will. First of all it says that on the death of the testator his sister-in-law (cousin's wife) Mt. Ratan Kuar, widow of Ghanshyam, shall be deemed to be his legal heir and after her death Mt. Hira Bibi and her children successively one after another shall be treated as "heirs". After a few sentences with which we shall deal presently, the will provides that :

> Should the aforesaid Mt. Hira Bibi, wife of the said son-in-law Babu Baijnath Prasad give birth to a child, in that case that child, i. e. the said grandson (daughter's son) after payment of the allowances to the allowance holders mentioned below, shall be treated as, heir to and absolute owner of all the nami benami, moveable and immoveable properties and lands left (by me) and shall appropriate all the collected amount, etc.

It has been contended on behalf of the appellant that the words "absolute owner" with reference to a son of Hira Bibi and the omission of these words where provision is made for succession by Hira Bibi and her "aulad" signify an intention to give to the former an absolute estate and to the latter, Hira Bibi and her daughters, only life estates. We shall consider the difference in the phraseology later but, apart from it there are difficulties in the way of accepting the view that only a life estate was given to Hira Bibi. First, if the testator's intention was not to give an absolute estate to Hira Bibi, or her daughters, he would have made some provision for succession to the properties on their death. Nobody is mentioned who would take the properties after the termination of the life estates and it is inconceivable that he left the estate undisposed of after giving only a life estate to Hira Bibi or to her daughters, having regard epecially to his avowed purpose in making the will

> to make arrangements for the maintenance and preservation of the name, fame, prestige and custom of the family . . . .

Nor are we prepared to accept the contention that the words of bequest in favour of Hira Bibi indicate that the testator wanted to create perpetual successive life estates each child or each generation taking an independent bequest from the testator. The words "and her children successively one after another" are, in our opinion, words of inheritance prescribing the course of succession and are what is technically called words of limitation; they are not words of purchase. The vernacular words are (the will is in Urdu) "*wo unki aulad silsilewar yake bad digare warisa qarar pate jayenge.*" It is to be noted that in

4. Mt. Sasiman Chowdhurain v. Shib Narayan, 1922 P C 63=66 I C 193=49 I A 25=1 Pat 305 (P C).

the copy before us the word is *warisa* which means heiress and that the verb can be read both as "*pate jaenge*," plural masculine gender, or "*pati jaengi*" feminine plural in conformity with the noun "*warisa*." We shall discuss the effect of the different readings later, but on the face of it the bequest is to Hira Bibi and her descendants. " Aulad " does not necessarily mean children; it means descendants and progeny as well. Human beings are called Aulad-e-Adam. The words in our opinion mean generation after generation.

No doubt the words used when giving an absolute estate to a son of Hira Bibi are different from the words of inheritance applied to her and her daughters, but we do not consider that the difference was meant to indicate a distinction in the character of the bequest, assuming that " Aulad " refers to her daughters. The reading of the will as a whole shows that in the event of her having a son, he would take the properties at once even during the life of Ratan Kuar. The word " waris" or " warisa" is, in our opinion, sufficient to denote that the person so described was to get an absolute estate unless a contrary intention appears from the text of the will as is the case in the bequest to Ratan Kuar: see 34 C W N 1073 (5), where the word heir (waris) was held to be sufficient to give an absolute estate. Stress has been laid upon the words " warisa qarar pati jaengi" which have been translated as "shall be treated as heiress." It is contended that what the testator wanted was that each of the children or descendants of Hira Bibi should one after the other be treated as his heiress, that is, her children one after the other would take the estate independently under the will as heiress of the testator himself, and therefore the bequest to Hira Bibi and her successors must be construed as conveying a life estate so that a remainder may be left to go to the next successor.

It is argued that the word " warisa" (feminine gender singular) has been purposely used to refer to each heiress, that is to say Hira Bibi and her daughters as the testator later on provided for the son, if born, giving him an absolute estate. Stress is also laid upon the tense used in the words "qarar pati jaengi" which mean "shall go on being treated" i. e. a continuous future tense meaning that each will take after the other and be treated as his heiress. We are unable to accept this construction. In the first place, according to the plaintiff's evidence, Hira Bibi had no daughter when the will was executed. It is true that the word "warisa" is singular feminine, but there is no reason to suppose that the testator expected that in the line of Hira Bibi there would be only one female child and no more, and that there would be no male issue in the line. In our opinion, either the word " warisa" is a mistake for "waris" (we have only got a copy of the will and not the original) or the word has been inadvertently used " waris" (masculine singular) has been used in respect of Ratan Kuar, a female. If, however, there is any significance in the word "warisa" and the verb is also feminine and should be read as pati jaengi, feminine plural, and not as "pate jaenge" (masculine plural), the implication could only be that there was at least one daughter of Hira Bibi in existence when the will was executed. In that case the testator was providing for a contigency which might arise if Hira Bibi was not living when Ratan Kuar died, the provision being that her daughters seriatim one after the other would take the estate. Serially is one of the meanings of silsilewar. The bequest in that case was in the alternative as contemplated by S. 96, Succession Act, of 1925 (corresponding to S. 83, Act 10 of 1865.)

Section 115, Succession Act, as it stood before the amendment of 1929 is clearly inapplicable. If the will be construed as making a bequest to a class, that bequest was in case the bequest to Hira Bibi failed. It did not fail in the present case. Besides, Hira Bibi being still alive, if the daughters come in after her the law applicable will be the amended section and those of the daughters if any who may have been born in the lifetime of the testator will come in, as an absolute owner in the absence of any words showing that the testator intended that either Hira Bibi or in her absence her daughters in turn would take only a life estate. No word of limitation is necessary to convey an absolute estate. S. 95, Succession Act,

5. Saligram v. Chirangit Lal, 1930 P C 239 = 128 I C 265=57 I A 282 = 11 Lah 645 = 34 C W N 1073 (PC).

which corresponds to S. 82 Act 10 of 1865, applies to Hindus.

The learned Advocate for the appellant contended that the Hindus are averse to giving an absolute estate to females He relied upon the case of 2 I A 7 (6) at p. 14. Their Lordships in that case observed that :

> In construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family, and it may be assumed that a Hindu knows that as a general rule at all events, women do not take absolute estates of inheritance which they are enabled to alienate.

This proposition is not however of universal application. In the present case the testator had no male relation. We have already stated that even if the plaintiff was his nephew, he has been entirely ignored in the will. Hira Bibi was the object of the testator's affection. Even according to the plaintiff he got her married and she, her husband and her children, if any, were living with him and he clearly wanted the estate to go in her line which was the line of his cousin, Hira Bibi being the daughter of his deceased paternal cousin. In I A Sup Vol 47 (7), where the bequest in favour of two ladies was under consideration, their Lordships of the Judicial Committee observed :

> We must hold that the gift in question was an absolute gift unless it can be shown that by the Hindu law gift to a female means a limited gift or carries with it the effect of creating an estate exactly similar to the 'widow's estate' under the law of inheritance. I am not aware of any such provision in the Hindu Law nor have we been referred to any authority in support of it.

This observation was referred to in 35 I A 17 (8). In 24 I A 76 (9) the word "enjoy" (in connexion with the phrase "son, grandson and so on in succession") was being construed and the Judicial Committee observed that the words were very frequently used in Hindu wills, and have acquired the force of technical words conveying a heritable and alienable estate. We have now to notice a few cases relied on by the learned Advocates for the parties. The decision in 33 Cal 23 (10) was relied upon by the respondents, where words somewhat similar to those used in the present will were held to give an absolute estate. The words there were "on your death your husband, sons, grandsons, and other heirs in succession will continue to enjoy and possess. The power to dispose of by gift or sale will successively vest in your husband, sons, grandsons, and others." The word "succession" was not taken to imply a limited estate for life. In another case of 24 Cal 834 (9) the words "enjoy," "with son," "grandson," and so on, in succession (putra putrade krame) were held to be proof of an intention to give absolute estates. The Urdu words used in the present will, in our opinion, convey the same meaning. The learned Advocate for the appellant relied upon 29 Cal 716 (11). In that case the Judicial Committee agreed with the High Court on the construction of the will and had held that the shebaitship devised by it on a "daughter and her husband and their male children successively" was not a perpetual estate and stress was laid upon the word "successively." But there is a good deal of difference between the present will and the will in that case. There the daughter, her husband and their children in the male line are specifically mentioned before the word "successively." Here we have only "Hira Bibi and her aulad."

We do not propose, as we have said, to discuss these cases in detail or to refer to other cases cited. They cannot be a safe guide to a proper construction of the present will. We have referred to some of them only in order to show that words like those used in the present will have been held to signify an intention to bequeath an absolute estate. Let us now see how far our construction is consistent with what follows in the will. Immediately after the words of bequest the testator proceeds to say that it was necessary to make provisions for the preservation of the name, fame, prestige and

6. Mahomed Shumsool Hooda v. Sheukram, (1876) 2 I A 7=22 W R 409=3 Sar 405 (P C).
7. Juttendro Mohun Tagore v. Ganendra Mohun Tagore, I A Sup Vol 47=9 Beng L R 377=18 W R 359=3 Sar 82=2 Suther 602 (P C).
8. Mt. Surjamani v. Rabinath Ojha, (1908) 30 All 84=35 I A 17=5 A L J 67 (P C).
9. Lalit Mohun Singh v. Chukun Lal, (1897) 24 Cal 834=24 I A 76=7 Sar 155 (P C).
10. Basanta Kumari Debi v. Kamikshya Kumari Debi, (1906) 33 Cal 23=32 I A 181=2 C L J 238 (P C).
11. Gopal Chunder Bose v. Kartick Chunder Dey, (1902) 29 Cal 716 (P C).

custom of the family and for the management of the properties, and he therefore appointed his son-in-law Baij Nath Prasad, husband of Hira Bibi, as an executor, giving him a salary and enjoining upon him to pay certain annuities. Then follows a bequest in favour of a son of Hira Bibi. It is contended on behalf of the appellant that the provision for an executor and manager, which has been made immediately after the bequest in favour of Hira Bibi, shows that she did not take an absolute estate. We do not think so. The legatees, Ratan Kuar and Hira Bibi, and for the matter of that her daughters, were all females. Debts had to be collected, the properties had to be managed, and therefore the appointment of an executor for those purposes was considered desirable. The appointment of an executor is in no way inconsistent with the giving of an absolute estate to Hira Bibi. Our attention has been drawn to the list of annuities given at the end of the will. Among the persons who were to be paid annuities are Ratan Kuar and Hira Bibi themselves and it is therefore argued that had Hira Bibi been given an absolute estate an annuity would not have been provided for her. No such intention can be inferred from the provisions regarding the annuities. The will is not artistically drafted and it seems that for convenience, in order to avoid repetition and to save space, only one comprehensive list of persons to receive annuities was drawn up and designed to serve the purpose of all the contingencies the testator had in view, instead of separate lists applicable to the several contingencies.

The list is to be read mutatis mutandis in accordance with the occurrence of events for which provision is made by the will. The provision of an annuity for Ratan Kuar and Hira Bibi is inconsistent with the taking of even a life estate by these ladies. What the testator wanted was that Ratan Kuar while holding a life estate should pay an annuity to Hira Bibi and in the event of Hira Bibi's giving birth to a son and his taking the estate immediately, or as he was intended to do, an annuity was to be paid to Ratan Kuar (if living then) and to Hira Bibi. After making an absolute gift in favour of a son of Hira Bibi, who might be born, the will gives the executor Baijnath Prasad power to withdraw a promissory note from the Bank of Bengal and to sell it and do with it whatever he might think proper, or give it as security on his being appointed to any post in the Bank. This of course was a bequest of the promissory note to him. Then it gives him power to realise the debts due to the testator. Some such arrangement was expedient as the immediate successors of the testator were pardanashin ladies. So far there is nothing which can be said to be inconsistent with an absolute gift to Hira Bibi. Then follows a passage that has been relied upon by the learned Advocate for the appellant. It runs thus :

> It will be necessary for and incumbent upon the said manager and the heirs mentioned above to manage all the affairs aforesaid with the advice and in concurrence and consultation with Lala Janki Prasad and Babu Sanwal Bihari (grandsons) of Babu Ram Chandraji. They should spend the surplus money on charity and on improvement of the property. The said heir and the manager shall have no exclusive right to execute any (deed) in any matter without the consent of the two persons mentioned above. Such writings shall, in such matter, be deemed to be void in Court. Be it noted that I also have been doing all works and management in consultation with the two aforesaid persons. Likewise in future also my heirs and manager will act and carry out (all works) with their permission and they shall have regard and respect for them as I have had for them.

The learned Advocate for the appellant contended that these restrictions apply only to Ratan Kuar and Hira Bibi, and not to her son who was to take an absolute estate, and they show that an absolute bequest was not intended to be made to either Ratan Kuar or Hira Bibi. Now, so far as Ratan Kuar is concerned, there is no question that she was given a life estate, as the property on her death was to go to Hira Bibi and her children. The question is how far these provisions indicate the bequest of only a life estate in favour of Hira Bibi. They occur not immediately after the bequest to Ratan Kuar and Hira Bibi, which was their proper place if they had reference only to that bequest, but after an absolute gift had been made to Hira Bibi's son. Therefore the heirs to which they refer cannot be only Ratan Bibi and Hira Bibi. They equally apply to Hira Bibi's son. What the learned Advocate wants us to do is to take out the passage making an absolute bequest to Hira Bibi's son from the place where it occurs and insert it at the end of the passage, quoted above. This

cannot be done. All the restrictions, except the restriction on sale, are, in our opinion, recommendatory, and not mandatory. Sales have been permitted but with the advice of the two persons named, and his purpose was, in our opinion, that these two gentlemen might remain associated with the management of the properties. In the earlier part of the will the testator has expressly stated that he was going to make provision so that the name and fame of the family might continue and he may have thought it expedient that, as he was to be succeeded by ladies, Hira Bibi and her husband being young and her son to whom an absolute estate was given was not yet born, he provided that transactions should be conducted with the advice of the two tried men who had been his own advisers. It is not disputed that the clause restricting sales, if applicable to a son of Hira Bibi, is repugnant and therefore cannot be given effect to and, in our opinion, it is also repugnant to the bequest in favour of Hira Bibi and her children. To sum up our decision on this point: the only clause which can be said in any way to be inconsistent with an absolute bequest is the restriction upon sales, but that clause in our opinion equally applies to a son of Hira Bibi who was given an absolute estate in the most unequivocal terms. It is, therefore, of no effect in either case.

The result is that in disagreement with the learned Subordinate Judge we hold that the plaintiff has not established that he is the nephew of the deceased Madan Mohan Lal. We also disagree with his view that Art. 125, Lim Act, applied to this suit. In our opinion, all the claims for a declaration, except in respect of the usufructuary mortgage of 17th August 1906, are within time. The plaintiff's suit, however, fails on the construction of the will and on his failure to establish the relationship to Madan Mohan Lal that he asserted, and has been rightly dismissed. We dismiss this appeal with costs in favour of defendants 7 to 10, 12, 14, 17 and 18; one set to be equally divided among those who have separately appeared.

V.B./R.K. *Appeal dismissed.*

S. N. DAR, B. A., LL. B.,
Vakil High Court.
SRINAGAR (Kashmir)

A. I. R. 1936 Patna 337

SPECIAL BENCH

COURTNEY-TERRELL, C. J., MACPHERSON AND FAZL ALI, JJ.

K, a mukhtar of Aurangabad — Petitioner.

Civil Ref. No. 3 of 1935, Decided on 20th February 1936, from report of Dist. Judge, Gaya, D/- 24th September 1935.

Legal Practitioners Act (1879), S. 13 (b)—Illegal exactions by mukhtar —Mukhtar is liable to suspension.

Exactions by a mukhtar for the purpose of gratifying Court Sub-Inspector to facilitate release of the client with regard to whom a release on bail has been ordered, are illegal, and receiving such amounts and adhering to the same, amounts to professional misconduct entailing suspension. [P 338 C 2; P 339 C 1]

Guru Saran Prasad, A. N. Lal and *Dhyan Chandra*—for Petitioner.

Govt. Advocate—for the Crown.

Courtney-Terrell, C. J.—In this matter the District Judge has reported upon the conduct of one *K*, a mukhtar, practising at Aurangabad in the District of Gaya under S. 13 (b), Legal Practitioners Act. The evidence very clearly reveals the following state of facts: In the early part of the year 1935, two persons Jaddu Lohar and Doman Lohar were the accused on a charge of theft. A relative of theirs Sardar Lohar on the 2nd of January accompanied by three other persons Raghuni Singh, Harbans Singh and Charitar Singh, went to the mukhtar to employ him to move an application for bail before the Subdivisional Officer. The mukhtar took from them a sum of Rs. 2 which has been described variously as his fee for making the required application and also as a mere retaining fee or a sagoon, for the work that he was to do for them and also Rs. 2 to pay for the necessary stamps. He went before the Magistrate and duly obtained the order that the accused persons should be released on bail, the bail being fixed at Rs. 300 for each of them. After the order was made, outside the Court and very close to it, the mukhtar had a further interview with Sardar Lohar and his friends and took from them a further sum of Rs. 13. They say, and in our opinion with truth, that the mukhtar told them that that would be by way of kharcha and that the sum was arrived at in the following way: The bail which was ordered being Rs. 600 he said that

the customary amount would be 5 per cent which would amount to Rs. 30. Sardar Lohar had come to the Court with only Rs. 18 provided by his relatives and he said that he could not afford such a sum. Thereupon the mukhtar took all that Sardar Lohar had by way of balance out of the sum with which he started out amounting to Rs. 13.

The kharcha referred to was well undersood in the nature of a customary exaction by the Court Sub-Inspector or by persons under his command to facilitate the release of the persons in custody pursuant to the order of the Court. The mukhtar, however, has told a story, and in our opinion it is a thoroughly false story, that his clients were so pleased with the result of his application for bail that they gave him Rs. 11 as a fee together with Rs. 2 to be paid to his clerk, making up the total of Rs. 13, and he has even endeavoured to produce evidence of other clients of his who purport to say that this was the mukhtar's customary fee for such services, evidence which we do not believe. The unhappy fact is that the efforts by this Court to secure in the lower Courts honest administration in the offices meets with little general public co-operation and this makes the detection of these cases of illegal exactions particularly difficult. Nevertheless this Court will not relax its endeavour to stamp out such abuses however difficult the task. It would appear from the evidence that while the accused persons were still in custody and not yet released, a friend of theirs, one Bechan Singh, who appears to have been quite accustomed to matters of Court procedure, came in and talked to them and they told him that they were in difficulties about being released and that they had paid to the mukhtar the necessary sum to obtain their release. He immediately went to the Court Sub-Inspector and complained about this matter on behalf of his friends. Thereupon the Court Sub-Inspector took them to the Sub-Deputy Magistrate to whom they told the story of the taking from them of this sum of Rs. 13 by the mukhtar for the purposes of the socalled kharcha. The Sub-Deputy Magistrate seems to have been under the impression that he was being asked to investigate a charge against the Court Sub-Inspector and his subordinate and in-as-much as these persons did not at the time mention specifically that the money was required by the Sub-Inspector he told the Court Sub-Inspector that there was no need for him to go into the matter further. The matter was again taken by the Sub-Inspector to the Subdivisional Officer himself who sent the Sub-Inspector with Sardar Lohar and his friends to the Sub-Deputy Magistrate where they repeated the story of the mukhtar's conduct but were a little more specific in stating that the money was required by the mukhtar to gratify the Court Sub-Inspector's office.

Now it would appear that shortly before this occurrence some other persons who were in custody and with regard to whom a release on bail had been ordered by the Magistrate, had complained of the fact that they were not promptly released and the Sub-Inspector had been censured by the Magistrate for not releasing the people according to his order. Moreover the friend of Sardar Lohar, that is to say Bechan Singh to whom I have already referred, had some grievance against the mukhtar. It is very clear that the Sub-Inspector and Bechan Singh saw their opportunity in revealing the state of facts before the Magistrate and that the facts were so revealed. The excuse by the mukhtar that he was not really endeavouring to obtain and had not obtained any money for the purpose of gratifying the Court Sub-Inspector or his subordinates but that he had merely asked and obtained his own professional remuneration cannot be believed for a moment. The mukhtar firstly offended against the clients themselves by taking money from them on the representation that it was required for an illegal but apparently necessary gratification of the Sub-Inspector's office; secondly he seems to have offended the Sub-Inspector by adhering to the entire sum which he got out of these persons, and thirdly he has lent himself professionally to a practice which though unfortunately common is disgraceful and leads to a serious evil in the administration of justice. We are told that the mukhtar is a man respected and occupies various public positions. To my mind insted of making the matter any better it is made substantially worse, for it would seem to indicate that a relatively low standard is required for those

positions. We owe a duty first of all to the administration of justice of which we are the properly appointed guardians and the litigant public must be protected from illegal exactions. We also owe a duty to the useful professional body of mukhtars whose good name is damaged by conduct of this kind and more especially so in the case of a man holding a relatively high professional and social position. We are constrained in the circumstances to order that the mukhtar be suspended from practice for two years.

Macpherson, J.—I agree.

Fazl Ali, J.—I agree.

V.B./R.K. *Order accordingly.*

---

* A. I. R. 1936 Patna 339

AGARWALA AND VARMA, JJ.

Secy. of State—Appellant.

v.

Amarnath and *others*—Respondents.

Appeal No. 169 of 1935, Decided on 2nd December 1935, from appellate order of Dist. Judge, Patna, D/- 13th March 1935.

*** Civil P. C., (1908), S. 80 — Notice to Secretary of State necessary condition precedent—No claim against Secretary of State though impleaded—Notice must still be given.**

Section 80 deals with two classes of suits: (a) suits against the Secretary of State for India in Council, and (b) suits against a Public Officer in respect of any act purporting to be done by such Public Officer in his official capacity. With regard to both these classes of suits the section is clear and peremptory that notice must be served on the Secretary of State or on the Public Officer, as the case may be, as a condition precedent to the institution of the suit. One cannot read into section an interpretation that in a suit against the Secretary of State notice is not required where no relief is sought, as against him; it is impossible to insert these words in the section or to read the section as if these words found a place in it: 1931 *Cal* 61, *Doubted*; 1934 *P C* 96, *Rel. on.*

[P 339 C 2; P 340 C 1]

Govt. Pleader—for Appellant.

A. K. Ray and *S. K. Roy*—for Respondents.

Agarwala, J. — The plaintiff-respondent instituted a suit in the Court of the Munsif of Barh to recover the rent of a holding. The rent of the holding in suit is payable in equal shares to the proprietors of two estates one of which is a khas mahal. The Secretary of State was impleaded as a pro forma defendant but no notice under S. 80, Civil P. C., was served on him. On objection taken in the trial Court the learned Munsif held that non-compliance with S. 80 barred the maintenance of the suit. The plaint was therefore rejected. On appeal by the plaintiff to the District Judge of Patna, the learned District Judge has held that as no relief was claimed against the Secretary of State notice under S. 80 was not necessary. In coming to this conclusion the learned Judge has taken into consideration the fact that the notice required by S. 80 must state among other things the cause of action and the relief which the plaintiff claims. In the view of the learned Judge, these requirements of the section indicate that where no cause of action against the Secretary of State is alleged, and no relief is sought as against him, no notice is required. I am unable to accept this interpretation of this section. S. 80 deals with two classes of suits, (a) suits against the Secretary of State for India in Council and (b) suits against a Public Officer in respect of any act purporting to be done by such Public Officer in his official capacity. With regard to both these classes of suit the section is clear and peremptory that notice must be served on the Secretary of State or on the Public Officer, as the case may be, as a condition precedent to the institution of the suit. The learned District Judge referred to an observation in 57 Cal 1127 (1) at p. 1134 where the learned Chief Justice of the Calcutta High Court in a suit against an Official Receiver, indicated that there may be cases against Public Officers, which do not require notice, and that suits ex contractu against Public Officers would fall within that class of cases. It is doubtful whether that proposition can be maintained in view of the decision of the Privy Council in 61 Cal 470 (2), at p. 475, where Sir George Lowndes said:

The learned Subordinate Judge held that the section had no application to suits in contract, and this dictum was rightly repelled by Mukerji, J., who delivered the judgment of the High Court. Having regard to the decision of this Board in 51 Bom 725 (3), their Lordships think that no such distinction is possible.

---

1. Prasaddas Sen v. K. S. Banerjee, 1931 Cal 61=130 I C 903=57 Cal 1127.
2. Rebati Mohan Das v. Jateendra Mohan Ghose, 1934 P C 96=148 I C 482=61 I A 171=61 Cal 470 (P C).
3. Bhagchand Dagadusa v. Secy. of State, 1927 P C 176=104 I C 257=54 I A 338=51 Bom 725 (P C).

In the Bombay case referred to, at p. 747 of the report, Viscount Sumner said:

> Section 80 is express, explicit and mandatory, and it admits of no implications or exceptions. A suit in which inter alia, an injunction is prayed is still 'a suit' within the words of the section, and to read any qualification into it is an encroachment on the function of legislation.

To accept the interpretation of the learned District Judge in the present case would entail reading into the section a qualification that in a suit against the Secretary of State notice is not required where no relief is sought as against him. It is impossible to insert these words in the section or to read the section as if these words found a place in it. The words of the section are perfectly unambiguous that no suit shall be instituted against the Secretary of State until two months after notice of the suit has been served upon him. There is no qualification of this requirement and no qualification can be read into the section. The order of the learned District Judge remanding the case to be disposed of on the merits will therefore be varied to this extent: that the name of the Secretary of State will be expunged from the action. The appellant is entitled to his costs in this Court and in the Court below.

Varma, J.—I agree.

B.D./R.K. *Order varied.*

A. I. R. 1936 Patna 340

COURTNEY-TERRELL, C. J.

Adikanda Sahu and *others*—Plaintiffs—Appellants.

v.

Banchhu Malik—Defendant—Respondent.

Appeal No. 52 of 1933, Decided on 16th January 1936, from appellate decree of Addl. Sub-Judge, Cuttack, D/- 3rd December 1932.

Bihar and Orissa Tenancy Act (7 of 1922), S. 61 (2)—No conflict between presumption under S. 61 (2) and that deriving from record of rights—Reclamation by tenant with implied consent of landlord—Tenant cannot be ejected.

There is no conflict between the presumption created by the second sub-section to S. 61 and the presumption to be derived from the entry in the record of rights. The word 'bebandobasti' that is to say without settlement merely means that the landlord did not conclude any arrangement with the tenant when inducting him upon the land. It is quite consistent with the presumption of consent to the reclamation imposed by S. 61. Where the tenant is a settled raiyat of the village and the consent of the landlord to the reclamation being presumed notwithstanding that there has been no specific bandobasti between the landlord and the tenant he cannot be ejected because he has acquired occupancy rights in the land which he has reclaimed with the implied consent of the landlord. [P 340 C 2; P 341 C 1]

S. N. Sen Gupta—for Appellants.

S. K. De—for Respondent.

Judgment. — This is a second appeal against the decision of the Subordinate Judge reversing the decision of the Munsif of Jaipur in a suit for recovery of possession of land described in the schedule to the plaint and a sum for mesne profits.

The defence of the defendant was that he had rights of occupancy in the land. The record-of-rights published on the 10th July 1928 recorded the land in question as waste land and under the column which headed the name of the tenant, the defendant is recorded as having been in possession since 1923 as bebandobasti Nayabadi, that is to say without settlement of newly reclaimed land.

Now S. 61 of the Orissa Tenancy Act forbids the reclaiming of waste land by a raiyat without the written consent of the landlord, and by sub-section 2 if the landlord does not within four years from the date when the raiyat commenced his reclamation, make an application to the Collector for his ejectment, the consent of the landlord is to be deemed to have been given.

It is contended on behalf of the appellant, the landlord, that there is a conflict between the presumption created by the second sub-section to S. 61 and the presumption to be derived from the entry in the records-of-rights and that the entry in the record-of-rights should prevail. In my opinion there is no conflict between the two. The word 'bebandobasti' that is to say without settlement, merely means that the landlord did not conclude any arrangement with the tenant when inducting him upon the land. It is quite consistent with the presumption of consent to the reclamation imposed by S. 61. It is admitted that the tenant respondent is a settled raiyat of the village and in these circumstances the consent of the landlord to the reclamtion being presumed, notwithstanding that there has been no specific bebandobasti between the landlord and the tenant, the tenant cannot be ejected

because he has acquired occupancy rights in the land which he has reclaimed with the implied consent of the landlord.

For this reason, in my opinion, the decision of the Subordinate Judge dismissing the suit was right and this appeal must be dismissed with costs.

K.S./R.K. *Appeal dismissed.*

A. I. R. 1936 Patna 341

SPECIAL BENCH

COURTNEY-TERRELL, C. J., MACPHERSON AND FAZL ALI, JJ.

Dukha Lal Choudhuri — Plaintiff — Appellant.

v.

Mt. Manabati and *others*—Defendants —Respondents.

Letters Patent Appeal No. 14 of 1935, Decided on 23rd March 1936, from decision of James, J., D/- 26th February 1935, as reported in 1935 Pat 194.

(a) Bengal Tenancy Act (8 of 1885), Ss. 38 and 52—Istimrari mukarrari tenant cannot claim reduction under S. 38 but he can do so under S. 52: 1935 *Pat* 194=156 *I C* 407, *Reversed.*

S. 38 does not apply to a tenant holding under an istimrari mukarrari lease, nor can the principle underlying that section be extended to him, on the grounds of natural justice. Consequently, a tenant holding under an istimrari mukarrari lease, is not entitled to claim reduction of the rent on the ground that his land has permanently deteriorated or has become useless for cultivation. He is, however, entitled to claim reduction under S. 52: 1931 *Cal* 537 (*F B*), *Foll.*; *Matthey* v. *Curling*, (1922) 2 *A C* 180, *Ref.*; 1922 *Pat* 169; (1864) *W R Act* 10, *Rul* 42 and (1863) *Marshall's Report* 558, *Dissent.*; 1935 *Pat* 194=156 *I C* 407, **Reversed.**

[P 343 C 2; P 344 C 1, 2]

(b) Contract — Construction — Natural justice cannot be invoked to relieve one party of hardship not provided for.

Where the rights and the liabilities of the parties are regulated by contract the terms of which could not be said to have been unfair at the date when the contract was entered into, the principle of natural justice cannot be invoked to relieve one of the parties of some hardship which might have been provided against in the contract but which the parties have omitted to provide for.

[P 343 C 2; P 344 C 1]

(c) Bengal Tenancy Act (1885), S. 38—Scope.

S. 38 applies only to occupancy tenants.

[P 343 C 2]

(d) Bengal Tenancy Act (1885), S. 52—Scope.

S. 52 is general and applies to all tenancies including a tenant holding under an istimrari mukarrari lease: 1931 *P C* 33, *Foll.* [P 343 C 2]

(e) Bengal Tenancy Act (1885), S. 52—S. 52 applies to all cases when there is deficiency in area of holding or tenure from whatever cause. 1935 *Pat* 194=156 *I C* 407, *Reversed.*

S. 52 is applicable only when there is found to be any deficiency in the area of the holding or tenure from whatever cause, though it will be found as a matter of experience that many of the cases in which abatement of rent is allowed under this section are cases of diluvion: 1935 *Pat* 194=156 *I C* 407, **Reversed.** [P 344 C 2]

M. N. Pal, *Navadwipa Chandra Ghosh* and *S. K. Ray*—for Appellant.

Manohar Lal and *N. C. Ray*—for Respondents.

Fazl Ali, J.—This is an appeal under the Letters Patent from the decision of a Judge of this Court in a second appeal arising out of a suit for arrears of rent in respect of an istimrari mukarrari tenure held by the defendants. The only substantial point which was raised in defence is set out in para. 4 of the written statement which runs as follows :

> The entire mukarrari property aforesaid was from before the years in suit subject to diluvion and was full of sand and jungle and was quite unfit for cultivation on account of overflow of the river Kosi. Hence the plaintiff is not at all entitled to get rent for the years in suit, rather this defendant is entitled to an "abatement of rent.

The learned Munsiff before whom the suit had been instituted deputed a Commissioner to make a local investigation and report whether the land in suit was fit for cultivation during the years in suit. When the Commissioner went to the spot he found that out of 107 bighas odd of land comprised in the tenure 81 bighas odd were covered with jungle, 21 bighas had certain crops and the remaining 4 bighas odd were cultivated but bore no crops at the time. After a minute observation of the condition of the land the Commissioner came to the conclusion that no portion of the land could have been fit for cultivation during the years in suit and the learned Munsif relying on his report which was supported by the oral evidence of the defendant held that the plaintiff was not entitled to recover any rent for the period in suit. When the case went up in appeal the learned District Judge accepted the finding of the Munsif that the lands were not fit for cultivation but he assessed a nominal rent of four annas a bigha upon the land on the basis that some profit could be made by the defendants even out of the jungle lands for the purpose of grazing cattle; for this the tenants should be required to pay rent. From the decision of the

learned Judge the plaintiff appealed to the High Court claiming his full mukarrari rent, while the defendants preferred a cross-objection claiming complete abatement of rent. The appeal was heard by Mr. Justice James who reversed the decision of the District Judge and restored the judgment of the Munsif. The plaintiff has now preferred this appeal under the Letters Patent.

It is no longer disputed that the land was in fact wholly unfit for cultivation and was not cultivated during the years in suit; it is also conceded that if the defendants had been occupancy raiyats they would on the findings arrived at by the Courts below be entitled to claim reduction of rent under S. 38, Ben. Ten. Act. It is, however, strongly contended that a tenant holding under an istimrari mukarrari lease cannot avail himself of the benefit of S. 38. The Courts below have rejected this contention and held that the principle underlying S. 38 is applicable to all tenancies and for this view they have relied upon the decision of a Division Bench of this Court in 2 P L T 569 (1), which again appears to be based on the decisions of Sir Barnes Peacock in 1864 W R Act 10, Rulings 42 (2) and (1863) Marshall's Report 558 (3). As one of the contentions on behalf of the appellant was that Sir Barnes Peacock has stated the law in too wide terms it becomes necessary to examine the question in some detail. In 1864 W R Act 10, Rulings 42 (2) the tenant who was sued claimed reduction on the ground (1) that part of his land had been washed away and (2) that part of it had been so covered with sand as to have been rendered wholly useless. A question then arose as to whether there was anything in the original lease by which the tenants had been inducted on the land to prevent them claiming reduction. Sir Barnes Peacock, C. J., and Shambhoo Nath Pandit, J., remanded the case for a determination of the terms of the lease but in so remanding it held that if either of the two allegations made by the tenant was proved he was entitled to claim reduction of rent. In the judgment in that case which was delivered by Sir Barnes Peacock he referred to the following passage in Bacon's Abridgment, 7th Edn., Vol. 2, p. 63:

> In this place we are to consider whether the tenant shall pay the whole rent, though part of the thing demised be lost and of no profit to him, or though the use of the whole be for some time intercepted, or taken away without his default; and here it seems extremely reasonable that, if the use of the thing be entirely lost or taken away from the tenant, the rent ought to be abated or apportioned because the title to the rent is founded upon this presumption: that the tenant enjoys the thing during the contract, and therefore if part of the land be surrounded or covered with the sea, this being the act of God, the tenant shall not suffer by it, because the tenant without his default wants the enjoyment of part of the thing which was the consideration of his paying the rent; nor has the lessee reason to complain, because, if the land had been in his own hands, he must have lost the benefit of so much as the sea has covered.

Sir Barnes Peacock then proceeded to observe:

> We think that that rule is founded on the principles of natural justice and equity, that, if a landlord let his land at a certain rent to be paid during the period of occupation, and the land is, by the act of God, put in such a state that the tenant cannot enjoy, the tenant is entitled to an abatement.

Again in (1863) Marshall's Report 558 (3), the learned Chief Justice observed:

> If a man stipulates to pay rent, it is clear he engages to pay it as a compensation for the use of land rented, and, independently of S. 18, Act 10 of 1859, we are of opinion that, according to the ordinary rules of law, if a talookdar agrees to pay a certain amount of rent, the tenant of it is exempt from the payment of the whole rent if the whole of the land be washed away or of a portion of the rent if a portion only be washed away. According to English law a tenant is entitled to abatement in proportion to the quantity of land washed away, and he is entitled to that abatement in a suit brought by the landlord for arrears of rent.

I think that properly speaking the observations of Sir Barnes Peacock should be discussed under two heads because in his opinion a tenant is entitled to claim abatement of rent (1) in the case of diluvion and (2) where the land is not covered with sand as to be unfit for cultivation. Now, whatever may be the state of the law in England it has always been held in this country that a tenant, whether he be an occupancy raiyat or otherwise, is entitled to abatement of rent if the whole or part of the land held by him is diluviated. This principle has now received statutory recognition and is embodied in S. 52, Ben. Ten. Act. The observations of Sir Barnes Peacock therefore in so far

1. Sukhraj Rai v. Ganga Deyal Singh, 1922 Pat 169=63 I C 219=6 P L J 665=2 P L T 569.
2. Sheikh Enayutoollah v. Sheikh Elahibuksh, (1864) W R Act 10, Rulings 42.
3. Afsurooddeen v. Mt Shoroshee Bala Debi, (1863) Marshall's Report 558=2 Hay 664.

as they related to the right of a tenant to claim abatement in case of diluvion were fully justified and there is nothing in the passage quoted by him from Bacon's Abridgment or in the observations made by him in (1863) Marshall's Report 558 (3), which was purely a case of diluvion to which exception need now be taken. But in *Enayutoollah's* case (2) Sir Barnes Peacock dealing with the contention of the tenant that a part of his land had been rendered useless on account of deposit of sand said :

> With regard to the land alleged to have been covered by sand the Judge of the first Court will have to inquire if that portion was covered by sand and thereby deteriorated or rendered wholly useless ; because if the land has been deteriorated or rendered wholly useless by the act of God the tenant would be entitled to an abatement provided that there was no stipulation to the contrary in the kabuliyat.

It is the view of law which is suggested in this passage that does not seem to be quite in consonance with the English authorities as will appear from the following observation made by Lord Atkinson in (1922) 2 A C 180 (4) at p. 232 :

> I cannot find any case in which the rent reserved by a lease was apportioned simply because the lessee was deprived of the use and enjoyment of a portion of the demised premises, his title to that portion not being either assailed, displaced or weakened. On the contrary, the trend of the authorities is, I think, strongly against any such result.

The matter seems to have been discussed at length in 35 C W N 1011 (5), where Rankin, C. J., referring to the passage which I have already quoted from Sir Barnes Peacock's judgment, said:

> In this sentence the learned Chief Justice would seem to have outstripped the English law and left it far behind.

It may be stated here that in 1864, when (1864) W R Act 10, Rulings 42 (2) was decided, the Act which was then in force was Act 10 of 1859. The only section of that Act which is relevant to the present discussion is S. 18 which ran as follows :

> Every raiyat having a right of occupancy shall be entitled to claim an abatement of the rent previously paid by him, if the area of the land has been diminished by diluvion or otherwise, or if the value of the produce or the productive powers of the land have been decreased by any cause beyond the power of the raiyat, or if the quantity of land held by the raiyat has been proved by measurement to be less than the quantity for which rent has been previously paid by him.

The provisions of that section have since been split up and re-enacted in two separate sections, these being Ss. 38 and 52, Ben. Ten. Act. S. 38 provides for cases where the soil of the holding has without the fault of the raiyat become permanently deteriorated by deposit of sand or other specific causes sudden or gradual. S. 52 deals with cases where the whole or part of the tenant's land is lost to him by reason of diluvion or other similar causes. The point which is to be borne in mind is that while S. 52 is general and applies to all classes of tenants, S. 38 has been made applicable only to an occupancy tenant. I think from this it may be pertinently argued that if the legislature intended that the principle underlying S. 38 should be applicable to all classes of tenants, it would not have confined it merely to occupancy tenants and the section might have been drafted in general terms as S. 52 has been drafted. Thus, if we are to decide the present case merely upon the express provisions of the Statute, there can be no warrant for holding that a tenant who holds under an istimrari mukarrari lease is entitled to claim reduction of rent on the ground that his land has permanently deteriorated or has become useless for cultivation. But it is said that the right of such a tenant is based upon the principle of natural justice and equity. In my opinion however the obvious answer to this argument is that the principle of natural justice which is invoked on behalf of the tenant must be one which does equal justice to the landlord. In the case of an occupancy tenant the landlord is entitled to claim an enhanced rent under certain conditions which are specified in S. 30, Bengal Tenancy Act, and the tenant has a corresponding right to claim reduction where his land becomes permanently deteriorated. In a case however where the rent has been permanently fixed by contract it is obvious that the landlord cannot claim any enhancement, if the productivity of the land is increased. Is it then just to hold that such a tenant is entitled to claim reduction where the productive capacity of the land had decreased ? It appears to me that where the rights and liabilities of the parties are regulated by contract the terms of which could not be said to have been unfair at the date when the contract was entered into, the prin-

---

4. Matthey v. Curling, (1922) 2 A C 180.
5. Arun Chandra Singha v. Bhagaban Chandra, 1931 Cal 537=133 I C 577=59 Cal 155 =35 C W N 1011 (FB).

ciple of natural justice cannot be invoked to relieve one of the parties of some hardship which might have been provided against in the contract but which the parties have omitted to provide for. In my opinion therefore there is no justification for extending the principles underlying S. 38, Bengal Tenancy Act, to a tenant holding under an istimrari mukarrari lease, and if *Sukhraj's* case (1) was intended to lay down that the principle can be extended to such a case, I respectfully dissent from such view. Indeed in the course of the elaborate arguments which were addressed to us in this case neither party was able to cite any decision in which the principle underlying S. 38 was held to be applicable to a tenant holding his lands under an istimrari mukarrari patta.

The next question which is to be considered is whether the defendant can claim abatement under S. 52, Bengal Tenancy Act. As I have already stated S. 52, Bengal Tenancy Act, is more general than S. 38 and is applicable even to a tenant holding under a mukarrari lease. This should be clear upon reading the section itself, but if any authority is required for the view, it is to be found in the decision of the Judicial Committee of the Privy Council in 48 Cal 473 (6). In that case certain tenants who held lands in Sundarbans under a permanent mukarrari lease claimed reduction of the agreed rent under S. 52 on the ground that a part of the land leased to them had been washed away. The landlords denied their right to a reduction relying on the terms of the lease which as they contended precluded the tenants from denying their obligation to pay the full rent fixed by the lease on the ground of flood or diluvion. One of the contentions which was raised on behalf of the landlord before the Judicial Committee was that under S. 179, Bengal Tenancy Act, the tenant could contract himself out of the benefit conferred upon him under S. 52, but it was held that the lands not being situated in a permanently settled area, S. 179 did not apply and the tenants were entitled to claim reduction of rent under S. 52.

Now S. 52 provides that a tenant shall be entitled to a reduction of rent in respect of any deficiency proved by measurement to exist in the area of his tenure or holding as compared with the area for which rent has been previously paid by him. This section, as is clear from its language, is applicable only when there is found to be any deficiency in the area of the holding or tenure from whatever cause, though it will be found as a matter of experience that many of the cases in which abatement of rent is allowed under this section are cases of diluvion. Thus the defendant would be undoubtedly entitled to claim abatement under this section if it could be ascertained that he had lost the whole or portion of the land during the years in suit by diluvion or some similar cause. It appears to me however that neither the parties to this litigation nor the Courts below which had to deal with the facts of the case attached much importance to the question of diluvion because it was assumed that in view of the decision in *Sukhraj's* case (1) the tenant was entitled to the relief he claimed apart from the question of actual diluvion, on the ground that the lands were unfit for cultivation during the years in suit. This is clear from the terms in which the writ was issued by the trial Court to the commissioner as well as from the discussion of the case to be found in the judgments of the first two Courts. That the defendant probably intended to set up a case of diluvion may be inferred from what they stated in para. 4 of the written statement which I have already quoted and I think that there must also be something in the record to show that the land had in fact been subject to diluvion, for James, J., in narrating the facts of the case, said :

> It appears that a few years ago the land of the tenure was submerged by the westward movement of the Kosi river, and that the land has only recently re-formed;

and again he observed :

> The tenure holder was entitled to abatement of rent until the effect of the submersion of his land had passed away.

It is true that when the commissioner held his local investigation, he did not find the land actually under water, but he held the investigation in the year 1339 Fasli and we must remember that the suit was for the rent of the years 1335 to 1338 Fasli and whatever may have been the condition of the land in the year immediately preceding the visit of the commissioner, there is nothing in the

---

6. Khetramoni Dasi v. Jiban Krishna, 1931 PC 33=60 I C 1=48 I A 39=48 Cal 473 (PC).

judgments of the Courts below to show what was the condition of the land during the earlier years for which the suit had been brought. Unfortunately the question whether in point of fact the land in question or any portion of it had diluviated during any of the years in suit cannot be properly investigated in this Court, because the appeal to this Court (which is the third Court of appeal) was confined only to questions of law and the learned advocates for the parties did not address us on the facts or the evidence adduced by the parties. In these circumstances I think that the case should be remanded to the Court below for the determination of the question whether the defendant is entitled to any relief under S. 52, Bengal Tenancy Act. If the Court below comes to the conclusion that the whole or any portion of the lands forming the tenure had diluviated in any of the years in suit causing thereby a deficiency in the area of the tenure, the defendants will be allowed proportionate abatement of rent; but no abatement will be granted if the defendants fail to establish that there was any deficiency in the area due to diluvion. I think that in the circumstances of the case the defendants should be allowed to adduce such relevant evidence as they may desire to adduce to prove the actual condition of the land during the years in suit because as I have already stated, the trial Court appears to have proceeded on the erroneous assumption that in order to establish their claim for exemption from rent it was enough for the defendants to prove that the land was not fit for cultivation during the years in suit and the case of actual diluvion need not have been proved. If the defendants wish to adduce any evidence, the plaintiff will also be entitled to adduce rebutting evidence. If the parties should desire to adduce any additional evidence it would be open to the learned District Judge to remit the case to the trial Court for recording such evidence. In my opinion therefore the appeal should be allowed, the judgments of the Courts below set aside and the case sent back to the District Judge to be disposed of according to law in the light of the observations made above. Costs will abide the result.

Courtney-Terrell, C. J.—I agree.

Macpherson, J.—I agree.

V.B./R.K. *Appeal allowed.*

A. I. R. 1936 Patna 345

VARMA, J.

Shiva Prasad Singh—Petitioner.

v.

Ramjas Agarwala and *another*—Opposite Parties.

Miscellaneous J. C. Nos. 80 and 81 of 1935, Decided on 18th February 1936.

Transfer—Appeal — Three suits tried by same Court and decided by one judgment—Two appeals filed before District Judge and one before High Court — Application to transfer all appeals to High Court was rejected.

Where three suits were heard together by the consent of the parties and only one judgment was delivered, but separate appeals were filed, two before the District Judge and one before the High Court, the High Court refused to transfer the appeals before the District Judge to itself because, although many of the grounds in the appeals were the same, one was raised specifically in the appeal before the District Judge and also because no great hardship was to be caused to the parties by allowing the appeals where they were. [P 345 C 2; P 346 C 1]

N. N. Roy—for Petitioner.

S. C. Mazumdar—for Opposite Parties.

Order.—M. J. C. No. 80 of 1935 arose out of title Appeal No. 55/35 by defendant 2 pending before the District Judge of Purulia. M. J. C. No. 81 of 1935 arises out of money Appeal No. 15/35 filed by the plaintiff before the same Court for a decree against defendant 2. First Appeal No. 112 of 1935 is pending before this Court and it was filed by the plaintiff praying for a decree against defendant 2 and arose out of money Suit No. 73/34. These two petitions are for the transfer of the two appeals pending before the District Judge to this Court. It may be noted that all these three suits were heard together by consent of parties and only one judgment was delivered to govern all these cases. Mr. N. N. Roy appearing for the petitioner urges that for the convenience of the parties it would be better when the same type of evidence is to be considered that these cases should be transferred to this Court. Mr. S. C. Mazumdar appearing on behalf of the opposite party contests that the point at issue in the various cases are different and that he would not like his right of second appeal to be jeopardised by a transfer to this Court. So far as title Appeal No. 55 is concerned it arose out of mortgage Suit No. 5 of 1934. I notice that, although the other issues that

arose out of the suit were the same as those in the other suits, yet issue 5 was an issue specifically framed for this suit, and I understand it is that particular issue that is in question before the lower appellate Court, therefore it would not be feasible to transfer title Appeal No. 55 of 1935. With regard to money Appeal No. 15 of 1935 there also seems to be some difficulty about the actual nature of the dispute between the parties, and moreover no great hardship would arise if the appeal is not transferred. I would therefore allow that appeal also to remain where it is. Under the circumstances I would reject both these applications. There will be no order as to costs.

K.S./R.K. *Applications rejected.*

A. I. R. 1936 Patna 346

DHAVLE AND ROWLAND, JJ.

Jugeshwar Singh and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 26 of 1935, Decided on 2nd May 1935, from decision of Sess. Judge, Gaya, D/- 12th December 1934.

(a) Criminal P. C. (1898), S. 537—Objection to initiation of proceedings after commitment is prohibited.

An objection to initiation of proceedings must be taken at an early stage and where the case is triable by Sessions, and is initiated on the complaint by a Magistrate under S. 476, once the commitment is made it is too late for the accused to take an objection against the initiation of the proceedings on the ground of want of jurisdiction in the Magistrate or the person functioning as such: 1929 *Cal* 203 and 1932 *Cal* 545, *Foll.* [P 347 C 1]

(b) Criminal P. C. (1898), S. 195—Complaint under S. 195—Cognizance is to be taken of whole case.

What S. 195 prohibits is taking cognizance of an offence of a certain class except on the complaint of a Court, but where a Court has complained of an offence specified in S. 195, then cognizance can be and is to be taken of the whole case; that is to say the prosecution will go forward against all the persons found to be concerned in the offence and also under any section found applicable to the facts which are the subject matter of the complaint, unless the Court making the complaint and naming certain persons therein has expressly considered and decided in the negative the question whether other persons should also be prosecuted on the same facts: 1934 *Pat* 467 and 536, *Ref.* [P 347 C 2]

(c) Penal Code (1860), Ss. 107, 120-A and 120-B—Criminal conspiracy amounting to abetment—Ss. 120-A and 120-B need not be invoked.

Where a criminal conspiracy amounts to an abetment under S. 107 it is unnecessary to invoke the provisions of S. 120-A and 120-B. [P 348 C 2]

Harihar Prasad Sinha—for Appellants.

Assistant Govt. Advocate — for the Crown.

Rowland, J.—The appellants have been convicted by the Sessions Judge of Gaya of offences committed in connection with an unregistered usufructuary mortgage deed which was used by the defence in a criminal case in which Jageshwar Singh and Jagdeo Singh were accused under S. 447, I. P. C. Possession of a plot of land was in issue and the document purported to create a hypothecation of this plot in favour of Jageshwar and Jagdeo. Jugal Lal's signature appeared on it as an attesting witness and it purported to be scribed by Parmeshwar Lal of Misirbigha. The document was found to be a forgery. The Honorary Magistrate Khan Sahib Syed Muhammad Islam, who disposed of the case, called on Jageshwar, Jagdeo and Jugal to show cause against their prosecution. It was alleged that the document was not written by Parmeshwar Lal but by Raghubar Dayal. He was also called on to show cause against prosecution. So was Bikhari Lal, another person whose name appeared on the margin as an attesting witness. The Honorary Magistrate purporting to act under S. 476, I. P. C., complained against Jageshwar, Jagdeo and Jugal Lal, the first two under Ss. 471 and 467 read with S. 120 and the third under Ss. 193 and 467 read with S. 120, I. P. C. His view was that the forged document came into being as a result of conspiracy and the complaint appears to have been intended to refer to S. 120-B, I. P. C. He declined to prefer a complaint against Raghubar Dayal and Bikhari Lal.

Against this order Shamdeo, the complainant of S. 447 case, preferred an appeal to the District Magistrate, who after reviewing the facts, found that there was a prima facie case against Raghubar Dayal and Bikhari also, and under S. 476-B, Criminal P. C., he complained against these two persons under S. 467 and S. 467 read with S. 120-B, I. P. C. He directed these two accused to be proceeded against in the same case as the other three persons already being prosecuted. The Sessions Judge found that the document was forged, basing his judgment on

possession of the land by the opposite party, Shamdeo Singh; on the production of rent receipts by Shamdeo; on the fact that the original raiyati khatian was in possession of Shamdeo; on the fact that proceedings have been taken by Shamdeo under S. 40, Ben. Ten. Act; on the absence of mention of this document in the written statement of Jageshwar and Jagdeo in the S. 447 case; on the fact that the stamp paper was of insufficient value being on 4 annas stamp instead of 8 annas; on the fact that the purchase of the stamp paper as endorsed thereon was later than the date of the alleged document; and on the evidence of the handwriting expert and other persons as to handwriting. The explanations offered for the appellants entirely failed to displace the reasoning of the Sessions Judge which is fully supported by the evidence, and the argument in the appeal has been directed mainly to an attack on the regularity of the initiation of the proceedings. The order of Khan Sahib Syed Muhammad Islam for the prosecution of the first three accused was dated 7th February 1934, and his complaint was presented on 16th February. At that time he was not exercising the powers of a Magistrate. He had been vested with such powers by Notification No. 2581, dated 27th September 1930, for a period of three years expiring on 26th September 1933. He was again vested with magisterial powers on 18th July 1934, and it is argued that in the interval he was not a Court capable of initiating proceedings under S. 476. The Sessions Judge thought that once a commitment had been made it was too late for the accused to take an objection against the initiation of the proceedings which they ought to have taken at an earlier stage. They had not appealed to the District Magistrate against the order purporting to be made under S. 476 directing their prosecution, nor to the Sessions Judge against the order of the District Magistrate under S. 476-B.

The Sessions Judge's view is supported by the decision of the Calcutta High Court in 1929 Cal 203 (1). The decisicn is followed by the same Court in 1932 Cal 545 (2). The intention of the legislature appears to be to prevent innocent persons being put on trial at the instance of persons likely to be moved by motives of revenge and not protect guilty persons from the penalty of their crimes. There is another answer available to the prosecution and that is that the Subdivisional Magistrate, before whom the case against all these appellants was inquired into, had before him the complaint of the District Magistrate under S. 476-B against two of the persons who were put on trial. What S. 195 prohibits is taking cognizance of an offence of a certain class except on a complaint of a Court; but where a Court has complained of an offence specified in this section then cognizance can be and is to be taken of the whole case, that is to say prosecution will go forward as against all the persons found to be concerned in the offence and also under any sections found applicable to the facts which are the subject-matter of the complaint. It was so held in this Court in the case of 15 P L T 438 (3) and in 15 P L T 694 (4). The complaints considered in those cases were complaints by private parties and not of offences requiring a complaint by a Court for the institution of proceedings.

But I have no doubt that the principle applies; cognizance having been taken of an offence, the inquiry will proceed against all the persons whom the evidence shows to have been concerned in it provided that the Court making the complaint and naming some persons therein has not expressly considered and decided in the negative, the question whether other persons should also be prosecuted on the same facts. I am satisfied therefore that S. 195, Criminal P. C., was no bar to the conviction of the appellant Raghubar Dayal under Ss. 467 and 193, of Jugal Lal under S. 471/109, of Jugeswar Singh under S. 467 and S. 467 read with S. 471, and of Jagdeo Singh under S. 467 read with S. 471. I need not discuss the proceedings against Bhikhari who has been acquitted. There was a further charge against all the appellants under S. 120-B, I. P. C. which was not framed by the committing Magistrate but by the Sessions Judge. The

1. Jabbar Ali v. Emperor, 1929 Cal 203=116 I C 632=30 Cr L J 656.
2. Ali Ahmad v. Emperor, 1932 Cal 545=1932 Cr C 545=140 I C 544=34 Cr L J 39.
3. Mathura Singh v. Emperor, 1934 Pat 467=1934 Cr C 1062=155 I C 58=15 P L T 438.
4. Jamuna Singh v. Laldhari Singh, 1934 Pat 536=1934 Cr C 1191=152 I C 228=36 Cr L J 26=15 P L T 694.

appellants have been convicted under this section also. No separate sentence was imposed, so the discussion of the propriety of the Sessions Judge framing a new charge under this section is somewhat academic. The law restricting the institution of a prosecution under S. 120-B, I. P. C., is contained in S. 196-A, Criminal P. C., and it is noticeable that the restrictions apply not to every class of criminal conspiracy. Referring to S. 120-B, I. P. C., we find that subsection (1) imposes a penalty equal to the punishment for abetment, on participation in a criminal conspiracy to commit an offence punishable with death, transportation or rigorous imprisonment for a term of two years or upwards, in case no express provision is made in the Code for the punishment of such a conspiracy.

The section appears to have been introduced to fill a gap in S. 107, I. P. C. defining abetment. Under S. 107, secondly, a person abets the doing of a thing who engages with others in a conspiracy for the doing of that thing if an act or illegal omission takes place in pursuance of that conspiracy. Abetment of an offence is punishable under Ss. 109 or 114 as the case may be if the offence is committed or under Ss. 115 and 116 as the case may be if the offence be not committed ; but it is clear that a conspiracy will not amount to an abetment unless an act or illegal omission takes place in pursuance of the conspiracy. Therefore the first class of cases which S. 120-B is designed to cover, is that in which the conspiracy is formed for the commission of a serious offence but no act or illegal omission has taken place in pursuance of it. S. 120-A, which defines criminal conspiracy, enacts that an agreement to commit an offence may itself amount to a criminal conspiracy even if no overt act follows on the agreement.

The second class of cases is that in which the conspiracy is formed in order to do an illegal act or an act not illegal by illegal means ; this sort of conspiracy in no case amounts to abetment and does not amount to a criminal conspiracy unless some act besides the agreement is done in pursuance thereof. Thus, whereas S. 120-A provides an extended definition of criminal conspiracy covering acts which do not amount to abetment by conspiracy within the meaning of S. 107, Section 120-B provides a punishment for criminal conspiracy " where no express provision is made in this Code for the punishment of such a conspiracy." Where a criminal conspiracy amounts to an abetment under S. 107 it is unnecessary to invoke the provisions of S. 120-A and 120-B because the Code has made specific provision for the punishment of such a conspiracy. In the case before us, the offences which are alleged to have been the object of the conspiracy were in fact committed; so the conspiracy amounted to abetment. The Court should not, therefore have framed additional charges under S. 120-B. Appellants having been convicted on the substantive charges framed were not liable to be convicted also of conspiracy. Argument was entered into on the question whether there was a proper sanction to the framing of charges under S. 120-B. It is not necessary to go into this matter when on other grounds those charges have failed. I would set aside the convictions under S. 120-B, I. P. C., while confirming the convictions under the other sections. The Sessions Judge has imposed sentences of 5 years on Raghubar Deyal, of three years on Jugal and Jageshwar and of 2 years on Jagdeo. As the sentences do not appear to be excessive, I would dismiss the appeal.

Dhavle, J.—I agree. As regards the merits there cannot be any doubt on the evidence that the forgery and connected offences have been brought home to the appellants as charged. As regards the initiation of these proceedings the facts are very peculiar. Stress has been laid by the appellants on the facts that though the first complaint under S. 195, Criminal P. C., was made by Khan Sahib Saiyed Muhammad Islam signing as Honorary Magistrate, he was at that time without any powers as a Magistrate. S. 195 (c) requires a complaint of the Court in which the forged document was produced or of some other Court to which such Court is subordinate. The forged mortgage bond had been produced before Mr. Islam during his trial of the case, brought under S. 447, I. P. C., by Shamdeo against Jageshwar Singh and Jagdeo Singh, in exercise of the powers of a Magistrate conferred upon him for three years by the notification of 27th September 1930. When these powers expired by lapse of time, he was not succeeded by any other Magistrate.

But the proceedings he took under S. 476, Criminal P. C., were based on an application made by Shamdeo during the trial of the case under S. 447, I. P. C. It was on this application that immediately on the disposal of that case the Honorary Magistrate ordered notices to issue against the five persons tried by the Court of Session to show cause why a complaint should not be made against them in respect of offences arising out of the forgery and its user. Before the expiry of his powers as a Magistrate, Mr. Islam adjourned these preliminary proceedings on the request of the five persons, as they represented that the same matter was directly and substantially in issue in the appeal that Jageshwar and Jagdeo had preferred against their conviction. The appeal was disposed of and the record returned after the expiry of the magisterial powers of Mr. Islam, who however proceeded to complete the preliminary proceedings under S. 476, Criminal P. C., without any objections raised by the five accused as regards his authority. He complained against three persons only out of the five, and on an appeal by Shamdeo under S. 476-B, Criminal P. C., the District Magistrate complained against the other two. The terms of this latter complaint distinctly indicate that the District Magistrate endorsed the complaint of Mr. Islam against the other three accused. The District Magistrate concluded :

> The witnesses against them (Raghubar and Bikhari) will be the same as in the case against the other three persons already prosecuted over the same transaction. The present accused should also be proceeded with in the same case.

It was upon these two complaints that the Committing Magistrate proceeded against the five persons. The power, if it may be so-called, to make a complaint under S. 476, is not among the powers specified in Schs. 3 and 4, Criminal P. C., and is not a Magisterial power, for it can be exercised as well by Civil or Revenue Courts as by Criminal Courts. The object of S. 195 clearly is to avoid harassment at the instance of private parties who may be acting for reasons of their own rather than in the interests of the administration of justice, and the complaint required by the section merely bars the taking cognizance of offences in the ordinary way under S. 190 (1). It cannot be said that this object was in any way defeated by the fact that at the time he made his complaint, Mr. Islam was not empowered to act as a Magistrate. He was not an officious intruder, but was merely completing the preliminary proceedings that he had begun before the expiry of his powers as a Magistrate and that he had adjourned at the request of the accused; and he was doing this at a time when it is not suggested on behalf of the appellants that there was in existence any Court which could be pointed out as the proper Court for completing the proceedings.

Had any objection been raised at that time on behalf of the accused, the matter would doubtless have been disposed of by the District Magistrate under S. 559 (2). But in any event Mr. Islam's complaint against Jageshwar, Jagdeo and Jugal was definitely endorsed by the District Magistrate while exercising his powers under S. 476-B in respect of the other two accused. It seems to me that it is now too late under S. 537 of the Code for the appellants to ask for a reversal of their convictions on the ground "of any error, omission or irregularity in the complaint " required under Section 195 for the initiation of the proceedings against them, since the objection could and should have been raised at more than one earlier stage in the proceedings. As regards the charge under S. 120-B, I. P. C., I observe that this section was mentioned in Shamdeo's initial application to the Honorary Magistrate against all the five accused merely on the footing that they had conspired to forge the mortgage-deed to support the false claim of Jageshwar and Jagdeo in the case under S. 447.

There never was any case of criminal conspiracy against these persons apart from the forgery and its user, and it is not suggested by the learned advocate for the appellants that any evidence was given on the charge of criminal conspiracy apart from what was given in respect of the other offences. The conspiracy was only inferable from the forgery and user, if proved, but would in that case come within the provisions of the Penal Code as regards abetment and would therefore not be punishable under S. 120-B at all. The charge under this section against the accused was thus also entirely unnecessary. The formal

addition of such a charge has plainly not affected the decision of the case on the merits, and it will therefore be sufficient to set aside the convictions of the appellants under this charge.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1936 Patna 350

VARMA AND ROWLAND, JJ.

Emperor—Appellant.

v.

Chaturbhuj Narain Choudhury—Respondent.

Govt. Appeal No. 1 of 1935, Decided on 30th September 1935, from decision of Deputy Magistrate, Darbhanga, D/- 29th January 1935.

(a) Interpretation of Statutes—Penal law—Dishonest intention is essential element of offence—No conviction unless guilty mind is proved.

Unless the statute creates an offence independently of dishonest intention there ought not to be a conviction unless the guilty mind is proved. [P 352 C 1]

(b) Penal Code (1860), S. 405—Fraud or deceit is not an ingredient.

Dishonesty is an essential ingredient of the offence defined in S. 405, and must be proved; fraud or deceit is not an ingredient. [P 352 C 1]

(c) Penal Code (1860), Ss. 24 and 405—"Wrongful gain" and "wrongful loss" meaning, explained.

"Wrongful gain" includes wrongful retention, and "wrongful loss" includes being wrongfully kept out of property as well as being wrongfully deprived of property : 22 *Cal* 1017 (*F B*) and 1929 *Pat* 429, *Foll.* [P 352 C 1]

(d) Penal Code (1860), S. 409—Intention wrongfully to deprive owner of use of property for a time and secure use of it for his own benefit for a time is sufficient.

To establish dishonesty, it is not necessary that the prosecution should establish an intention to retain permanently the property misappropriated. An intention wrongfully to deprive the owner of the use of the property for a time and to secure the use of the property for his own benefit for a time, may be sufficient : 8 *Bom L R* 951, *Foll.* [P 352 C 1, 2]

(e) Penal Code (1860), S. 409—Ingredients—Precise manner the money was spent or appropriated by the accused not necessary to be proved.

It is not necessary or possible in every case of criminal breach of trust to prove in what precise manner the money was spent or appropriated by the accused because under the law even temporary retention is an offence provided that it is dishonest but the essential thing to be proved in case of criminal breach of trust is whether the accused was actuated by dishonest intentions or not. The question of intention is not a matter of direct proof but the failure to account for the money proved to have been received by the accused, or giving a false account as to its use is generally considered to be a strong circumstance against the accused. The mere act or intent to deprive the master of his property is the gist of the offence : 1930 *Pat* 209; 1925 *Lah* 411; *L. E. Lainer* v. *The King*, (1914) *A C* 221 and *R. B. Nomar*, (1842) *Car & M* 501, *Ref.* [P 352 C 2]

(f) Criminal Trial—Appeal from acquittal—Principles which should be observed stated.

The accused in an appeal from an acquittal retains his right of being presumed to be innocent until the charge is fully brought home to him. He has the right which he had in the trial Court of being given the benefit of a reasonable doubt as to his guilt. He must also have the benefit of the opinion of the trial Court upon the credibility of the witnesses whom that Court had the advantage of seeing face to face and judging of their demeanour and he has the right to ask that the acquittal should not be set aside unless the trial Court has taken a perverse view of the evidence and has arrived at an unnatural and distorted conclusion : 1929 *Pat* 491 and 1934 *P C* 227 (*P C*), *Foll.* [P 353 C 1]

(g) Evidence Act (1872), S. 14—Prosecution under S 409, Penal Code—Evidence as to history and dealings between accused and owner is relevant.

In a prosecution under S. 409, Penal Code, the evidence as to the history and the dealings between accused and his master or officer is relevant under S. 14, Evidence Act, for the purpose of showing the accused's state of mind, and it is from this evidence that the Court has to deduce whether the intention of the acoused was dishonest within the meaning of the statute, always remembering that if there is room for reasonable doubt the accused is to get the benefit of it. [P 353 C 2]

(h) Penal Code (1860), S. 409—Entrusting in capacity of agent necessary — Accused need not be agent when committing breach of trust.

All that S. 409 requires is that the person charged with the offence must have been entrusted with the property in his capacity of an agent, but the section does not require that he should still be agent at the time of committing the breach of trust. [P 356 C 1]

(i) Penal Code (1860), S. 409—Marginal note must not prevail over description of offence.

The description of the offence itself in S. 409 must prevail over that in the margin. [P 356 C 1]

(j) Penal Code (1860), S. 409—Charge can be framed with reference to date of overt act manifesting intention.

The gist of the offence being the mental act of the accused, it is beyond the power of any other person to give direct proof of the act or of its date : the prosecutor, in asking the Court to frame a charge, is entitled to refer to the date of the overt act by which that intention is manifested and put into effect, and on which he relies as proof of the misappropriation. [P 356 C 1]

Govt. Advocate and *Asst. Govt. Advocate*—for Appellant.

Manohar Lal and *Rai Kant Choudhury*—for Respondent.

Rowland, J. — This is an appeal by Government against the judgment and order of the Deputy Magistrate, Darbhanga, acquitting the accused Babu Chaturbhuj Narain Choudhury, pleader, on a charge of an offence punishable under S. 409, I. P. C, which was to the effect that he, between 21st March and 27th March 1934, being an agent for the Maharajadhiraj of Darbhanga, had committed criminal breach of trust by misappropriating Rs. 5,689-7-6, money belonging to his employer consisting of decretal amounts withdrawn from the Munsif's Court in Darbhanga and decretal money and unsued for rents realized from tenant defendants or judgment-debtors and the balance of unspent law advances. The judgment of the Magistrate opens with a clear statement of the facts. He has correctly recited the duties of the accused as Raj pleader from which recital it is perfectly clear that the moneys received by him in the course of his employment were so received in the capacity of an agent. He was discharged from the service of the Raj on 20th March 1934. He submitted his accounts within the next few days, and according to those accounts there was a balance of Rs. 5,689-7-6 due to the Raj. He has not paid any part of this amount in spite of repeated demands. "The allegation therefore is that as an agent he was guilty of an offence under S. 409, I. P. C."

The accused admits withholding the money. He says in his written statement "the money on account is lying with me to the credit of the Raj." He says that he was ready to pay up the balance in hand, but was advised not to pay because the Raj would not finally accept his account as correct and would not dispose of his claims (for election expenses and some other items), therefore he says he withheld the money

> to compel the Raj to go to the civil Court so that the accused's due may be judicially recognised and adjusted and at the same time the accounts of the accused may be judicially pronounced to be correct so that the accused may be freed from all future troubles.

The Magistrate thought that the accused had claims which justified him in withholding the money and has acquitted him. In appeal it is said that the Magistrate has proceeded on a wrong view of law and that the claims which accused might have against the Raj could ~~not~~ in any case amount to more than a few hundred rupees which could not justify him in withholding payment of over five thousand rupees. It is contended that this withholding of the money is itself sufficient to establish the offence charged. The correspondence will not support the inference which the Magistrate has based on it. Before examining the facts it will be well to make it quite clear what the prosecution has to prove in a case of this nature. The English law is thus stated in Halsbury's Laws of England: Vol. 9, Part 13, para. 892:

> The crime of embezzlement is complete when the servant fraudulently misappropriates the property, and he is not necessarily entitled to be acquitted because he has made true and correct entries in his master's accounts. But if the money received for the employer is accounted for and not denied, the fact of not paying it over without some evidence of fraudulent intent is not sufficient proof of the felony.
>
> If the prisoner does not deny the receipt or appropriation of property which he is accused of embezzling, but acknowledges that he received it and alleges a right or an excuse for detaining the property, unless it is clear that such allegation is merely a pretence, he ought not to be convicted of embezzlement.

This is of course the briefest summary of the decisions, and the last proposition is based on a decision (1842) Car and M 501 (1), which has not always been followed in subsequent cases. The principles to be borne in mind in a prosecution for embezzlement were examined in (1914) A C 221 (2), where the essence of the offence is said to be that:

> The conduct which is libelled has been a wilful appropriation by the accused of the property of another, or after possession of the same has been acquired, a wilful squandering or destruction of it to his prejudice. The mixture of the funds of another with one's own funds may be in many cases natural and proper, in other cases convenient but irregular, and in the third, both irregular and criminal. The distinctions between these cases require to be treated with the greatest judicial care, so as, while observing the amplest civil responsibility, to prevent the third or criminal category from being extended to mistaken though convenient acts. This is only to say that apart from constructive criminal responsibility, which of course may be imposed by statute, a Court of Justice cannot reach the conclusion

1. R. B. Norman, (1842) Car & M 501.
2. L. E. Lanier v. The King, (1914) A C 221=110 L T 326=30 T L R 53=24 Cox C C 53.

that crime has been committed unless it be a just result of the evidence that the accused in what was done or omitted by him was moved by the guilty mind.

That case was a decision on facts different from those before us and involving the construction of statutory provisions different from those of the Indian Penal Code; but it is laid down as a principle of general application that unless the statute creates an offence independently of dishonest intention, there ought not to be a conviction unless the guilty mind is proved. The definition of criminal breach of trust in S. 405 penalises a dishonest misappropriation or conversion or dishonest use or disposal of property in an improper manner, that is to say, dishonesty is an essential ingredient in the offence and must be proved. "Dishonestly" is an expression defined in the Penal Code and it is to that definition, and not to the popular meaning of the word, that we must look. It is important to notice that fraud or deceit is not an ingredient in the definition. A thing is said to be done dishonestly according to the definition in S. 24, I. P. C., when it is done with the intention of causing wrongful gain to one person or wrongful loss to another and these expressions are defined in S. 23, and have been explained in the Full Bench decision of the Calcutta High Court in 22 Cal 1017 (3), which was followed in this Court in 10 P L T 483 (4). Wrongful gain includes wrongful retention, and wrongful loss includes being wrongfully kept out of property as well as being wrongfully deprived of property. Expln. (1) to S. 403, I. P. C., makes it clear that a dishonest misappropriation for a time only is a misappropriation within the meaning of this section.

The decision of the Full Bench was that where a creditor seized property of his debtor with the intention not of permanently retaining that property but of compelling the debtor to satisfy the debt the taking was dishonest within the meaning of the definition. To establish dishonesty therefore it is not necessary that the prosecution should establish an intention to retain permanently the property misappropriated. An intention wrongfully to deprive the owner of the use of the property for a time and to secure the use of the property for his own benefit for a time, may be sufficient. It was so held in 8 Bom L R 951 (5). At the hearing we were shown a large number of decisions on cases in which the prosecution had established irregularities of one kind or another, retention of trust property, omission to account, false accounting, and in which such irregularities had been held to amount or not to amount to criminal breach of trust. It will serve no useful purpose to examine the facts of all those decisions in the attempt to arrive at a rule enabling one to say that this or that overt act or this or that irregularity in conduct will or will not amount to criminal misappropriation or breach of trust. I am quite unable to deduce any such hard and fast rule from the decision, and I do not think that there is any such rule. The principle to be followed is, if I may say so with respect, correctly laid down in two decisions: one of this Court 11 P L T 319 (6), a case ending in acquittal; and the other in 6 Lah 257 (7) which ended in conviction. In the former of these cases Fazl Ali, J., said:

> It is not necessary or possible in every case of criminal breach of trust to prove in what precise manner the money was spent or appropriated by the accused, because under the law even temporary retention is an offence provided that it is dishonest;
>
> but
>
> the essential thing to be proved in case of criminal breach of trust is whether the accused was actuated by dishonest intentions or not. As the question of intention is not a matter of direct proof, the Courts have from time to time laid down certain broad tests which would generally afford useful guidance in deciding whether in a particular case the accused had mens rea for the crime. So in cases of criminal breach of trust the failure to account for the money proved to have been received by the accused or giving a false account as to its use is generally considered to be a strong circumstance against the accused. We should however not lose sight of the principle and make a universal formula of what is after all only an indication of or a piece of evidence pointing to dishonest intention.

The other case proceeded directly on the view that "the mental act or intent

3. Queen-Empress v. Sri Churn Chungo, (1895) 22 Cal 1017 (FB).
4. Jagannath Misra v. King-Emperor, 1929 Pat 429=115 I C 895=30 Cr L J 546=10 P L T 483.
5. Emperor v. Chhagan Lal, (1906) 8 Bom L R 951=5 Cr L J 5.
6. Harakrishna Mahatab v. Emperor, 1930 Pat 209=121 I C 321=31 Cr L J 249=11 P L T 319.
7. Crown v. Dina, 1925 Lah 411=88 I C 461=26 Cr L J 1149=6 Lah 257.

to deprive the master of his property is the gist of the offence." Extracts are cited from two English decisions in each of which the jury were told that some circumstance proved was "evidence from which you may infer that she (or he) intended to appropriate the money;" and that if they drew that inference they should convict. These decisions, it seems to me, are entirely in accordance with the principle laid down by their Lordships of the Privy Council in *Lanier's* case (2) above cited. The Magistrate's statement of the law applicable is that

> if the accused's submissions are reasonable, and if it appears that he had a bona fide even though mistaken idea of his claims, he would be not guilty; on the other hand if his claims appear to be clearly empty ones, without any substance, then of course he is guilty.

These remarks do not show a grasp of the fundamental idea that the essence of the case was what intention is to be attributed to the accused. In dealing with this matter, which is one of inference and opinion rather than one capable of direct proof, we have further to remember that this is an appeal from an acquittal, and as pointed out in 8 Pat 496 (8):

> The accused in an appeal from an acquittal retains his right of being presumed to be innocent until the charge is fully brought home to him. He has the right which he had in the trial Court of being given the benefit of a reasonable doubt as to his guilt. He must also have the benefit of the opinion of the trial Court upon the credibility of the witness whom that Court had the advantage of seeing face to face and judging of their demeanour and he has the right to ask that the acquittal should not be set aside unless the trial Court has taken a perverse view of the evidence and has arrived at an unnatural and distorted conclusion.

The principles which should govern the High Court in dealing with an appeal from acquittal were considered in 15 P L T 607 (9), by their Lordships of the Privy Council whose conclusion agrees with what is stated in the Patna decision. In the present case the following matters detract from the weight to be attached to the decision of the first Court. First, in stating the law he appears to have missed the substantial point of the matter that he had to try and instead propounded as the main question a point which is really a side issue; secondly, the material evidence in the case was almost entirely documentary. Practically nothing turned on the appreciation of oral evidence and, so far as the documents are concerned, the appellate Court is in as good a position to form its own conclusion as the Court of first instance; thirdly, the Magistrate's examination of the papers is based on an incomplete survey of the documentary material. His attention was drawn prominently to the letters which referred to the dispute between the accused and Babu Bulaki Lall Matha, Circle Manager of Ahins Circle; but to form a correct conclusion on the point which I have stated for our consideration, it is necessary to deal with the whole of the correspondence relied on by both sides, which I shall therefore now proceed to examine. (After examining the whole of the correspondence His Lordship proceeded.) The charge refers to the period between 21st March and 27th March 1934. That is the period during which the accused wrote letters bearing date 21/23rd March 1934, to the several Circle Managers advising them that he was sending their dues as noted in the chalans which he sent with his letter, but did not send any money. The evidence as to the history and the dealings between accused and the officers of the Raj is relevant under S. 14, Evidence Act, for the purpose of showing the accused's state of mind and it is from this evidence that we have to deduce whether the intention of the accused was dishonest within the meaning of the statute, always remembering that if there is room for reasonable doubt the accused is to get the benefit of it.

I propose to examine the claims referred to in para. 4 of the accused's written statement. The first claim mentioned is that for election expenses. Ex. A shows that he was promised Raj support and Ex. B shows that the Circle Managers concerned were instructed to give him assistance. It nowhere appears that the Chief Manager ever undertook to bear the entire expenses which might be incurred by the accused in contesting the election. When the accused found himself incurring heavy expenses on account of the election, it was a loan of Rs. 300 and not a grant which he asked for in his letter Ex. 19. Ex. E/3 of 16th May 1933 may be described as a begging letter rather than a letter making any claim.

8. Emperor v. Deboo Singh, 1929 Pat 491=1929 Cr C 243=120 I C 634=8 Pat 496.
9. Sheo Swarup v. Emperor, 1934 P C 227=1934 Cr C 1134=151 I C 322=56 All 645=61 I A 398=15 P L T 607 (P C).

Ex. G of 25th August 1933, if genuine is the letter with which the accused sent to the Chief Manager his election accounts for Rs. 1,472-5-0 saying that he had only been granted Rs. 500 and had taken Rs. 300 as an advance against his retainer fee. Assuming it to be genuine it is certainly a request and not a demand or claim. Ex. G/1 of 11th December 1933, is again a request and not a claim. The letter concludes by leaving everything to the kindness of the Chief Manager. In Ex. 53 dated 2nd April 1934, it is no claim that accused puts forward, but a prayer for "kind indulgence over my election account." The matter is again referred to in Ex. 19/8 from the accused to the Chief Manager dated 26th June 1934, where he says :

> Besides I should be permitted to claim some more money from the Raj as requested in my demi-official letter No. 1 of 10th April 1934; of course this is entirely dependent upon your kindness.

Therefore the election account was not a business in respect of which anything was justly due from the Raj to the accused and in respect of which the accused could lawfully claim to withhold payment until it was adjusted. Mr. Danby, P. W. 23, says that Rs. 300 was the amount that was ordinarily allowed to those candidates whom the Raj helped. The accused in fact got Rs. 500 and Babu Bulaki Lal Matha, another candidate supported by the Raj, got Rs. 350 towards his expenses. Mr. Tarleton, P. W. 3, also stood as a candidate and his expenses were paid by the Raj, but it does not appear how much. The written statement refers to "other claims," but the only one that I can trace is a claim for Rs. 192. The earliest reference to this in the correspondence appears to be in Ex. 19/4, letter of accused to the Chief Manager dated 10th April 1934, and demi-official letter of the same date Ex. 53/1 from the accused to the Chief Manager. In the official letter the accused says:

> I have furthermore to request you to direct early payment of the balance of my bill of Rs. 192 on Ahins Circle account out of which, I am told, you have ordered for deduction of a sum of Rs. 50, the only sum standing against me in my advance account.

This sum of Rs. 50 appears to be the balance of the loan of Rs. 300 taken by the accused as a personal advance in May 1933. In the demi-official letter accused says:

> My bill for Rs. 192 has been passed with respect to Ahins Circle, and I am told, you have ordered for deduction of Rs. 50 which is the only sum standing against me in my advance account. May I get that balance amount of Rs. 152 soon.

It may be noted that the balance after deducting Rs. 50 from Rs. 192 would be Rs. 142 and not Rs. 152. The matter is again referred in letter Ex. 19/8, dated 26th June 1934, from the accused to the Chief Manager. The accused says:

> Raj should pay me a sum of Rs. 192 only as my dues of fees on account of Ahins Circle for which my bill has been passed and payment has been withheld.

Here the accused ignores the deduction of Rs. 50 on account of outstanding advance to him. The correspondence regarding this claim does not at all disclose that it was either the reason or the pretext for withholding payment of the Raj dues. The two items of claim, if we call them both claims, together only amount to Rs. 972-5-0 and Rs. 142, total Rs. 1,114-5-0, and this could never justify the accused in withholding the Raj dues exceeding this claim by over Rs. 4,000. I turn now to the matter which has attained such prominence in the judgment of the Magistrate, that is to say the relations between accused and the Circle Manager, Ahins. It is not necessary to make a separate analysis of this part of the correspondence. It is clear that from the start Babu Bulaki Lal Matha was disposed to regard the accused's accounting with suspicion and in every case of irregularity to infer if not to impute dishonesty. Perhaps a more generous spirit would not have been so ready at the earliest moment to think the worst of accused, but the fact is clear that there were material irregularities since several months before the dates which have been the subject of the charge, and by February the accused was definitely behind hand with remittances which were due on fixed dates. The suggestion however that accused was withholding the moneys due because of an imputation made against his conduct by the Ahins Manager, does not appear until a later stage. The earlier defaults were explained by the accused at the time as being due to an accounting irregularity, namely that being kept short of advances on law cash account by the Manager, Ahins, he found it necessary to use some of the decretal moneys in his hand for urgent law expenses and there-

fore was not in a position to make remittances punctually. "I have spent and am spending the Raj money in Raj cases" Ex. E. In his letter Ex. G-3, dated 16th March, to Maharajadhiraj, the accused says:

> I had several disputes with Manager, Ahins Circle, for not sending advances to meet expenses of cases pending in my file.

There is no suggestion that it was withheld because of an imputation that his accounts were incorrect. There was an offer in February to pay up Rs. 2,000 then in arrears, conditionally on receiving an assurance that accused would not be discharged. The plea that money was withheld because an imputation was made that accused had not correctly accounted appears for the first time after the Chief Manager had written to the accused letter Ex. 54/2, dated 28th March 1934. The summary which I have given makes it clear how the expression "not credited in your accounts" was apparently based on a misunderstanding of Surenrda Prasad's note Ex. 48/1. The accused has made this imputation the central point of his defence and contends that so long as that imputation is not withdrawn he was justified in withholding the money. I have pointed out that in office notes on the correspondence it was stated "there is no question of suppression of any account at present," but this does not appear to have been communicated to the accused. That is unfortunate and its result certainly was to leave the accused in suspense as to whether he was likely to be charged only with wrongful retention of Raj money or also with falsification of his accounts. It was not until oral evidence was entered into that accused could know that no charge of falsification was laid against him and no such imputation made. The complainant Babu Dani Lal Matha in cross-examination states :

> The accounts were correctly drawn up. I know of no item in which the accused may have realised money and not noted it;

and similar admissions were taken from other witnesses. But the fact remains, that the accused had failed in his duty before Mr. Danby ever wrote his unfortunate letter, Ex. 54/2, dated the 28th March. Therefore, though this letter may have given a pretext for the withholding of money during the subsequent period, it cannot be the reason why the money was not paid as it should have been before the letter was issued. The point that we have to see is whether the accused was guilty of criminal breach of trust in not paying the money before that date. At the time of his dismissal he took a week's time for making over charge completely which of course must include making payment. He advised the respective circles that money was actually being sent and he sent none. The point we have to see is, was this dishonest? There is dishonesty if he had spent it for his own purposes and had not the means to send it. The Government-Advocate has argued that the inference to be drawn from what happened in February and March was that the accused had spent the money for his own purposes, and he has referred us to the existence of decrees obtained by creditors against the accused for the money. These are Ex. 51, dated 4th December 1931, a compromise decree for Rs. 310, payable in three instalments: Rs. 100 in February 1932, Rs. 105 in April 1932, and Rs. 105 in June 1932, a compromise decree Ex. 51/2, dated 5th July 1933 for a sum of Rs. 700, and a consent decree, Ex. 51/1 dated 14th September 1932, for Rs. 395. (The last named decree however appears to be beyond the period which we are considering and to be hardly relevant). The abortive negotiations for payment in February and for part payment in July are however undoubtedly relevant. From the whole tenor of the correspondence it seems to be clear that the accused was in March 1934 unable or unwilling to produce the money, and from then onwards was playing for time.

The sending of letters to the Circle Managers was merely in the words of the Manager Ahins, "a dodge played" by the accused who did not intend to send the money. His failure to do so was wilful and dishonest within the meaning of the statute. I would, therefore, allow the appeal and convict the accused of criminal breach of trust. It has been argued that as the breach of trust charged relates to a period during which the accused was no longer in Raj service having been dismissed on 20th March 1934, and, therefore, the offence is not criminal breach of trust by an agent punishable under S. 409 but at most a breach of trust punishable under S. 406, I. P. C.

The marginal note to S. 409 describes the offence as criminal breach of trust by public servant . . . or an agent, and may lend some colour to the argument advanced, but the description of the offence in the section itself must prevail over that in the margin. It is clear from the definition that the person charged must have been entrusted with the property in his capacity of an agent, but the section does not require that he should be still an agent at the time of committing the breach of trust. I have shown above that the money was entrusted to the accused in the capacity of an agent, and, therefore, the offence falls under S. 409. The date assigned in the charge to the commission of the offence is between 21st and 27th March 1934; whereas the evidence indicates at least the possibility that accused had committed the misappropriation earlier. Is the charge then defective? I think not. The gist of the offence being the mental act of the accused, it is beyond the power of any other person to give direct proof of the act or of its date; the prosecutor in asking the Court to frame a charge is entitled to refer to the date of the overt act by which that intention is manifested and put into effect, and on which he relies as proof of the misappropriation. It is the practice, and in my view the correct practice, to frame the charge with reference to any such act.

It remains to consider the question of sentence. In deciding what sentence to impose I think that, we ought to bear in mind the fact that, so far as it appears, the accused correctly entered in his account all items of receipt and has not made any false entries in his books. We should also bear in mind that the accused was put in fear of a possible charge of fraudulent accounting in addition to that of retention of the trust money and suffered in consequence additional anxiety and mental distress. Therefore, in my opinion, it is not necessary to impose a long term of imprisonment though the section requires us to pass a sentence of imprisonment. I would impose the sentence of rigorous imprisonment for three months and a fine of Rs. 7,500, in default to be rigorously imprisoned for a further period of one year and three months. Of the fine, if realised, Rs. 6,000 should be paid to the complainant on behalf of the Maharajadhiraj of Darbhanga as compensation and expenses under S. 545, Criminal P. C.

Varma, J.—I agree.

V.B./R.K. *Appeal allowed.*

A. I. R. 1936 Patna 356

SAUNDERS, J.

Ramrachhya Singh and *others* — Appellants.

v.

Damar Singh and *others* — Respondents.

Appeal No. 122 of 1935, Decided on 14th February 1936, from appellate order of Deputy Commissioner, Hazaribagh, D/- 22nd December 1934.

Chota Nagpur Tenancy Act (6 of 1908), S. 11—Rent suit—Issue of limitation decided in plaintiff's favour — Defendants have no right of appeal to Deputy Commissioner.

Where in a rent suit on an objection by defendants that the suit is barred by provisions of S. 11, the Court with the consent of parties framed a preliminary issue on the point and decides it in favour of the plaintiff, no appeal lies to the Deputy Commissioner because a decision on such point in plaintiff's favour is not a decree declaring or determining the rights of parties conclusively. If on the other hand the point was decided against the plaintiffs and their suit was dismissed, they would undoubtedly have a right of appeal. [P 357 C 1]

Nirod Chandra Ray—for Appellants.

Mahabir Prasad and *Harinandan Singh*—for Respondents.

Judgment. — In a suit brought by a person claiming to be a tenure-holder for arrears of rent payable by raiyats holding land in the tenure, the latter objected that the suit was barred by the provisions of S. 11, Chota Nagpur Tenancy Act, because the plaintiffs' names had not been registered in the office of the superior landlord as required by that section. This question was decided by the trial Court as a preliminary issue with the consent of the parties and the Court held that as the plaintiffs had acquired a title to the estate by adverse possession, S. 11 of the Act was inapplicable. Having decided this issue the Court was about to proceed with the trial of the suit but the defendants preferred what purported to be an appeal against the decision to the Deputy Commissioner. The appeal was heard and

decided in the plaintiffs' favour, the Deputy Commissioner holding that registration of their names was necessary. The appeal was accordingly allowed and the Rent Suit Deputy Collector, before whom in the meantime by the order of the Deputy Commissioner the further hearing of the suit had been stayed, dismissed the suit in conformity with the appellate Court's order. This second appeal by the plaintiffs is against the order of the Deputy Commissioner.

The first point taken on behalf of the appellants is that the order of the learned Deputy Commissioner was made without jurisdiction as no appeal lay to him from an order passed by the trial Court on a preliminary issue which did not amount to a decree. This contention, in my opinion, is correct. No appeal lay from the decision of the Deputy Collector as from a decree for it did not, so far as the Court that made it was concerned, conclusively determine the rights of the parties with regard to any of the matters in controversy in the suit. Only one issue has been decided and it remained to be decided whether the plaintiffs were entitled to a decree for rent. The position would of course have been different if the Deputy Collector had decided the issue against the plaintiffs and dismissed their suit.

The plaintiffs would then have had a right of appeal. The appeal was apparently taken by the Deputy Commissioner to be from an order; but I do not find any provision in the Chota Nagpur Tenancy Act that permits an appeal from an order of that kind. The hearing of a suit cannot be interrupted in order to enable a party to it to obtain a decision of an appellate Court as to whether a particular issue has been correctly decided. S. 215 of the Act provides that no judgment of a Deputy Commissioner (which term includes a Deputy Collector empowered to try rent suits) in any suit and no order of a Deputy Commissioner passed in any suit relating to the trial thereof . . . . . shall be open to revision or appeal otherwise than as expressly provided in the Act. The appeal, it must be supposed, purported to be under sub-s. (2) of S. 218. But that section allows an appeal only where the suit had been tried and decided. In the present case only one issue had been decided. This second appeal may be taken to be an application for revision and in exercise of the Court's powers of revision I set aside the order of the Deputy Commissioner allowing the appeal and the order of the Rent Suit Deputy Collector dismissing the suit. The hearing of the suit on the other issues will now proceed. If the suit is decreed by the trial Court, it will of course be open to the defendants to appeal on the ground that the suit is not maintainable in view of the provisions of S. 11, Chota Nagpur Tenancy Act. The parties will bear their own costs of this Court and of the Court of the Deputy Commissioner.

B.D./R.K. *Order set aside.*

A. I. R. 1936 Patna 357

AGARWALA AND ROWLAND, JJ.

Gochuran Singh Chaudhury — Appellant.

v.

Ramballabh Das and *another* — Respondents.

Appeal No. 272 of 1934, Decided on 16th March 1936, from original order of Sub-Judge, Shahabad, D/- 14th September 1934.

Receiver — Appointment of— Receiver of mortgagor's property appointed by insolvency Court—Subsequent appointment of a receiver in mortgage suit—Effect of a later appointment would be to deprive creditors in insolvency of usufruct of mortgage property—Appointment of receiver in mortgage suit was set aside.

The considerations which apply in a suit between the mortgagee and mortgagor as regards the appointment of a receiver differ considerably from the considerations which arise where the interests affected are not of the mortgagor only, but also of the mortgagor's creditors. The appointment of a receiver in the mortgagor's suit will have the effect of depriving the creditors in the insolvency proceedings of the benefit of the usufruct of mortgaged property although the mortgagee has not yet obtained a final decree in the mortgage suit. Hence the appointment of a receiver in a mortgage suit subsequent to the appointment of receiver in insolvency was set aside. [P 358 C 1, 2]

B. C. Sinha and *H. Singh*—for Appellant.

D. N. Varma—for Respondents.

Agarwala, J.—The appellant is a receiver appointed in the insolvency of defendants 1 and 2 who executed a mortgage in respect of sixteen annas of village

Kalayanpur and 10 annas 8 pies of Sanjhauli. The mortgagee sued on the footing of his mortgage and obtained a preliminary decree on 8th June 1935. An appeal against that decree is pending in this Court. In the meanwhile the mortgagors were declared insolvent and a receiver was appointed who has taken possession of Kalayanpur. The plaintiffs in the mortgage suit also applied for the appointment of a receiver. In that suit the Court below has passed an order appointing a receiver. An appeal was preferred against that order by the sons of the mortgagors who were co-defendants in the suit. Their appeal was not pressed and has been dismissed.

In the present appeal it has been contended by the learned advocate for the appellant that a receiver should not have been appointed in the suit after the receiver of the property of the insolvents had been appointed by the insolvency Court; and it was further argued that the Court has no power to appoint a receiver at the instance of a simple mortgagee. For this latter proposition reliance was placed on the decision of this Court in 13 P L T 525 (1). For the respondents reliance was placed on the decisions in 56 Mad 915 (2) and 47 Cal 418 (3) in which it was held that a receiver may be appointed at instance of a simple mortgagee. It is not necessary in the circumstances of this case to attempt to reconcile the divergence of views revealed by these decisions; but it may be mentioned that considerations which apply in a suit between the mortgagee and his mortgagor may differ considerably from the considerations which arise where the interests affected are not of the mortgagor only but also of the mortgagor's creditors.

In the present case the appointment of a receiver in the mortgagee's suit will have the effect of depriving the creditors in the insolvency proceedings of the benefit of the usufruct of the mortgaged property although the mortgagee has not yet obtained a final decree in the mortgage suit. The order we propose to make in the present case is to set aside the order appointing the receiver in the mortgage suit so far as village Kalayanpur is concerned and to direct the receiver in insolvency to repay to the mortgagees the amount which they have spent to save the mortgaged property from sale for public demands and to see that future public demands are paid in due time to prevent the mortgaged property being sold. The appellant is entitled to his costs. Hearing fee two gold mohurs.

Rowland, J.—I agree.

M.D./R.K. *Order set aside.*

1. Nrisingha Charan Nandy v. Rajniti Prasad Singh, 1932 Pat 360=142 I C 300=13 P L T 525.
2. M. Paramasivan Pillai v. Ramasami Chettiar, 1933 Mad 570=145 I C 449=56 Mad 915=65 M L J 222 (F B).
3. Rameshwar Singh v. Chuni Lal Shaha, 1920 Cal 545=56 I C 839=47 Cal 418=31 C L J 385.

A. I. R. 1936 Patna 358

VARMA AND ROWLAND, JJ.

Nanhkoo Mahton—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 311 of 1935, Decided on 28th February 1936, against order of Addl. Sess. Judge, Patna, D/- 25th November 1935.

(a) Evidence Act (1872), S. 21—False report by accused to police of offence—Report not a confession to Magistrate under Criminal P. C., S. 164, as accused reported was not accused under S. 211, I. P. C., but only witness making statement of admission—Hence admissible in evidence under S. 21.

One *N* falsely reported to police that two persons caused death of his child. On investigation it was found that report was false and malicious. *N* therefore was convicted under S. 211, I.P.C. It was contended for the accused that the report by accused was a confession recorded by Magistrate and as the rules under S. 164, Criminal P. C., were not observed it was not admissible in evidence:

Held: that the accused when reported to police was not accused but was only a witness making a statement amounting to admission and therefore was admissible in evidence under S. 21, Evidence Act. [P 359 C 1, 2]

(b) Penal Code (1860), S. 211—False report by accused to two officers—One not competent to investigate—Offence under S. 211 held partially committed at each place.

The accused reported to two police officers, one being A. S. I. of M, who had no jurisdiction to investigate but the other, the S. I. of S, had:

Held: that accused committed offence though partially at each place: 17 *Cal* 574 (*F B*) and 1925 *Pat* 678, *Applied*. [P 360 C 1]

(c) Criminal Trial—Charge — Offence at two places but only one stated—Accused not misled in defence—His conviction is unaffected.

The offence was committed partially at two places but only one place was mentioned in the charge:

Held: that by mentioning of only one place, the accused was not misled in his defence and that that did not affect his conviction. [P 360 C 1]

B. N. Rai—for Appellant.
Asst. Govt. Advocate—for the Crown.

Rowland, J.—The appellant Nanhkoo has been convicted under S. 211. I. P. C. by the unanimous verdict of a jury on a finding that an information laid by him on 25th May 1935 before the Assistant Sub-Inspector at Mokamah, which he confirmed the same evening before the Sub-Inspector of P. S. Sarmera was false, and by making it he falsely charged and instituted criminal proceedings against Munshi Mahton and Sheocharan Nahton.

The child of the accused an infant of eight months died on 24th May 1935 in village Govindpur, P. S. Sarmera but the accused went first to police station, Mokamah where his statement was taken in the form of fard-beyan by the Assistant Sub-Inspector who after taking down the statement sent the informant to the Sub-Inspector of Sarmera. The latter officer read the statement to Nanhkoo who confirmed it and the officer then drew first information report on the basis of it. The allegation was that the two accused had come to the house of Nanhkoo in his absence, had thrown down his wife causing the fall and death of the child by injury to the head and had snatched away the hasuli from the neck of his wife. The hasuli was described in detail, mention being made of an inscription of the name of the informant engraved upon it. On investigation of the case the Sub-Inspector came to the opinion that it was wilfully and maliciously false, and the Court of Session has given effect to that view of the facts. The only point of law that could be taken in connection with the question of fact was that the Court was wrong in allowing a statement of accused made on 29th May to go to the jury. This was a statement made by him before a Magistrate who recorded it under S. 164, Criminal P. C. The Magistrate did not caution Nanhkoo in the manner prescribed for warning a confessing accused and did not record the statement in the form prescribed for recording confessions.

The answer to this argument is that at time Nanhkoo was not an accused person but a witness and the statement which the Magistrate recorded was not a confession. It was, however, an admission and as such relevant and admissible in evidence under S. 21, Evidence Act, subject to being properly proved. Besides the record of the statement we have the oral evidence of the Deputy Magistrate who recorded it. Therefore the admission in evidence of this statement was correct in law. In this statement the accused said that as far as he knew nobody killed his daughter, that is to say he withdrew all the charges he had preferred on the 25th. Incidentally he denied having made those charges before the Police. Then it is suggested that as he reported the incidents not as an eyewitness but as having heard of them from his wife, there was no evidence on which it could properly be held that he made the report in bad faith or that he did not make it in good faith relying on the statement of his wife. The wife naturally has not been examined as a prosecution witness. Whether the accused could have made the report which he did in good faith, in the circumstances of the particular case, was a question of fact for the jury, but we have noticed that the first information report of the accused contains a mention that he had seen with his own eyes injury on the head of the dead child, and the doctor found no such injury. Therefore on the facts there is nothing to be said against the verdict. It is not based on inadmissible evidence.

The next point taken was that by the statement made by Nanhkoo before the Assistant Sub-Inspector at Mokamah he cannot be said to have instituted a criminal proceeding because the Assistant Sub-Inspector at Mokamah was not an officer competent to investigate the alleged offence said to have been committed in the jurisdiction of another police station. Reference has been made to the Full Bench decision of the Calcutta High Court in 17 Cal 574 (1) which was followed in this Court in 4 Pat 472 (2). The law which is well settled is that the laying of an information which

1. Karim Buksh v. Queen-Empress, (1890) 17 Cal 574 (F B).
2. Parmeshvar Lal v. Emperor, 1925 Pat 678= 92 I C 885=27 Cr L J 373 = 4 Pat 472 = 7 P L T 657.

the police officer has power to investigate and the causing of that officer to investigate the information amounts to institution of criminal proceedings. There is no doubt that the accused has committed the offence charged against him though from one point of view it may be said that the offence was not completely committed at Mokamah police station but was committed partly at Mokamah and partly at Sarmera. But this will not be of any assistance to the accused because the charge refers to the lodging by him of an information "before A. S. I. Gauri Shankar Lal and later also before S. I. Syed Abdul Hakim." Thus the proceedings are said in the charge to have been instituted by the laying of the information at Mokamah coupled with the repetition of it in Sarmera which correctly represents the state of things.

Then it is pointed out that the place of commission of the offence is in the charge stated as Mokamah and not as Sarmera. It might have been desirable to mention both places, but the accused cannot have been misled in his defence and the omission to name Sarmera does not affect the conviction. Nor is it of any avail to the accused to contend that the proper person to complain against him was the Sub-Inspector of Sarmera rather than the Assistant Sub-Inspector of Mokamah. As a matter of fact, the Sub-Inspector of Sarmera had at first submitted a report for the prosecution of Nanhkoo under S. 211 on which the Magistrate directed that the Assistant Sub-Inspector of Mokamah might present a complaint. This was done. So that in fact the Magistrate had before him two complaints, one by each of the officers and the case could not be more complete. Therefore all the objections urged against the conviction have failed.

Finally it is said that the sentence of three years' imprisonment is excessive. The age of the accused as noted by the Magistrate is 60 years and the evidence as to his conduct about the time of the death of his child seems to indicate that he was in a very disturbed frame of mind. After his arrest he was placed under medical observation, but was found not to be insane. But there is evidence that immediately after the death of the child he accused one of his co-villagers of being a witch and thereby having caused his child's illness and death.

A sentence of two years rigorous imprisonment would, in my opinion, be sufficient to meet the ends of justice, and I would, while affirming the conviction, reduce the sentence to this amount.

Varma, J.—I agree.

M.D./R.K. *Conviction affirmed*
Sentence reduced.

A. I. R. 1936 Patna 360

MACPHERSON, J.

In re *Narsingh Narain* and *another.*
v.
Rameshwar Singh and *others.*

Criminal Ref. No. 2 of 1936, Decided on 4th March 1936, made by Addl. Sess. Judge, Patna, D/- 12th February 1936.

Criminal P. C. (1898), Ss. 137 and 139-A—Order under S. 137 passed without making the inquiry enjoined under S. 139-A (1) cannot stand.

In an application under S. 133, on the opposite party denied the existence of any public right; what the Magistrate did was to visit the spot and to examine witnesses for the first party who had set the law in motion and then to examine the remaining witnesses 12 days later; and then an amin was deputed to examine the alleged encroachment after comparison with the survey map and record of rights; without any further proceedings he made the order absolute:

Held: that the Magistrate did not make the inquiry as enjoined under S. 139-A (1), and therefore his order could not stand.

[P 360 C 2; P 361 C 1]

B. K. Sen—for Reference.
Ganesh Sharma—Against Reference.

Order. — Under the provisions of S. 438, Criminal P. C., the Additional Sessions Judge of Patna has recommended that the order upon Narsingh Narain Singh and Sheoratan Singh under S. 133, Criminal P. C., be set aside as made without jurisdiction. Substantially the basis of the recommendation is that the Magistrate has failed to proceed in accordance with the provisions of S. 139-A. The persons mentioned, when they appeared, denied the existence of any public right, that is to say, that plot 1004 was ever a public pathway. Thereupon it was incumbent upon the Magistrate before proceeding under S. 137 or. S. 138 to inquire into the matter. What the Magistrate did was to visit the spot and to examine witnesses for the first party who had put the law in motion and then

to examine the remaining witnesses twelve days later and then an amin who had been deputed to examine the alleged encroachment after comparison with the survey map and record-of-rights. Without any further proceedings he made the order absolute. It is, of course, clear that he ought to have found whether there was any reliable evidence in support of the denial of these petitioners that the public right existed and thereupon either to have stayed the proceedings altogether so that the existence of the public right alleged might be decided by a competent civil Court or on finding that there was no such evidence to have proceeded as laid down in S. 137 or 138 as the case might require. It has been frequently pointed out in this Court (it was not necessary for the learned Sessions Judge to deal with the rulings of the other High Courts on the subject) that an order under S. 137 passed without making the inquiry enjoined under S. 139-A (1) cannot stand.

The order under reference must be set aside and the Magistrate, treating his previous inquiry as one under S. 139-A (1), must now proceed to record the finding required by S. 139-A (2) and dispose of the matter in accordance with such finding. It is pointed out by the learned advocate appearing on behalf of the petitioners that no order was passed in respect of the encroachments which were admittedly made by other persons than the two petitioners in respect of whom proceedings under S. 133 were drawn up and who appeared and stated that they had no objection to the removal of the obstructions. It is not enough to record such willingness. A substantive order for the removal of the obstructions ought to have been passed in their case also. The reference is accepted, the order under reference is set aside, and the Magistrate will proceed to determine the matter in accordance with the directions given above.

M.D./R.K. *Reference accepted.*

A. I. R. 1936 Patna 361

JAMES, J.

(*Babu*) *Sripati Samanta*—Plaintiff—Appellant.

v.

Lalji Sahu and *others*—Defendants—Respondents.

Appeal No. 856 of 1933, Decided on 17th March 1936, from appellate decree of Addl. Sub-Judge, Hazaribagh, D/- 10th April 1933.

Limitation Act (1908), Ss. 20 and 21 (2)—Payment by one joint mortgagor saves limitation against all.

Whereas with joint contractors there are a number of separate single debts, for the persons interested in the equity of redemption, there is one single indivisible debt and a single indivisible security and therefore any person interested in the equity of redemption may by making payment in the manner provided by S. 20, Lim. Act keep the mortgage alive in such a manner that the whole of the mortgaged property remains liable for the debt although the provisions of sub-s. (2) of S. 21 might be applied if the suit were based on personal covenants to repay: 1933 *Pat* 1, *Rel. on.* [P 362 C 1]

G. C. Mukherji—for Appellant.

Satya Sunder Bose—for Respondents.

Order.—This is a second appeal from the decision of the Additional Subordinate Judge of Hazaribagh confirming the decision of the Munsif of Giridih. The facts as found by the lower appellate Court are as follows: On 3rd September 1910 Gurucharan Sahu and Lalji Sahu, on behalf of their joint family, took a loan from Babu Sripati Samanta of Giridih for the necessities of the joint family and for family benefit on the security of certain joint family property. On 20th June 1917, Gurucharan Sahu made a payment of Rs. 200 towards interest, the fact of which was endorsed by Gurcharan over his signature on the mortgage bond. On 26th January 1923 Gurcharan made another payment of Rs. 10 towards interest which was similarly endorsed by him on the bond. When this second payment was made, the family had left Giridih; and the Courts have found that by that time the family had ceased to be joint, though it does not appear that Sripati Samanta was aware of that fact. If it had not been for the payment of interest on 26th January 1923 by Gurcharan Sahu, the suit would have been barred by limitation. The Courts below held that the payment by Gurcharan Sahu affected only himself and his son and the defendant who was a subsequent mortgagee of the house in suit. The mort-

gagee Babu Sripati Samanta has appealed from that decision. Mr. G. C. Mukherji on behalf of the appellant argues that this question is concluded by the decision of a Division Bench of this Court in 14 P L T 6 (1). It was there held that payment made by one of the debtors would save limitation for a suit to realise the security, although in the hand of persons other than those making the payment. It was pointed out by Agarwala, J., that in the case of a debt secured by mortgage, the liability is indivisible; and no splitting up of the security avails to split up the liability unless the mortgagee consents to it: the payment of interest by one of the mortgagors will keep the mortgage alive so that the mortgagee would be entitled to enforce it against all or any part of the mortgaged property.

Mr. S. S. Bose on behalf of the respondents argues that the mortgagors should be regarded as joint contractors within the meaning of sub-s. (2), S. 21, Lim. Act and that the payment made by one could not affect any other of them. Mr. Bose argues as if the case were one of first impression; but this point is concluded by the authority of the decision upon which Mr. Mukherji relies. It is expressly pointed out there that where the debt is a single debt and the liability is one and indivisible the case falls within S. 20 and is not taken out of its operation by S. 21 (2) of the Act, so that any person interested in the equity of redemption may by making payment in the manner provided by S. 20, Lim. Act keep the mortgage alive in such a manner that the whole of the mortgaged property remains liable for the debt. The provisions of sub-s. (2), S. 21, might be applied if the suit were based on personal covenants to repay; but I take it that the distinction between joint contractors and the body of persons interested in the equity of redemption is this: that whereas with joint contractors there are a number of separate single debts: for the persons interested in the equity of redemption, there is one single indivisible debt and a single indivisible security. The appeal is allowed and the plaintiff's suit will be decreed with costs throughout.

R.K. *Appeal allowed.*

1. Badri Das v, Pasupati Banarji, 1933 Pat 1=140 I C 145=12 Pat 93=14 P L T 6.

A. I. R. 1936 Patna 362

COURTNEY-TERRELL, C. J. AND AGARWALA, J.

Bengal North Western Rly. Co., Ltd. and *another*—Plaintiffs—Appellants.

v.

Janki Prasad and *another*—Defendants—Respondents.

Appeal No. 185 of 1930, Decided on 17th April 1935, from original decree of Sub-Judge, Purnea, D/- 8th May 1930.

(a) Landlord and Tenant — Raiyat—Every cultivator is not raiyat—Raiyat is one who cultivates land as raiyat directly under zamindar or tenure holder—Test is whether person concerned has obtained interest in land.

Every person who is a cultivator is not necessarily a raiyat. A raiyat is one who cultivates the land as a raiyat directly under a zamindar or a tenure-holder and the test of the tenancy is whether the tenant in question obtains an interest in the land and this in turn is a matter of paramount intention of the parties to the contract. [P 367 C 1]

(b) Deed — Construction — Transaction, whether lease or license—Essence of matter is whether there was intention to transfer interest in land– Land belonging to Railway Company given to defendants for cultivation for one year—Word 'license' used throughout document embodying transaction—Document expressly mentioning that nothing therein should be construed to create any right, title or interest in land—Defendants held to have been mere licensees—Deed held not to have transferred any interest in the land.

In determining whether a transaction was a lease or a mere license the substance of the agreement must be considered more than the words. In the case of a license there is no transfer of interest in the land, whereas in the case of a lease there is a transfer of such interest. The essence of the matter is whether the intention of the parties was to transfer any interest in the land. Certain lands belonging to a Railway Company in respect of which a circular was issued by the Railway Board of the Government of India, that it was not permissible to lease them out without the sanction of the Secretary of State, but in respect of which it was permissible to grant a license for certain purposes were given to the defendants for cultivation for period of one year. In the document embodying the agreement between the parties, the word license was used throughout and instead of the word 'rent' the expression "in lieu of rent" was used. There was an express clause stating that "nothing herein contained should be construed to create any right, title or interest in favour of the licensee in the said land." It was expressly provided that the Railway Company was to control the land for railway purposes. The Railway Company and the Secretary of State after the expiry of the period of the license instituted a suit against the defendants for ejectment and for rent and mesne profits on the ground that the defendants were mere licensees. The defendants contended that the land was settled with their father as a raiyat for purposes of cultivation

and that he being a settled raiyat of the village in which the land was situated, he had acquired occupancy rights in the land:

Held: the document merely conferred on defendants' father the rights of a mere licensee. It was not intended by the document that the defendants' father should obtain any interest in the land and as he had acquired no interest in the land he could not be considered as a tenant or as having held the land as a raiyat.

[P 368 C 2]

(c) Bengal Tenancy Act (8 of 1885), S. 21—Act applies only to ordinary agricultural relationship of zamindar, tenure holders and raiyats under them—It does not apply to contracts whereby Railway Company grants license of land owned by it for purposes of cultivation—Licensee does not acquire occupancy rights in land given to him.

The Bengal Tenancy Act is intended to apply to the ordinary agricultural relationship of zamindars, tenure holders and raiyats under them. It does not, in dealing with the acquisition of occupancy rights, contemplate a contract whereby a Railway Company, in a time of public emergency, in quite exceptional circumstances, makes use of the land normally held by it for railway purposes for growing a special crop and bringing on to the land a cultivator for that purpose for a very short and specified term under a very special agreement.

[P 368 C 2; P 369 C 1]

Where, therefore, the Railway Company in this way, grants a license to a person for purposes of cultivation in respect of certain land in its possession for railway purposes, for a period of one year, such person does not acquire occupancy rights in the land. [P 368 C 2; P 369 C 1]

(d) Limitation Act (1908), Arts. 149, 109 and 116—Railway Company granting land owned by it for cultivation under license—Suit by Railway Company and Secretary of State for ejectment of licensee after expiry of license and for rent and mesne profits is governed by Art. 149 and not by Art. 109 or 116.

Where certain lands belonging to a Railway Company are transferred by the Railway Company to a person for cultivation under a license, a suit by the Railway Company and the Secretary of State, for ejectment of the licensee after the expiry of the license and for rent and mesne profits is governed by Art. 149 and not Art. 109 or 116 inasmuch as the Railway Company is merely the managing agent on behalf of the Government. [P 369 C 2]

Sultan Ahmad and *S. N. Bose*—for Appellants.

S. M. Mullick, *D. L. Nandkeolyar* and *Pancham Prasad*—for Respondents.

Courtney-Terrell, C. J. — This appeal arises out of a suit by the Bengal North-Western Railway Company, plaintiff 1 and the Secretary of State, plaintiff 2, to eject the defendants from 175 acres of land situated near Kursela Railway Station on the Bengal North Western Railway, and for rent and mesne profits. Ladu Prasad, the father of the defendants, was granted 48 acres of the land in dispute by an agreement dated June 1920, for a period of one year. There was a similar agreement dated 19th June 1920, with regard to 92 acres. The defendants are alleged to have encroached upon the remainder of the land in dispute. The contention of the plaintiffs is that under the agreements referred to, namely 1 (K 1) and 1 (L 1), the father of the defendants was merely a licensee for one year. The contention of the defendants, on the other hand, is that this land was settled with Ladu Prasad as a raiyat for the purpose of cultivation and that, Ladu Prasad being a settled raiyat of the village in which the land is situated, he immediately acquired occupancy rights in the land covered by the agreement. To this the reply of the plaintiffs was that the land in dispute was land which had been acquired for the Railway Company under the Land Acquisition Act of 1894, and therefore that S. 116, Ben. Ten. Act, applied to bar the acquisition of occupancy rights in the land by Ladu Prasad. The defendants also contended that Ladu Prasad had been granted a permanent tenancy of the land by the Railway Company in August 1920.

The facts necessary to be stated for the determination of the dispute between the parties are as follows: Plaintiff 1 is the proprietor of the Bengal North Western Railway and plaintiff 2 is the proprietor of the Tirhut State Railway. By an indenture (Ex. 12 (b), dated 18th July 1890), between plaintiffs 1 and 2 plaintiff 1 took over the management of the Tirhut State Railway on the terms stated in the indenture. Shortly stated the effect of the agreement between the plaintiffs was that plaintiff 1 took over the management of the Tirhut State Railway and plaintiff 2 undertook to supply capital for the purposes of the railway and to acquire land for the purposes of the railway as occasions should require. The indenture debarred plaintiff 1 from selling any property forming part of the Tirhut State Railway without the sanction of plaintiff 2. In all matters not expressly covered by the indenture it was agreed that plaintiff 1 should be subject to the supervision and control of plaintiff 2. This agreement was subsequently supplemented by another indenture between the plaintiffs,

dated 23rd July, 1896, which required plaintiff 1 to construct a railway from Hajipur to Begum Serai and from Garhara to Katihar. Kursela Railway Station lies between Garhara and Katihar.

On 26th November 1912, the Railway Board of the Government of India issued a circular to the Agents of certain railways, including the Agent of the Bengal North Western Railway Co., regarding the leasing of railway lands. It was pointed out that it was not permissible for a Railway Co. to lease out lands not required for the purposes of the railway except with the sanction of the Secretary of State. The railway Agents were however informed that it was permissible to grant licenses to outsiders for certain purposes and to railway servants for the purposes of cultivation, etc. A specimen license form was annexed to the circular. In terms the form of license applied only to land let for the purposes of constructing and maintaining bulk oil depots, but it was pointed out that the form was readily adaptable to land let for other purposes. The following paragraphs of the specimen license form are material :

(1) The licensee shall have the use of the piece of land described in the schedule hereto for the purpose of constructing and maintaining thereon tanks, etc.

(8) The said privileges in clause 1 hereof mentioned are granted on the express understanding that either party may be at liberty to determine and put an end to this license by giving to the other of them at any time three calendar months' notice in writing and such privileges may be so determined by the administration without any claim for compensation whatever on the part of the licensee, and on the expiration of such notice the licensee shall discontinue to use and shall yield up to the administration the said land together with all such tanks, etc., thereon as the administration shall elect to purchase as hereinafter mentioned.

(9) Nothing herein contained shall be construed to create a tenancy in favour of the licensee of the said premises and the administration may of their mere motion upon the determination of this license re-enter upon and re-take and absolutely retain possession of the said land.

On 23rd December 1916, the Agent of the Bengal North Western Railway Co. addressed the Chief Engineer of the Railway, Ext. 4 (a), on the subject of granting licenses permitting the use of railway lands and pointing out that according to the Railway Board's circular already referred to it was not permissible for a Railway Co., to lease lands without the sanction of the Secretary of State, but the Chief Engineer was informed that, in cases where railway land was required by outsiders for any purpose which could fairly be held to be a purpose of the railway, the necessity for obtaining the Secretary of State's sanction could be avoided by the grant of a license. Specimen forms of licenses for various purposes were enclosed. Form No. E 19 was the form of a license to cut and remove grass. Form No. E 64 was the form of a license for the use of land for the purpose of cultivation. The Agent's letter to the Chief Engineer stated that a license in form E 19 could be issued by the Resident Engineer but that in all other cases the sanction of the Agent must be obtained prior to the signing of the license. Endorsements on this letter show that six copies were forwarded to the Resident Engineer of Mansi and that the latter in due course forwarded a copy to the Assistant Engineer of Thana Bihpur. The Assistant Engineer of Thana Bihpur was one Mr. Hamilton. Form No. E 64, which was the specimen form for a license for the use of land for the purpose of cultivation, was in the following terms:

Form No. E 64.

Non-Judicial Stamp.
Eight annas.

Agreement.

An agreement made this . . . . day of . . . . 191 between the Bengal and North-Western Railway Company, Limited, hereinafter called the "Administration" of the one part and . . . son of . . . . . resident of village . . . . thana . . . . . district . . . . . hereinafter called the "Licensee" of the other part.

Whereby it is agreed as follows:

1. The Licensee shall have the use of the piece of land described in the schedule hereto for the purpose of cultivation subject to such rules, regulations and bye-laws as may from time to time be made by or on behalf of the Administration or by or on behalf of the Government or any local authority and subject to the conditions hereinafter contained.

2. The Licensee shall pay to the Administration a rent of Rs. . . . . in advance for the period extending from the . . . . to the . . . . commencing from the first day of . . . . .

3. The Licensee shall not transfer or sublet the privileges in Cl. 1 hereof mentioned without the consent in writing of the Administration.

4. The said privileges in Cl. 1 hereof mentioned are granted on the express understanding that either party may be at liberty to determine and put an end to this lease by giving to the other of them at any time three calendar months' notice in writing and such privileges may be so determined by the Administration without any claim for compensation

whatever on the part of the licensee, and on expiration of such notice the licensee shall discontinue to use and shall yield up to the Administration the said land free of all crops and plants.

5. At the expiratitn of the notice the Administration shall be entitled to enter into and take possession of the said land and cut down and remove the crops and plants and whatever else may be standing thereon without being liable for any damages to the licensee therefor.

6. Nothing herein contained shall be construed to create any right, title or interest in favour of the licensee in the said land or in neighbouring lands of the Administration.

7. The Licensee shall pay all necessary costs for stamping and executing this agreement.

Schedule.

As witness the signature of the parties hereto the day and year first above written.

Witness.

Signature.

It will be noticed that the material portions of para. 8 of the Railway Board's circular are produced in paras. 4 and 5 of the form of license and that para. 6, which provided that nothing contained in the license should be construed to create any right, title or interest in favour of the licensee in the land covered by the license, gives effect to para. 9 of the Railway Board's circular. Owing to the shortage of mineral oils in 1918 it became necessary to increase the production of castor seeds for the purpose of securing an adequate supply of the castor oil for lubricating purposes. Consequently on 19th June 1918, the Railway Board addressed a letter (Ex. 1) to the Agent of the Bengal and North-Western Railway, drawing attention to the necessity of increasing the production of castor seed and pointing out that the Government of Bombay had adopted the policy of granting of Government waste land for one year, free of assessment, for the cultivation of castor, and that the Eastern Bengal Railway were making arrangements to cultivate the castor plant on the side of their track. The Railway Board suggested that this example might be followed with advantage wherever conditions were favourable, and requested that the Agent of the Bengal and North-Western Railway should give the matter his early attention. The Agent of the Railway replied (Ex. 1 (a)) that the matter was already under consideration and Ex. 1 (b) is a letter from the District Locomotive Superintendent to the Locomotive and Carriage Superintendent of the Bengal North Western Railway, dated 8th May 1919, stating the results of an experiment conducted for the purpose of ascertaining the cost of cultivating castor plants, and suggesting that the Engineering Department should be asked to give out suitable lands, at stations where available, to railway men who were prepared to take it.

The suggestion was that land should be granted to railway servants on the batai system. The railway was to be entitled to half the produce and to purchase the remaining half at the bazar rate. A copy of this letter was sent to the Chief Engineer by the Agent on 10th May 1919, (Ex. 1 (d)). On 18th May 1919, the Resident Engineer of Mansi wrote to the Assistant Engineer of Thana Bihpur (Ex. 1 (f)) directing him to make arrangement to let out surplus railway lands for the cultivation of castor on the batai system and submit names of persons willing to cultivate castor on this system. On 9th July 1919, the Chief Engineer of the Railway wrote to the Agent (Ex. 2) pointing out that when waste lands are brought under cultivation it usually takes three years before a remunerative crop is obtained. He stated therefore that there was little prospect of obtaining the cultivation of castor on the batai system unless the cultivator was given a lease for at least five years. The Agent's reply to this was that leases for five years could not be given but only licenses for one year (Ex. 2 (a)). In communicating this reply to the Resident Engineer the Chief Engineer suggested that prospective licensees should be informed that the licenses would be renewable. A copy of this was forwarded by the Resident Engineer to the Assistant Engineer of Thana Bihpur (Ex. 2 (b)). In August the Resident Engineer, Mansi, again addressed the Chief Engineer on this subject inquiring whether licenses were to be confined to railway servants, and pointed out that it would be easier if he were given a free hand in the matter (Ex. 1 (g)).

The Chief Engineer replied (Ex. 1 (i)) stating that a free hand was accorded for the granting of licenses provided they were confined to 12 months. On 28th August 1919 a number of employees of the railway at Thana Bihpur submitted an application for the settlement of rail-

way lands to Mr. Hamilton, Assistant Engineer, to be forwarded to the Resident Engineer. The applicants pointed out that they would have to incur considerable expenditure during the first year of the license and that it would not be profitable if "the lease were not to continue each and every year to us or to our heirs." The Resident Engineer refused to forward this letter to the Agent on the ground that the request would not be granted, and on the letter there is an endorsement by Mr. Hamilton "Inform parties concerned and return." On 26th August 1919, the Resident Engineer wrote to the Assistant Engineer at Thana Bihpur enclosing a specimen license form (No. E-64) and informing him that applicants could be granted land only on the terms referred to in the previous communications from the Chief Engineer (Ex. 2, (C-2)). An endorsement on this letter shows that Mr. Hamilton forwarded it to the Sub-Inspector, Way and Works, with instructions to him to read the specimen form to the applicants and ask them whether they were willing to take up land on the conditions therein stated. There is a further endorsement by the Sub-Inspector, Way and Works, stating that the parties did not agree to the terms. It is noticeable that in the specimen form (Ex. 2 (C-1)), sent by the Resident Engineer with his letter (Ex. 2 (C-2)) to Mr. Hamilton, paras. 4 and 5 of the original form which had been sent by the Agent of the Railway to the Chief Engineer with his letter (Ex. 4 (a)) of 23rd December 1916, were omitted. It was in this state of affairs that Mr. Hamilton signed the first agreement with Ladu Prasad, dated 11th June 1920, (Ex. 1 (K-1)). This agreement was as follows :

Agreement between B. N. W. Ry. Co. and Ladu Prasad, Bengal and North Western Railway (Incorporated in England).

An agreement made this eleventh day of June 1920 between the Bengal and North Western Railway Company, Ltd., hereinafter called the "administration" of one part, and Ladu Prasad, son of Mukhlal Seth, resident of village Kursela, thana Karaha, District Purnea hereinafter called the "Licensee" of the other part.

Whereby it is agreed as follows :—

1. The Licensee shall have the use for a period of one year from the date hereof of the piece of land described in the schedule hereto for the purpose of cultivation of castor seed, subject to such rules, regulations and bye-laws as may from time to time be made by or on behalf of the administration or by or on behalf of the Government or any Local Authority and subject to the conditions hereinafter contained.

2. The Licensee shall pay to the Admistration in lieu of rent one-half of the crop obtained which shall not be less than three maunds of castor seed per bigha.

3. The Licensee shall not transfer or sublet the privileges in Cl. 1 hereof mentioned.

4. Nothing herein contained shall be construed to create any right, title or interest in favour of the Licensee in the said land or in neighbouring lands of the Administration.

5. The Licensee shall pay all necessary costs for stamping and executing this agreement.

(Sd) J. W. Hamilton.

(Sd.) Lado Prosad of Khursela (In Hindi).

(Sd.) Illegible.

Schedule.

Part of land of old staff quarters at Kursela as per plan attached=48 acres.

As witness the signature of the parties hereto the day and the day and year first above written.

(Sd.) Lado Prosad. By my own pen.
(In Hindi).
Signature.

Witness—

Syed Parikat Husain,
Station Master, Kursela.
(Sd.) J. W. Hamilton,
Assistant Engineer,
Thana Bihpur Sub-division.

This agreement is in the form 2 (C-1) and not in the form E-64, but it stipulated in para. 4 that nothing therein contained should be construed to create any right, title or interest in favour of the licensee in the said land or in neighbouring lands of the administration. The second agreement signed by Mr. Hamilton in favour of Ladu Prasad (Ex. 1 (L-1)) in respect of 92 acres is in precisely the same form as Ex. 1 (K-1), The legal effect of these agreements will be considered hereafter. At present it is proposed to consider the second contention of the defendants that they were granted a permanent lease of the land in August 1920. It was at one time the case of the defendants that the whole of the 175 acres in dispute had been leased to Ladu Prasad and not merely the 140 acres now covered by Exs. 1 (K-1) and 1 (L-1). The Court below has found that in respect of the remaining 35 and odd acres the defendants have encroached on railway lands. The defendants filed a cross-objection in this Court in respect of this finding, but in the course of the hearing no submission was made to us with respect to it. (His Lordship then discussed the evidence and proceeded). From our examination of the evidence we arrive at the conclusion that although the signature of the disputed document is

genuine, the body of the document was not in existence when the signature was made, and the document as a whole is a forgery. Moreover, even if the document as a whole were genuine, Mr. Hamilton had certainly no authority, express or implied, to execute it. Similarly, apart from the matter of the disputed document, there was no promise by Mr. Hamilton to grant a permanent interest, and even if he had so promised he had no authority to promise and his promise would not in any way have bound the Railway Company.

It now becomes necessary to consider the rights acquired by Ladu Prasad under the documents Exs. 1 (K-1) and 1 (L-1) because, failing success upon the document which we have held to be forged, it is the contention of the defendants that Ladu Prasad was under these documents brought upon the land as a raiyat, and as it is an uncontested fact that he is a settled raiyat of the village, it is argued that under S. 21, sub-s. (1), Ben. Ten. Act, he so acquired occupancy rights and cannot be ejected. Much stress is laid on the undoubted fact that Ladu Prasad was brought upon the land under these documents for the purpose of cultivating it as though that fact were the determining factor in deciding whether his advent upon the land in dispute was or was not in the capacity of a raiyat. But this fact is by no means conclusive. Every person who is a cultivator is not necessarily a raiyat. A raiyat is one who cultivates the land as a tenant directly under a zamindar or a tenure-holder and the test of a tenancy is whether the cultivator in question obtains an interest in the land, and this in turn is a matter of the paramount intention of the parties to the contract. This criterion was clearly laid down by a Full Bench of the High Court of Madras in 48 Mad 368 (1). The point in dispute in that case has no bearing upon the question of whether Ladu Prasad was or was not a raiyat, nor was the land in dispute let out for cultivating purposes; but it had to be decided whether the document in question was a mere license to use the land in question or was a lease giving the grantee an interest in immoveable property and so whether it was governed by the article relating to leases in the Stamp Act. In that case a Railway Co., had granted permission to certain consignees of coal to stack coal on certain plots of ground in the station yard. The Railway Co., as in this case, had no power to grant a lease without the sanction of the Secretary of State. In the document evidencing the agreement it was expressly stated that nothing therein should be construed to create a tenancy and there were moreover certain clauses imposing conditions which would ordinarily be implied in a license. After an elaborate review of the authorities it was held that as no interest in the land was given by the document it did not operate as a lease. The Acting Chief Justice said:

> The test is not the right of the lessor to give the lease but the interest intended by him to be created by the document. The fact, however, that the Railway Co. is prohibited by orders of the Government of India from executing leases of lands in their possession is important for understanding the intention of the framer of the document, as showing that the Company would be naturally averse to giving away any rights that ought to be reserved.

An instance of an agreement for cultivation which was nevertheless held not to create a tenancy is to be found in 32 C L J 37 (2) where certain land was made over to the defendant who at the time of the arrangement was a settled raiyat of the village for a period of 11 months on conditions first that the defendant would bring the land under cultivation and would make over half the produce to the plaintiff and take the other half as his remuneration, and secondly that at the end of the 11 months the defendant would quit the land without notice. Newbould, J., had held that the contract was one of letting out the land for cultivation and was not a mere contract of service and that the defendant had acquired a tenancy right in the land and therefore, in view of his position as a settled raiyat, he had acquired occupancy rights. This view was dissented from on appeal. Sir Asutosh Mookerjee, Ag. C. J., said :

> It is sufficient to say that the document does not, in our opinion, create a tenancy. In the first place, there is no covenant to pay rent: and, in the second place, there is no clause which creates in favour of the defendant an interest in the land . . . . . In individual cases the terms of the contract may indicate that the intention of the parties was to create

1. Board of Revenue v. S. I. Ry. Co., Ltd., 1925 Mad 434=86 I C 688=48 Mad 368=48 M L J 161 (FB).

2. Brahmamoyee Barmani v. Sheikh Mansur, 1920 Cal 548=58 I C 859=32 C L J 37.

in the grantee an interest in the land; in other words, if there is a demise, a tenancy is created. But the case before us is not of that description . . . . . It is not disputed that at the date of the arrangement the defendant was known to be a settled raiyat of the village. Consequently, the moment he obtained a tenance right in the disputed land he would acquiry the status of an occupancy raiyat under subs. (1) of S. 21, Ben. Ten. Act. In such circumstances, it is inconceivable that the defendant should have solemnly agreed to quit the land at the end of 11 months. We cannot assume that the object of the parties was not to give expression to the real understanding between them, but rather to conceal the true arrangement. Reviewing all the terms of the contract we feel no doubt that there was no tenancy and that the defendant was bound to quit the land upon the expiry of the prescribed period: see also 50 I C 285 (3).

It was attempted to differentiate the case in 32 C L J 37 (2) above quoted from that before us by referring to a passage in the judgment in which attention was called to the fact that the contract was to subsist only for 11 months; whereas in the case before us the contract is for one year, that is to say for an entire agricultural period. But the main point of the decision of Mookerjee, Ag. C. J., was not the period of 11 months but the fact that it was clearly contemplated by the parties that at the end of a short fixed period the defendant should quit the land and that this was inconsistent with there having been any intention on the part of the parties that he should have a tenancy which, had it been granted, would clearly have resulted in the acquisition of occupancy rights. The case in 17 C W N 166 (4) is an instance of a document which was held to create a present demise and Mookerjee, J., referred to the decision which laid down the distinction between a license and a lease, and said :

> That distinction is, that in the case of license, there is no transfer of interest in land, whereas in the case of a lease there is a transfer of such interest. Taking the instrument as a whole we entertain no doubt that the paramount intention of the parties was to create a present demise, and that the grantee was in the position of a tenant.

In 35 Cal 82 (5), Mookerjee, J., reviewed the English cases on this question and at p. 100 said :

> The essence of the matter is, whether the intention of the parties was to transfer any interest in land, for as Parker, C. J., put it in [(1814) 11 Mass 533 (6), an American case] a license is an authority to do some act or series of acts on the land of another without passing any estate in the land. In determining whether a transaction was a lease or a mere license, the substance of the agreement must be considered more than the words.

Applying these principles to the documents in question, and to the circumstances in which they were executed, we have the conspicuous fact that the Railway Company had no power to grant a lease and had been strictly enjoined not to grant a tenancy. Moreover this order had been passed on to Mr Hamilton. It could not therefore have been his intention to disobey an order of such a strict kind. Furthermore the fact that Ladu Prasad was pestering him to grant permanent rights indicates that he did not believe that anything in the nature of a permanent right would be given by the documents in question. Moreover the actual terms of the document exhibit the features (1) that the word "license" is expressly used, (2) that instead of the word "rent" the expression "in lieu of rent" is used. Further that there is an express clause stating :

> Nothing herein contained shall be construed to create any right, title or interest in favour of the licensee in the said land or in the neighbouring lands of the administration.

Further that the first clause of the agreement expressly implies in no uncertain fashion that the Railway Company are to continue to control the land for railway purposes. We do not think that it can be successfully contended in the light of these circumstances and the document itself that it was intended by the parties that Ladu Prasad should obtain any interest in the land, and indeed that intention is expressly negatived. Ladu Prasad therefore, since he acquired no interest in the land in dispute, cannot be considered as a tenant or as having held that land "as a raiyat." The document merely conferred upon him, as they expressly state, the rights of a licensee and nothing more. We would further say that in our opinion the Bengal Tenancy Act, in dealing with the acquisition of occupancy rights, never contemplated a contract of this nature: it was intended to apply to the ordinary agricultural relationship of zamindars, tenure-holders and raiyats under them. Had the cir-

3. Pokam v. Rajani Kamal, 1919 Cal 264=50 I C 285=23 C W N 614.
4. Mohipal Singh v. Lalji Singh, (1913) 17 C W N 166=16 I C 705.
5. Secy. of State v. Karuna Kanta, (1908) 35 Cal 82=6 C L J 342=11 C W N 1053 (FB).
6. Cooks v. Steams, (1814) 11 Mass 533.

cumstances been those in which the zamindar had brought a settled raiyat upon the land, and had given him an interest in that land for the purpose of cultivation for however short a time, and even if the crop to be cultivated was of a limited kind, the provisions of S. 21 of the Act might have been held to apply. But here we have the case of a Railway Company making use, in a time of public emergency in quite exceptional circumstances, of the land normally held by them for railway purposes for growing a special crop and bringing on to the land a cultivator for that purpose for a very short and specified term under a very special agreement. These circumstances considered quite apart from the matter of S. 116 of the Act (relating to railway land) in our opinion take the case out of the operation of the Act.

In view of our finding that the defendants have not established the express grant of the permanent tenancy and that the documents executed by the Railway Company to Ladu Prasad did not result in the acquisition of occupancy rights by the defendants, it is hardly necessary to discuss in detail the second line of defence relied on by the plaintiffs in case it should be held that such occupancy rights had in fact been acquired. This second line of defence was based on Section 116, Ben. Ten. Act, according to which such rights cannot be acquired in land belonging to the Government or the Railway Company and acquired under the Land Acquisition Act of 1894 where such land is held under a lease for a term of years or under a lease from year to year. According to our finding the defendants did not hold the land under any kind of lease. Moreover, the defendants failed to prove strictly the acquisition of the land in question under the Act of 1894. It is true that they established that proceedings to acquire the land in question had been initiated, but they did not produce the decision of a competent authority, and an attempt to prove this indirectly by the production of a map Ex. 5 failed.

We were told that the construction of the Bajipur Katihar line of the Tirhut Railway was not sanctioned by the Secretary of State nor constructed until the year 1896 and that the land in question is adjacent to this line lying south of Kursela station building. But an examination of the map produced gives no indication that the land in question was acquired under the Act, nor the date of its acquisition. An application was made to us on behalf of the plaintiffs to call further evidence on this point, but in our opinion this course was unjustifiable at this stage of the case and we refused permission to call the proposed evidence. Having regard to our decision on the other points the defence under S. 116 requires no further consideration.

Lastly we have to consider the point of limitation and the length of time in respect of which mesne profits are recoverable by the plaintiffs. In ordinary cases Art. 109, Limitation Act, is applicable and the profits for only three years prior to the suit could be recovered. But in this case the plaintiffs rely on Art. 149 dealing with suits by or on behalf of the Secretary of State in respect of which a period of 60 years is prescribed. It is contended on behalf of the defendants that this article is not applicable because mesne profits are only recoverable by the Railway Company as the Company are entitled to possession. It is necessary, therefore, to refer again to the relationship between the Secretary of State and the Railway Company by virtue of the agreement between them. An examination of the Indenture of 18th July 1890 makes it clear that the company are merely Managing Agents and that there is no demise by the Secretary of State of the land upon which the railway is built. The provisions for dealing with the accounts are consistent only with the possession of the company as Managing Agents and the company merely takes possession not as having an interest in the land, but for the purpose of carrying out a contract of employment the land remains the property of the Secretary of State.

The learned Judge has held that Article 116 is applicable which relates to compensation for breach of contract which prescribes a period of six years. The suit, however, was not brought for breach of contract, but for eviction of the defendants after declaration of the plaintiffs' right and title and for mesne profits by way of compensation. The terms of the license contract between the Railway Company and Ladu Prasad provided that the defendants should quit the land at the termination of the agreement, that is

to say on 11th June 1921. After that date the defendants became trespassers and the plaintiffs were entitled to a decree for mesne profits from that date until delivery of possession.

As to that part of the plaintiffs' claim which relates to rent, there is a finding on the part of the learned Judge that whereas the agreement provides for the rent being paid at so much per bigha, and whereas the local meaning of the word 'bigha' is a third of an acre, the rent must be paid upon this basis. We have no materials upon which we can criticise this finding and this finding must, therefore, stand in estimating the amount of rent claimed. The question of the recovery of mesne profits involves no such question and need no further consideration. In the result, therefore, the appeal succeeds and the suit will be decreed with costs and the costs of this appeal.

R.M./R.K. *Appeal allowed.*

A. I. R. 1936 Patna 370

WORT AND ROWLAND, JJ.

Bhagwati Saran Singh—Defendant—Appellant.

v.

Rai Kishunji—Plaintiff—Respondent.

Appeal No. 857 of 1932, Decided on 17th January 1936, from decision of Dist. Judge, Gaya, D/- 4th May 1932.

(a) Bengal Land Revenue Sales Act (11 of 1859), S. 31—S. 31 does not bar suit for recovery of surplus sale proceeds by actual proprietor against recorded proprietor.

Section 31 merely directs payment by the Revenue Officer to a certain person, that person being the person whose name is entered as proprietor. There is nothing in that section which in any way governs the right of a person, who is in fact entitled to the surplus sale proceeds, recovering them from the person paid by the Collector under this section. [P 370 C 2]

(b) Bengal Land Revenue Sales Act (11 of 1859), S. 31—Suit for surplus sale proceeds by actual proprietor — Cause of action is for money had and received for plaintiff's use.

Where under S. 31 the Revenue Officer pays surplus proceeds to persons whose name is entered in land registration register, a suit, by the person who is in fact entitled to surplus sale proceeds for recovery of the same from recorded proprietor is maintainable as for money had and received by the recorded proprietor for the use of the person in fact entitled to it: *Sinclair* v. *Brougham*, (1914) *A C* 398, *Ref.* [P 371 C 2]

(c) Interest — Suit for recovery of money had and received for plaintiff's use—Interest runs from date of demand.

In a suit for recovery of money had and received for plaintiff's use by the defendant, the plaintiff is entitled to interest only from the date on which demand is made. [P 372 C 1]

(d) Bengal Land Revenue Sales Act (11 of 1859), Ss 31 and 60—Entry in register does not create title.

Mere entry in the register of collectorate does not either create or prove title. [P 372 C 1]

Khurshed Husnain and *Sarju Prasad* for Appellant.

Baldeva Sahay—for Respondent.

Wort, J.—The defendant is the appellant in this appeal which arises out of an action in which the plaintiff sought to recover the sum of Rs. 1,890-14-6, principal and interest amounting in all to a sum of Rs. 2,468-4-6. This amount was the surplus sale proceeds of a revenue sale of certain property of which the defendant was the recorded proprietor. The property however had been sold to the plaintiff prior to the date upon which the revenue sale was held resulting in the surplus sale proceeds here claimed. The defendant having been paid by the Collector under S. 31, Act 11 of 1859, this action was brought by the plaintiff. It was contended by Mr. Khurshed Husnain appearing on behalf of the defendant-appellant that, as the Collector was bound to pay his client under S. 31, Act 11 of 1859, he was in law entitled to the sum, and that there was nothing either in contract or quasi contract under which the plaintiff could recover. In my judgment the contention cannot be supported. S. 31, Act 11 of 1859, is a section which merely directs payment by the Revenue Officer to a certain person, that person being the person whose name is entered as proprietor and there is nothing in that section which in any way governs the right of a person who is in fact entitled to the surplus sale proceeds recovering them from the person paid by the Collector under the section.

The learned Judge in the Court below relied upon certain decisions. The first was the decision of this Court in 1 Pat L J 374 (1). The second was the decision of the Calcutta High Court in 24 C W N 294 (2). In neither of the cases was the question before us in this appeal decided. In the Calcutta case, in circumstances exactly similar to those

1. Harihar Misser v. Syed Mohamed, 1916 Pat 54=37 I C 30=1 Pat L J 374.
2. Bejoy Lal Seal v. Noyunmanjory Dasi, 1920 Cal 885=55 I C 639=47 Cal 331=24 C W N 294=31 C L J 372.

which are present in this case, there was no contest as regards the liability of the defendant, the only question for determination being the question of limitation. In the Patna case Roe, J., delivering the judgment of the Court as to whether Art. 62 or Art. 120, Limitation Act, applied, made this observation :

> It is not a question of the defendant's intention in taking the money. He undoubtedly intended to rob the plaintiff and intended to keep the money for his own use. But this is not the point. The point is, for whose use did the party making the payment intend the money ?

The learned Judge then proceeded to make certain observations as regards the knowledge of the Collector as to whom the money really belonged. In so far as the Judge purported to decide that it was the question of the knowledge of the Collector, I would respectfully disagree. It seems to me that the real test in the case is, not the knowledge of the Collector, not the question as suggested by Mr. Husnain as to whether he had rightfully received the money from the Collector, but to whom the money rightfully belonged. It is not suggested in this case that the money rightfully belonged to the defendant excepting in the sense that under S. 31 of the Act of 1859 the Collector was bound to pay the defendant. That in my opinion in no sense concludes the matter. Mr. Husnain has further advanced the argument that under no specific provision of law is the plaintiff entitled to recover the sum, and his action must fail. In connexion with that argument he has referred us to S. 72, Contract Act, which provides :

> A person to whom money has been paid, or anything delivered by mistake or under corrcion, must repay or return it;

and rightfully contends that this section does not apply to the facts of this case. He then advances an argument with which I cannot agree, namely that the cause of action not coming within the provision of S. 72, and, as there is no other definite provision of law, the plaintiff has no cause of action. But in this case the cause of action is for money had and received to the plaintiff's, use and in considering that cause of action we are applying no specific provision of the law of India as there is none, but the rule of justice, equity and good conscience : in other words, in the absence of any rule in India, the Law of England as pointed out by Lord Hobhouse in the case reported in Vol. 14 of Indian Appeals, to which repeated reference has been made by me in this Court. Mr. Husnain in this connexion contends that unless it could be shown that there was a contract or quasi contract, the action must fail The history of an action for money had and received is discussed in 1914 A C 398 (3). Lord Haldane, in the course of his speech referring to certain authorities made this statement :

> In its origin an action of tort, it was soon transformed into an action of contract, becoming afterwards a remedy where there was neither tort nor contract. Based at first only upon an express promise, it was afterwards supported upon an implied promise, and even upon a fictitious promise. Introduced as a special manifestation of the action on the case, it soon acquired the dignity of a distinct form of action, which superseded debt, became concurrent with account, with case upon a bailment, a warrantee and bills of exchange and competed with equity in the case of the essentially equitable quasi contracts growing out of the principle of unjust enrichment.

It is clear from that statement and from the judgments of the other learned Judges with regard to this matter that it is neither a case of contract nor is it a case of tort, but, as described in the English authority, as an action on the case in which the form of relief granted is to meet the circumstances of the case. Mr. Husnain's argument therefore that unless it can be shown that the action was either in contract or in tort it must fail, obviously fails. It seems to me however, that the matter is quite beyond argument. All the High Courts in India have recognized the right impliedly and no case has been called to our intention in which it has ever been suggested that the action in the circumstances of this case would not lie, and indeed the very authorities. upon which by implication Mr Husnain relies, are cases which are distinctly against the contention which he advances. In my judgment the decision of the learned Judge in this regard was correct and his judgment must be affirmed.

There is one matter however in which the appellant is to some extent entitled to succeed. There was a demand made by the plaintiff for this sum on 13th September 1929, the money having been withdrawn on 30th January 1928. It was from 30th January 1928 that interest has been allowed by the Court below. It is

3. Sinclair v. Brougham, (1914) A C 398 = 83 L J Ch 465=111 L T 1.

clear not only on the authority of this Court in which this matter has been discussed, but also on a reading of the statute itself, that is to say S. 31, Act 11 of 1859, that the plaintiff is entitled to interest only from the date upon which the demand was made, that is to say from 13th September 1929. A question was mentioned in the argument as regards the rate of interest but this is not found in the grounds of appeal, and in any event the interest allowed by the Judge up to the date of the suit is interest which is customary in India. For those reasons, with the modification as regards interest indicated above, I think the appeal fails, and it must be dismissed with costs. It is said that the name of the plaintiff as given in the memorandum of appeal is not in accordance with that given in the plaint. Let the memorandum be corrected in accordance with the plaint.

Rowland, J.—I entirely agree. Indeed it was somewhat difficult to find any basis, either in principle or in authority, on which Mr. Khurshed Husnain's argument could hope to be acceptable. But the underlying idea was perhaps that the provisions of S. 31, Revenue Sales Act, which gave directions that the sale proceeds of an estate are to be applied in a certain manner and paid to certain persons, would operate to create title in those persons ; that is to say after satisfaction of the Government dues, in the registered proprietors. Certainly the Act does not say so, and in a somewhat analogous matter there is a different special provision made. I refer to S. 60, Ben. Ten. Act, which contains a special provision regarding the registered proprietor of an estate. S. 60 enacts that the registered proprietor is authorized to give a receipt which shall be a sufficient discharge for any rent payable to the proprietor, and if he sues for the rent the person liable to pay cannot plead that the rent is due to any third person. But it is well settled that mere entry of one's name in the registers of the Collectorate does not either create or prove title; and S. 60 has the express saving that

> nothing in this section shall affect any remedy which any third person entitled to the property may have against the registered proprietor.

Now it is true that S. 31, Land Revenue Sales Act 11 of 1859, has no express saving similar to that in S. 60 ; but I am entirely satisfied that the Courts cannot introduce a new principle and, merely because of the absence of such a saving, hold that for the purpose of S. 31 an entry in the Land Registration Register creates ownership in the registered proprietor. Therefore the suit has to be decided on the simple question, in whom the ownership of the property was, when it was sold ? The result can only be that which my learned brother has stated in his judgment.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1936 Patna 372

MOHAMAD NOOR AND VARMA, JJ.

Kuchwar Lime and Stone Co. Ltd.—Plaintiff—Appellant.

v.

Secy. of State—Defendant—Respondent.

Appeal No. 68 of 1935, Decided on 7th February 1936, from original decree of Sub-Judge, Shahabad, D/- 7th March 1935.

(a) Practice—Relief—Suit for injunction and damages—Question of damages may await decision of title.

In a suit for injunction and damages, it is ordinarily desirable that the question of damages should await the decision of the question of title : 1933 *P C* 43, *Foll.* [P 382 C 1]

(b) Lease—Construction—Forfeiture clause must be literally and strictly construed and taken strongly against lessor.

A forfeiture clause must be literally and strictly construed and should be taken most strongly against the lessor inasmuch as he can always provide as stringent conditions as he likes. [P 376 C 1]

(c) Lease—Construction — Forfeiture for assignment without assent—Mere agreement to assign does not incur forfeiture.

A contract to assign is not an assignment, and where a condition in a lease makes it possible for the lessee to assign the lease provided the lessee first obtains the assent of the lessor or any person on his behalf to the assignment and for the infraction of the condition forfeiture is provided, merely entering into an agreement to assign the lease, promising to sell the same provided that assent was obtained, does not incur forfeiture. [P 376 C 1]

(d) Lease—Construction—Covenant against assignment—Agreement to assign does not amount to assignment nor does putting prospective assignee in possession amount to subletting or transfer of interest in leasehold.

Where a lease provides that neither the lessee nor any person claiming through or under the lease shall assign the lease or transfer any right or interest thereunder, or underlet the whole or any portion of the premises comprised in the lease without the assent of the lessor, or any person on his behalf being first obtained,

and that the penalty for the infraction of the condition shall be forfeiture, and the lessee enters into an agreement to assign the lease, putting the prospective assignee into possession of the premises pending the completion of the assignment, it does not amount to underletting or transfer of any interest in the leasehold property either, so as to incur forfeiture of the lease in the absence of a covenant in the lease against parting with possession : *Horsey Estate, Ltd.* v. *Sleiger*, (1899) 2 *Q B* 79 ; *Church* v. *Brown*, 15 *Ves Jun* 258, *Ref.* ; 35 *Cal* 82 ; 17 *C W N* 166 and 1925 *Mad* 434, *Disting.*

[P 376 C 1 ; P 377 C 1]

(e) Transfer of Property Act (1882), Ss. 4 and 107—S. 107 is to be read as supplemental to Registration Act and lease falling under Para. 2, S. 107, if unregistered, shall not affect any immoveable property comprised in lease.

Section 107 of the Act is to be read as supplemental to the Registration Act, and if a document is to be executed for a lease not coming under S. 107, para. 1, the document must be registered and the effect of non-registration is that the document shall not affect any im-immoveable property comprised therein.

[P 377 C 2]

(f) Lease—Construction—Forfeiture—Lease providing forfeiture must be legal.

A condition against transfer is not broken by transfer which is in fact void, and consequently, where a lease provides for forfeiture in case the lessee underlet except as provided by the lease itself, in order that underletting may incur forfeiture, the underletting must be legal.

[P 377 C 2]

(g) Transfer of Property Act (1882), S. 53-A —Completed agreement is necessary prerequisite of S. 53-A.

In order to attract the provisions of S. 53-A which is based on the English doctrine of part performance, it is necessary that there should be a completed agreement and that possession be delivered in part performance of that agreement.

[P 378 C 1]

(h) Lease—Construction—Covenant not to assign—Equitable assignment is not sufficient.

A covenant "not to assign," or "not to assign or otherwise part with" the premises, is only broken by a legal assignment for the entire residue of the term. Consequently the covenant is not broken either by an equitable assignment, or by a declaration of a trust of the premises in favour of a third person, or by the deposit of the lease as security for an advance : *Doed Lloyed* v. *C. Powell*, 5 *B & C* 308, *Ref.*

[P 378 C 2]

(i) Transfer of Property Act (1882), S. 53-A —Section only debars transferor from enforcing any right in respect of property if transferee in possession.

Section 53-A does not provide that under the circumstances stated therein a good title passed to the transferee. It only says that the transferor shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken possession.

[P 378 C 2]

(j) Lease—Construction—Lease for mining —Agreement by lessee authorising third party to extract and remove limestone on behalf of lessee is license and not sub-lease.

Where a lessee is granted lease to work mine of limestone on the premises let out, an agreement by the lessee authorising third party to extract and remove limestone on his own behalf, is in the nature of a license, and not a sub-lease : *Duke of Sutherland* v. *Hathcote*, (1892) 1 *Ch* 475, *Ref.*

[P 379 C 1, 2]

(k) Lease — Forfeiture — Forfeiture and grant of lease to another do not amount to dispossession.

Mere forfeiture of lease, followed by grant of new lease to another person does not amount to dispossession. There is no dispossession unless the lessee is actually dispossessed.

[P 380 C 2]

P. C. Manuk, *Mahabir Prasad* and *Tarkeshwar Nath*—for Appellant.

Govt. Pleader—for Respondent.

Mohamad Noor, J.—This appeal is from the decree of the Subordinate Judge of Shahabad, dated 7th March 1935, dismissing the appellant's suit the facts of which are these : By two indentures, both dated 1st April 1928, the Government leased to the plaintiff company for 20 years the right to quarry limestone in the two areas specified in the documents, situated in the district of Shahabad and known as Murli Hill. By one of them (Ex. 2) only the right to quarry limestone was leased as the Government have no surface right in the lands of that area, but by the second (Ex. 2-A) the land itself measuring 137 acres was leased out for the purpose of quarrying and extracting limestone. The plaintiff was to pay to the Government on the limestone extracted and removed royalties at a rate specified in the leases. No minimum royalty was fixed. In both the leases there was a clause which prohibited without the previous permission of the Board of Revenue, assignment of the lease, or transfer of any right acquired thereunder or underletting it. The penalty for the breach of this condition was forfeiture of the lease. Cl. 5 of the one and 6 of the other which are identical run thus :

That neither the lessee nor any person claiming through or under it shall assign the lease or transfer any right or interest thereunder or underlet the whole or any portion of the premises comprised in such lease without the assent of the Board of Revenue first obtained. The penalty for the infraction of this condition shall be the forfeiture of the lease.

By Cl. 20 of the one and Cl. 22 of the other it was provided that in the event

of the breach of any of the conditions specified in certain clauses (one of them being the clause prohibiting assignment, transfer and subletting) the lessee was liable to be ejected. The leases were terminable by the lessee giving six months' previous notice to the Collector. In January 1933, the plaintiff company went into voluntary liquidation and Messrs. Lovelock and Lewis, Chartered Accountants of Calcutta, were appointed liquidators. On 30th September 1933, the Company through its Managing Agents and the liquidators entered into an agreement with one Subodh Gopal Bose for the sale of the leases to him for a sum of Rs. 6,000 of which a sum of Rs. 101 was taken by them from the prospective vendee by way of earnest money. The agreement was subject to the sanction of the Board of Revenue of Bihar and Orissa it being provided that it would stand cancelled if such assent was not given. The agreement is not registered. In the meantime the prospective vendee was to work the quarries as an agent of the vendor. He was to pay to the plaintiff company the royalties payable by the latter to the Government under the leases and submit accounts to it. Cl. 6 of the agreement runs thus :

> The purchaser shall be appointed local agent of the vendor in respect of the leasehold right of the vendor to the lands set out in the Schedule hereto and continue to act as such until the transfer of the leasehold right be effected or until it is finally decided that such transfer cannot be made on and after purchaser's furnishing guarantee to the vendor of regular payment of all royalties and other dues on despatches from the Murli centre or otherwise in respect of the lands set out in the Schedule hereto and on and after his depositing with the liquidators a sum of Rs. 4,000 in cash by way of security for such payment, such deposits bearing interest at the rate of 5 per cent. per annum from the date of deposit till the transfer of the said leasehold right or final decision that the leases should not be transferred.

By Cl. 5 of the agreement it was provided that Rs. 4,000 so deposited would be forfeited if the purchaser failed to pay the balance of Rs. 5,899 after the assent of the Board of Revenue was obtained for the transfer of the leases and so also would be forfeited the earnest money deposited. The liquidators of the plaintiff company by a letter dated 9th October 1933, applied to the Collector of Shahabad for permission to assign the leases to Subodh Gopal Bose, but in the meantime things had taken a different turn. It seems that when the plaintiff company went into liquidation, and thus ceased working, the Government lost its income. It was discovered that by some oversight no minimum royalty was provided in the leases As early as 23rd March 1933, the Collector addressed a letter (Ex. 4) to the Managing Agent of the Company to the effect that it was understood that the Company had gone into liquidation but no notice of the determination of the leases was given to the Collector. It was pointed out that the leases could not be transferred to anybody without the permission of the Board of Revenue. Attention was also drawn to an earlier lease, dated 19th July 1914, (that lease is not before us) in which a minimum royalty of Rs. 5,000 was provided. The relevancy of a reference to an earlier lease is not clear to me, unless it was intended to convey to the Company that it was liable to pay the minimum royalty under it.

The liquidators replied to it on 27th March 1933 (Ex. A) to the effect that they had not decided whether they would surrender the leases and that they knew that the assent of the Board of Revenue was required for assigning them to any other person. They however enquired the meaning of the reference to the minimum royalty of Rs. 5,000 mentioned in the Collector's letter. On 12th April 1933, (Ex. 1) the Collector again asked the liquidators either to apply for cancellation of the leases or for permission to assign them to some other person or persons. After the conclusion of the agreement with Subodh Gopal Bose referred to above the liquidators, as I have already stated, applied to the Collector of Shahabad on 9th October 1933, for permission to assign the two leases to Subodh Gopal Bose. By a letter dated 25th October 1933, the Collector inquired about the position, status, solvency and business capacity of the proposed assignee. No further correspondence on the subject of permission to assign the leases is on the record ; but the liquidators must have supplied to the Collector the necessary information, as from the letter of the Collector to the Commissioner of the Patna Division, dated 15th/16th November 1933 (Ex. D) it appears that the liquidators reported to the former that the proposed transferee was solvent and of sufficient standing to be a party to a

Government lease. Nothing further seems to have happened in this connexion.

On 20th October 1933, the local agent of Subodh Gopal Bose informed the Subdivisional Officer of Sasaram, within whose jurisdiction the properties lie, that the mines were opened on 9th of the month and that the despatch of lime and limestone was expected to commence on the 22nd. The Subdivisional Officer already had independent information of the opening of the work and reported the fact to the Collector suggesting that opportunity of the situation should be taken to rectify the mistake of not providing a minimum royalty in the two leases (Ex. B, dated 26th October 1933). Under instruction from the Commissioner of the Patna Division the Subdivisional Officer stopped the work of Subodh Gopal Bose on or about 6th December 1933. Steps were also taken for the forfeiture of the leases and ejecting the plaintiff. On 27th March 1934 (Ex. E) the Local Government sanctioned the proposal of the Commissioner for the forfeiture of the two leases and later a formal Resolution, dated 18th July 1934, was issued declaring that the leases were forfeited on the ground that the lessee had by an indenture of 30th September 1933, between it and Subodh Gopal Bose which was a contract to transfer, coupled with a sublease of the Company's right, transferred or sublet the rights or interest under the two leases to the said Subodh Gopal Bose without the assent of the Board of Revenue and that Subodh Gopal Bose was found working the quarries on his own account without being liable to the Company for profit and loss.

In the meantime, on 23rd March 1934, the Collector wrote to Mr. Bose asking him, if he himself wanted to take the lease of Murli Hill limestone deposits, to submit a formal application offering terms. On 29th March, Mr. Bose replied to this letter offering certain terms. Nothing turns on this correspondence, and it need not be considered for the purposes of this suit. I have mentioned it only to complete the narration of facts. On 23rd July 1934, within a few days of the Government Notification of 18th July 1934, referred to above, the plaintiff Company served upon the Collector notice under S. 80, Civil P. C., and thereafter instituted the present suit on 24th November 1934.

The plaintiff prayed for (1) a declaration that the leases of 1st April 1924, were not validly forfeited and were operative for and during the residue of their respective terms ; (2) damages estimated at Rs. 11,000 for wrongful interference with the leases ; (3) an injunction restraining the defendant, his servants and agents from granting a lease or leases of the leasehold properties and from authorizing any person to carry on any operation in or on the leasehold properties or on any portion thereof and from interfering with any of the rights of the plaintiff company ; (4) interest and (5) costs.

The defence was that the leases were lawfully forfeited and that the officers of the Government rightly re-entered the leasehold properties. The learned Subordinate Judge has dismissed the suit holding that the agreement of 30th September 1933 between the plaintiff and Mr. Bose coupled with the plaintiff company making over the possession of the properties to Mr. Bose constituted a breach of the conditions of the leases and the defendant was entitled to forfeit them. The plaintiff has preferred this appeal.

The learned Government pleader has raised a question about the maintainability of the suit, which does not seem to have been specifically raised before the lower Court. I shall take it up in the end. The main question is whether the defendant was entitled to forfeit the leases. The defendant has relied upon two acts of the plaintiff company as constituting a breach of the condition of the leases, namely, the execution of the agreement and putting Mr. Bose in possession of the properties leased. The agreement may be divided into two parts: one is a contract to assign to Mr. Bose, subject to the consent of the Board of Revenue, the leases on a consideration of Rs. 6,000 out of which Rs. 101 was taken in advance; and the second is a promise to put the prospective vendee in a position to work the quarries of the leasehold properties on the latter's depositing with the liquidators of the company a sum of Rs. 4,000. It is not contended on behalf of the Government, as it cannot possibly be contended, that the first part of the agreement constituted any breach of the covenants of the leases. The covenant relied upon by the Government prohibits

assignment of the leases or transfer any right or interest thereunder or under-letting whole or any portion of the premises comprised in the leases without the assent of the Board of Revenue.

A contract to assign is not an assignment especially when the contract was subject to the Company's obtaining the necessary assent of the Board of Revenue. It is well established that a forfeiture clause must be literally and strictly construed and should be taken most strongly against the lessor inasmuch as he can always provide as stringent conditions as he likes. In this case the condition itself makes it possible for the lessee to assign the leases provided that the Board of Revenue gives its assent. In order to obtain such assent there must be a negotiation for assignment. The lessee cannot apply for assent unless there is a prospective purchaser. Therefore, it does not require any argument to hold that the plaintiff Company did not incur forfeiture by entering into an agreement with Mr. Bose promising to sell the leases to him provided that the assent of the Board of Revenue was obtained.

The second part is a promise to put the prospective purchaser in a position to work the quarries of the leasehold properties " as agent of the Company," provided he deposited Rs. 4,000 with the liquidators of the Company. According to the Government this contract, coupled with a subsequent making over of the possession of the property to Mr. Bose, constitutes subletting. The learned Subordinate Judge has held that the possession of Mr. Bose could not be that of an agent of the Company as he was described in the argument because he was to work the quarries on his own account without being liable to the Company for profit or loss. This was also the reason given by the Government in their Notification for holding the transaction as subletting. It may be that strictly speaking Mr. Bose was not an agent of the plaintiff. An agent acts on behalf of his principal at the instance of the principal and the profit and loss of the business is that of the principal. In this case Mr. Bose was in fact to work the quarries on his own account pending the decision of the Board of Revenue about the assignment of the leases to him. It was clearly provided that if the Board of Revenue would sanction the transfer of the leases a proper deed would be executed and Mr. Bose would continue in possession as purchaser; otherwise the transaction was to come to an end.

The present case seems to be almost similar to the case in (1899) 2 Q B 79 (1). In that case a lease was granted to an individual and a Joint Stock Co., and it contained, among others, a covenant by lessees for themselves and their assigns not at any time or times during the term to assign or underlet the premises or any part thereof without first obtaining the consent of the lessor in writing which consent was not to be unreasonably withheld. The lessors conveyed all their interest in the premises to the plaintiff. There was also a clause providing forfeiture if the company went into liquidation for certain purposes. The lessees with the consent of the plaintiff assigned the residue of the term of the lease to the defendants. The consent of the plaintiff was expressly limited to the particular assignment. Thereafter the company went into voluntary liquidation. The liquidation was for the purpose of reconstructing the company and increasing its capital. A new company was formed and duly registered. Notice was served upon the original lessees and the defendant preparatory to taking proceedings to enforce the right of re-entry. Thereafter an agreement was entered into between the defendant company, the defendant Steiger and the new company for the sale of the lease by which it was provided that at a certain period, though the purchase might not then be completed, the purchaser should be let into possession of the premises and from that date pay the rents and outgoings in respect of the same. The purchasers were let into possession under that agreement, the purchase remaining uncompleted. It was contended by the lessor among others that an agreement to assign the lease, coupled with the making over of the possession to the proposed assignee, constituted the subletting of the premises. Lord Russell of Killowen, C. J., delivering the judgment of the appeal Court, said :

Finally, as to the alleged breach by underletting. It is admitted that there has been no assignment within the meaning of the covenant against assignment. What has taken place is

1. Horsey Estate, Ltd. v. Steiger, (1899) 2 Q B 79=68 L J Q B 743=80 L T 857=47 W R 644=15 T L R 367.

this. The defendants, having agreed to sell to the new company, have let them into possession pending the completion of the purchase, the new company undertaking to pay all rents, rates and outgoings in connection with the premises or the business there carried on. There is a provision for redelivery of possession to the defendants if the contract should be rescinded. It is contended that this makes the new company the defendant's under-tenants. But on what terms? The new company pay no rent to the defendants; they have undertaken no obligations to the defendants except those mentioned, which are not necessarily obligations of tenancy. But it is said the proper implication from these facts is that a tenancy at will has been created. Whether this may be technically so or not, the practical answer to this contention seems to be that the defendants could not by the exercise of their will turn the new company out. The effective answer of the new company would be: We have come in as purchasers and we are willing to carry out our terms of purchase. In this sense and according to the ordinary understanding of men, this is not a case of underletting at all, but merely a case in which the new company has been let in on terms of purchase. Had the covenant been (as is of late years often the case) against parting with possession without license of the landlord, the plaintiff company would have provided a breach of such a covenant, but they have not established a breach of the covenant in question, which is against under-letting only.

The learned Government Pleader tried to distinguish this case from the case before us. He contended that the reason why the transaction in that case was not held to be subletting was that there was no rent payable to the vendor, and in this case there is a provision for the payment of royalties by Subodh Gopal Bose to the plaintiff company. In my opinion, there is no force in this contention. In that case also rent, etc., were required to be paid by the prospective assignee to the lessor. In this case nothing strictly speaking was payable to the plaintiff company. The royalties which Mr. Bose was required to pay were only those which were payable to the Government. As there was no relationship of landlord and tenant between the Government and Mr. Bose the royalties were to be paid through the plaintiff. Putting a prospective assignee into possession of the premises cannot, in my opinion, be said to be subletting. Lease of an immoveable property is a transfer of a right to enjoy such property. The agreement of 30th September 1933, does not, in my opinion, purport to transfer any right in the leasehold properties. Cl. (6) which is the only operative clause in this respect says:

> The purchaser (Mr. Bose) shall be appointed local agent of the vendors of the leasehold right of the vendors to the lands..... until the transfer of the leasehold right be effected or until it is finally decided that such transfer cannot be made.

Allowing a man to work cannot be said to be a transfer of an interest in the properties. Assuming, however, that the transaction amounted to a sublease, it was void on account of want of registration of the document. S. 107, T. P. Act, says that :

> A lease of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent can be made only by a registered instrument. All other leases of immoveable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession.

The learned Government Pleader contended that the transaction in question did not come within para. 1 of the section. Assuming it to be so, there is no question that it comes under the para. 2 being included in the words "all other leases." In that case the lease must be made either by a registered instrument or orally accompanied by delivery of possession. Under S. 4, T. P. Act, S. 107 of the Act, is to be read as supplemental to the Indian Registration Act. Under para. 2 of S. 107, if a document is to be executed for a lease not coming under para. 1, the document must be registered and the effect of non-registration under S. 49, Registration Act, is that the document shall not affect any immoveable property comprised therein. In order to attract forfeiture the subletting must be legal. A condition against transfer is not broken by transfer which is in fact void (Halsbury's Laws of England. Vol. 18, para. 1040).

The learned Government Pleader next contended that if the transaction did not amount to a sublease, it was a transfer of a right or interest under the lease and therefore it lead to forfeiture. I have already stated that in my opinion the transaction does not amount to transfer of any interest in the leasehold property. Assuming that it does, it is inoperative for want of registration of the document. Being an interest created in an immoveable property of more than Rs. 100 the document was compulsorily registerable under S. 17, Registration Act, and not having been registered has not affected the property under S. 49 of the Act.

The learned Government Pleader further contended that as Mr. Bose was put in possession of the leasehold premises as

a prospective purchaser or as a sublessee or a transferee by virtue of the agreement he had a complete title to the premises under S. 53-A, T. P. Act. This argument is also in my opinion untenable. In order to attract the provisions of S. 53-A which is based on the English doctrine of part performance, it is necessary that there should be a completed agreement and that possession be delivered in part performance of that agreement. In this case, first of all, there was no completed agreement to sell nor any agreement to sublease or to transfer any interest acquired under the lease. The agreement to sell was dependent upon the obtaining of the assent of the Board of Revenue. As long as this assent was not given Mr. Bose was not entitled to sue for specific performance of contract. Secondly, the possession which was to be given to Mr. Bose under the agreement was not in part performance of the contract nor Mr. Bose took possession of the premises in part performance of the contract. In the agreement it was clearly stated that the possession of the latter would be that of an agent. The learned Subordinate Judge has held, as I have stated, that Mr. Bose could not be treated as an agent, as the plaintiff company was not responsible for the profit and loss of the quarry business. The position of Mr. Bose may not be exactly that of an agent, but it was definitely provided that he could not claim any position other than that of an agent. Cl. (9) of the agreement sets forth :

> If the purchaser do not take any appointment as local agent of the vendors as provided in Cl. (6) aforesaid he shall not do any work in the quarries of the lands set out in the schedule or burn or manufacture lime thereon nor despatch lime and stone from the said Murli centre until the transfer of such leases has been completed.

It was by virtue of this agreement that Mr. Bose took possession of the quarries. It was not possible for Mr. Bose to claim that he took possession in part performance of the contract to assign the leases. In this view of the matter it is not necessary to consider the contention of Mr. Manuk on behalf of the appellant that an equitable transfer contemplated in S. 53-A, T. P. Act, cannot constitute a breach of the prohibition assignment contained in the leases, though it has some force. In Halsbury's Laws of England under the heading, "Landlord and Tenant," para. 1106, it is stated that

> a covenant "not to assign," or "not to assign or otherwise part with" the premises is only broken by a legal assignment for the entire residue of the term. Consequently the covenant is not broken by a declaration of trust of the premises in favour of a third person, or by the deposit of the lease as security for an advance.

This principle seems to have been laid down in the case in 5 B & C 308 (2). In Woodfall's Law of Landlord and Tenant (p. 844, 23rd Edn.) the same principle has been enunciated, i. e., an equitable assignment is not sufficient to operate as a breach of the covenant. There must be an assignment in law. The Judicature Act has not effected any alteration of the law in this respect. S. 53-A, T. P. Act, does not provide that under the circumstances stated therein a good title passes to the transferee. It only says that the transferor shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken possession. However, it is not necessary for me to pursue this matter further as in my opinion, as I have already said, in this case even an estoppel has not been created as contemplated in S. 53-A, T. P. Act.

Let us now see whether the act of parting with the possession of the leasehold properties by itself constitutes a breach of the conditions independent of the execution of the agreement of 30th September 1933. In my opinion it does not. The only undertakings given by the lessee were: "(1) not to assign the lease; (2) not to transfer any right or interest thereunder, and (3) not to underlet the whole or any portion of the premises comprised in such leases without the assent of the Board of Revenue being obtained." If the transaction was not an assignment of the leases nor subletting nor transfer of any right or interest thereunder the plaintiff company did not incur forfeiture of the leases. There was no covenant that the plaintiff company would not part with possession. Such a covenant was necessary in order to attract forfeiture. In 15 Ves Jun 258 (3), decided in 1908, the question was

2. Doed Lloyd v. C. Powell, (1826) 5 B & C 308=108 E R 115=4 L J (O S) K B 159=8 D & R 35.
3. Church v. Brown, (1808) 15 Ves Jun 258=33 E R 752.

whether a covenant restraining alienation without licenses was a proper and usual covenant in a lease. Lord Chancellor Eldon referring to Dumpor's case observed :

> But how does the fact, that there was such a covenant in that case where it was held to be gone by alienation with license, prove that this is a usual, general covenant in a lease ? The conclusion is rather the other way; that this is a special and particular covenant. Consider how this grows. This covenant (meaning thereby covenant, and not alienation), which is represented to be usual, would not prevent underletting. Then is a covenant against under-letting a usual covenant and is it proved to be so by the authorities, that it is not restrained by the other covenant. Further, if the landlord has a covenant against both assigning and under-letting, the tenant might by an agreement, neither assigning, nor under-letting, put another person in possession of the premises; and parting with the possession in that manner would not be a breach of those covenants. Is a further covenant therefore not to part with the possession of the premises, to be given as a usual covenant ? That would not have restrained the tenant from parting with a part of the premises, these covenants having been always construed by Courts of law with the utmost jealousy to prevent the restraint from going beyond the express stipulation.

Later on a practice grew in England for a covenant in a lease against parting with possession without license of the landlord. Referring to this Lord Russell of Killowen in the case in (1899) 2 Q B 79 (1) (already referred to) said :

> Had the covenant been (as is of late years often the case) against parting with possession without license of the landlord, the plaintiff company would have proved a breach of such a covenant, but they have not established a breach of the covenant in question which is against under-letting only.

Hitherto I have treated the case as if the plaintiff company parted with the possession of the leasehold properties. In my opinion, in fact, this has not been the case if the agreement be literally construed. It simply allowed Mr. Bose to work the quarries on certain conditions and, as I have said, Mr. Bose was to claim no other position than that of an agent. It is not essential for the determination of the case to find the exact legal position of Mr. Bose, vis a vis the plaintiff company. It is enough to hold that he was neither an assignee nor a sublessee nor a transferee of any interest in the leasehold property. He was obviously put in a position to work the quarries on his own account in anticipation of the execution of a proper deed of conveyance which depended on the sanction of the Board of Revenue being obtained. As I have held this cannot incur forfeiture. Mr. Bose was more of a licensee under the plaintiff than anything else. The learned Subordinate Judge has referred to the cases in 35 Cal 82 (4), at p. 99, 17 C W N 166 (5) at p 168 and 48 Mad 368 (6). These cases discuss about distinction between a lessee and a licensee which is well known, that is in a lease there is a transfer of interest in the land and in a license there is a permission to do something on the land. The learned Government Pleader contended that a person to whom a mining right is given is not a licensee. He referred us to the case of (1892) 1 Ch D 475 (7) at p. 483, where Lindley, L. J., observed:

> A right to work mines is something more than a mere licence : it is a profit a prendre, an incorporeal hereditament lying in a grant. The distinction between a licence and a profit a prendre was pointed out in 7 M & W 63 (8), at p. 78, a leading case on rights of sporting.

In this case however there is no grant of mineral rights. If the document of 30th September be taken to be a grant, it is void for want of registration as I have already stated. The learned Subordinate Judge has held that Mr. Bose was not a licensee as he was given exclusive possession of the properties. I do not however find anything in the agreement which shows that this was the case. The deed simply authorised him to extract and remove the limestone on his own account. I next take up the question of the maintainability of the suit which was urged by the learned Government Pleader. He contended that as the plaintiff company was dispossessed from the leasehold properties by the Government it ought to have sued for recovery of possession and in such a case injunction is not the proper remedy. The plaintiff not having sued for possession the suit was not maintainable. He relied on the proviso to S. 42 and S. 56 (i), Specific Relief Act. The proviso to S. 42 only says that a plaintiff is not entitled

4. Secy. of State v. Karuna Kanta, (1908) 35 Cal 82=11 C W N 1053=6 C L J 342.
5. Mohipal Singh v. Lalji Singh, (1913) 16 I C 705=17 C W N 166.
6. Board of Revenue v. S. I. Ry. Co., Ltd., 1925 Mad 434=86 I C 688=48 Mad 368=48 M L J 161.
7. Duke of Southerland v. Hathcote, (1892) 1 Ch D 475.
8. Wickham v. Hawker, (1840) 7 M & W 63=10 L J Ex 153.

to a declaration where being able to seek further relief than a mere declaration, he omits to do so. In this case the plaintiff has not asked for a mere declaration but also for an injunction as a consequential relief though I think that on the facts a simple declaration was enough. S. 56 (i) provides that an injunction cannot be granted when equally efficacious relief can certainly be obtained by any other usual mode of proceeding. The learned Government Pleader contended that the plaintiff being able to sue for recovery of possession cannot get an injunction; whether the plaintiff is out of possession is a question of fact and it was not raised before the trial Court. No doubt, the defendant in his written statement vaguely asserted that the suit was not maintainable, but no ground was mentioned. No issue about the maintainability of the suit was raised. The order-sheet of the lower Court, dated 1st March 1935 records as follows :

> Parties ready. Suit taken up. It appears that no issues were framed. Pleaders heard, and issues settled.

The issues therefore were framed after the parties were heard. There were only two issues raised and they do not refer to the maintainability of the suit. The parties adduced no evidence and the case was argued purely on the pleadings and on the documentary evidence. In these circumstances the defendant, in my opinion, is not entitled to raise in the appeal Court the issue of maintainability on the ground of the plaintiff being out of possession. The determination of this question depends upon facts for which evidence will be necessary. The learned Government Pleader however argued that it was clear from the pleadings of the parties that the plaintiff was dispossessed by the defendant. I do not find any such statement either in the plaint or in the applications for temporary injunctions filed by the plaintiff in the lower Court or in this Court. The only thing in this connexion is contained in para. 7 of the plaint which runs thus :

> On or about 6th December 1933, whilst the said Subodh Gopal Bose was working as local agent of the plaintiff company as aforesaid, the Subdivisional Officer of Sasaram wrongfully caused the said working to be suddenly stopped and by a letter, dated 20th April 1934, the Commissioner of Patna Division informed the plaintiff company that Government had forfeited the said two leases. The Government further wrongfully authorised Kalyanpur Lime Works Limited, to carry on quarrying operations in the lands demised to the plaintiff company as aforesaid with a view to granting a lease thereof to the said Kalyanpur Lime Works, Limited, and to oust the plaintiff company therefrom.

The only admission in this paragraph is that the Subdivisional Officer of Sasaram stopped the work at about 6th December 1933 and that the Government authorised a certain company to quarry stone in the area "with a view to grant leases to the said company." It appears that the Subdivisional Officer asked the local agent of Mr. Bose to stop the work, and this was done. This does not, in my opinion, amount to dispossession of the plaintiff. It was before the forfeiture of the leases and I cannot presume that the Government dispossessed the lessees seven months before they forfeited the leases. Nor can the fact that the Government authorised a certain company to quarry stone amounts to dispossession of the plaintiff. Even if a landlord grants a new lease the grant by itself does not constitute dispossession of the previous lessee unless the new lessee actually dispossesses him. In the application for injunction filed before the lower Court there are two statements of the plaintiff which have been relied upon by the learned Government Pleader. One is in para. 6 and the other in para. 7. In para. 6 it is stated as follows :

> Your petitioner verily believes and apprehends that the defendant is looking for an opportunity to put the said Kalyanpur Lime Works, Limited, into possession of the said mines and will do so at its earliest opportunity without recourse to process of law.

This is not an admission of dispossession. In para. 7 it is stated :

> That the plaintiff is informed that Messrs. Kalyanpur Lime Works, Limited, are removing limestone from the said lands.

Removal of some limestone, even if it was a fact, does not mean the ouster of the plaintiff. Coming to the written statement of the defendant, there is no allegation even that the Government have taken possession of the leasehold properties. Para. 11 (e) of the written statement says that

> the plaintiff company was rightly ejected under the terms of the lease from the leased premises.

This at first sight appears to be a statement of fact, but while verifying the written statement of the Collector stated about some paragraphs including para. 11 (e) that they were matters of legal opinion. Therefore the fact that the plaintiff was ejected was not stated as a

matter of fact but as a matter of law, as the Collector was so advised. I must point out that legal opinion given to the Collector ought not to have found a place in a written statement. The only other paragraph in this connexion is para. 11(d) which runs thus:

That the Government rightly re-entered, authorized and inducted the Kalyanpur Lime Works Company to quarry or to carry on quarry operations in the lands previously leased out to the Kachhua Lime Stone Company with a view to avoid loss to the Government and to grant subsequently a lease thereof to the said company.

But this, in my opinion, hardly means dispossession of the plaintiff. The re-entry may refer to ejectment mentioned in the next paragraph as the legal effect of forfeiture. Nor is it clear that any act of dispossessing the plaintiff was done prior to the institution of the suit. The learned Government Pleader has referred us to the observation of the learned Subordinate Judge where he says:

In the present case the defendant was able to effect peaceful ejectment and therefore it was not necessary for the defendant to have recourse to a regular suit in order to enforce the ejectment clause in the indenture.

As I have said there is no basis for this observation. The only statement about ejectment is in para. 11(e) of the written statement which, according to the Collector, is a matter of legal opinion. I have stated in the beginning of my judgment that the Government Notification forfeiting the lease was dated 18th July 1933, and the notice of the suit under S. 80, Civil P. C., was served on the Collector on 23rd July of that year. There is nothing on the record to show that between these two dates anything was done by the Government which may constitute dispossession of the plaintiff. The plaintiff was entitled to sue only on the cause of action which accrued to him before the notice and it was the forfeiture of the lease. Until the date of notice there was no act of dispossession of the plaintiff. When the present appeal was filed the plaintiff applied for a temporary injunction. In that application it was stated:

That the petitioner verily believes and apprehends that the defendant-respondent is looking for an opportunity to put the said Kalyanpur Lime Stone Works, Limited, into possession of the said lands and will do so at its early opportunity without recourse to the process of law and grant a lease of the said lands to the said Kalyanpur Lime Stone Works, Limited, and thereby cause irreparable loss and injury to the petitioner unless the defendant-respondent is immediately restrained by an injunction from doing so.

In the next paragraph it is stated:

That the petitioner is informed that Messrs. Kalyanpur Lime Works, Limited, is removing limestone from the said lands.

This statement in the petition which was filed on 23rd April 1935, shows that up to that date, according to the plaintiff, the Government had not given a fresh lease to the Kalyanpur Lime Works, Limited, and the plaintiff was not dispossessed. The injunction prayed for was:

That the defendant be restrained forthwith till the disposal of the appeal from granting lease or leases either to the said Kalyanpur Lime Works, Limited, or to any other person or persons and from authorizing and allowing such person or persons their servants, agents, tenants and workmen to carry on or suffer to be carried on any portion of the said lands or any portion thereof and from otherwise interfering with any of the rights of your petitioner, possessory or otherwise, over or in respect thereof, and from changing the character and conditions of the said lands.

An ad interim stay was granted by this Court on 25th April 1935 and notices were served on the defendant. No written refutation of the allegations of the plaintiff was filed on his behalf. When the matter of temporary injunction came up for hearing it was orally opposed, but it was granted on 25th July 1935. It was open to the defendant at that stage to prove by an affidavit or otherwise or even to assert that a lease had already been granted to the Kalyanpur Lime Works, Limited, and that the plaintiff was dispossessed and therefore a temporary injunction would be infructuous. Nothing seems to have been done. On the other hand, after the plaintiff had applied for a temporary injunction, the defendant applied that security for costs be taken from the appellant. In that application, which was filed after the notice of application for injunction was served upon the defendant, it was stated that:

The plaintiff company were removing the rails and tubs from the Murli quarries and it is submitted that they are doing so in a precautionary measure to avoid payment of costs awarded in the decree.

The application for an order for security of costs was rejected by the Registrar of this Court on 23rd July 1935, as the plaintiff had already paid in the Court below the costs decreed by that Court. But the statement in the petition of the defendant shows that the

plaintiff company's men were on the leasehold properties, its rails were there and that it was removing them. This can hardly be consistent with the fact which was urged by the Government Pleader at the hearing of the appeal that the plaintiff was entirely out of possession. No doubt, the plaintiff stated that it was informed that the Kalyanpur Company was removing stones, but that cannot be said to be an admission of dispossession. The removal by the Kalyanpur Company of some stones, which might possibly have been quarried by the plaintiff or Mr. Bose, cannot amount to dispossession of the plaintiff specially when we know nothing of the extent of the removal. Nor, as I have said, is there anything to show that it was done before 23rd July 1933, when the plaintiff gave notice of the suit. In my opinion therefore the suit is maintainable.

The next question urged by the learned Government Pleader was that the plaintiff was not entitled to any damages for interference with the leases as it had abandoned the claim for them. I do not find any such abandonment. In fact an issue about the damages was raised, but no evidence was given as parties very rightly wanted the determination of the main issue. When dealing with the question of damages the learned Subordinate Judge has stated that the plaintiff adduced no evidence. The remark is not justified. Both parties seem to have agreed that no oral evidence should be adduced and the case should be decided on the pleadings and documents. Ordinarily it is desirable that the question of the amount of damages should await the decision of the question of title. This is a procedure which has been approved by their Lordships of the Judicial Committee in the case of 14 P L T 219 (9), where the trial Court had reserved the question of the amount of damages till a further stage of the suit. This was disapproved by this Court, but their Lordships of the Judicial Committee observed that the course adopted by the trial Court was a very usual, a very proper and a very convenient one. In its appeal to this Court the plaintiff has claimed damages, as it has paid court-fee on that claim.

The result of my findings is that that the plaintiff succeeds, and the suit will be decreed with costs throughout. It will be declared that the two leases, dated 1st April 1928, have not been validly forfeited on account of the agreement of 30th September 1933 and the plaintiff allowing Mr Bose to quarry stone in the leasehold properties. There will also be an injunction restraining the defendant and his servants from interfering with the plaintiff's leases on the basis of the forfeiture claimed by him in the Government Notification of 18th July 1933. The plaintiff will also get from the defendant damages for wrongful interference with its leases, the amount of which will be ascertained in a subsequent proceeding on a proper application being made to the lower Court. In calculating the costs of the plaintiff in the two Courts the court-fee and the hearing-fee on the value of the damages claimed will not be allowed at this stage, but they will be allowed by the lower Court when the amount of damages have been ascertained and only on the amount which the plaintiff may be found to be entitled to. The trial Court may then also award to the defendant costs on any amount by which the plaintiff's claim for damages may be found to have been overvalued.

Varma, J.—I agree.

V.B./R.K. *Appeal allowed.*

9. Naresh Mohan Thakur v. Brij Mohan Misra, 1933 P C 43=141 I C 756=14 P L T 219.

A. I. R. 1936 Patna 382

JAMES, J.

Beyas Narain Singh and *others*—Petitioners.

v.

Dasrath Singh and *others*—Opposite Parties.

Criminal Revn. No. 7 of 1935, Decided on 10th January 1936, from order of Addl. Dist. Judge, Muzaffarpur, D/- 27th August 1935.

(a) Civil P. C. (1908), S. 115—Trial Court directing prosecution under S. 476, Criminal P. C.—Appellate Court not satisfied with case of prosecution can direct withdrawal of complaint—High Court will not interfere under S. 115 with its order.

Where the trial Court directs prosecution of a party to a suit, under S. 476, Criminal P. C., for having used a forged document in evidence, the appellate Court has, on an appeal from the order, jurisdiction to direct withdrawal of the complaint if it is not satisfied with the case for prosecution, and the High Court will not interfere under S. 115, Civil P. C. [P 383 C 2]

(b) Criminal P. C. (1898), S. 476-B—Hearing of appeal under S. 476-B is function which District Judge may assign to Additional Judge—Additional Judge hearing such appeal exercises same powers as District Judge.

There is nothing in the Code of Criminal Procedure or in the Civil Courts Act which suggests that a hearing of an appeal under S 476-B is not one of the functions which a District Judge may assign to the Additional Judge by general or special order in his distribution of business. Where an appeal under S. 476 has been assigned in this way to the Additional Judge, the Additional Judge exercises the same powers as the District Judge. He should be regarded as another officer exercising the functions of the Court of the District Judge in the same manner as an Additional Judge of the High Court exercises the functions of a High Court Judge. [P 384 C 1]

N. K. Prasad II—for Petitioners.

P. K Sen and *Harihar Prasad Singh*—for Opposite Parties.

Order.—This is an application for revision of the order of the Additional District Judge of Muzaffarpur allowing an appeal under S. 476-B, Criminal P. C. The petitioner now before the Court was the plaintiff in a suit which was instituted in the Court of the Munsif of Hajipur. The claim was for arrears of hak azri due on a zerpeshgi bond; but the defendants produced the bond with certain endorsements purporting to be acknowledgments of payments received by the plaintiff Beyas Narain Singh. These endorsements were examined by a so-called handwriting expert who, after comparing them with admitted writing of Beyas Narain, expressed the view that they were forged. The Munsif found that these endorsements were forgeries, and his decision was affirmed on appeal by the District Judge who regarded the evidence of the handwriting expert as discredited, but acted on comparison which he himself made of the admitted writing and the questioned signatures. A little more than three months after the decision of the appeal the plaintiff applied to the Munsif of Hajipur, requesting that he would take steps for the prosecution of the defendants for using a forged document in evidence, under S. 476, Criminal P. C. The Munsif made his order directing that a complaint should be made, on 8th July 1935; but it may be noted that on 4th June, while those proceedings were pending, the document with the questioned endorsements upon it had been returned to the defendants. The defendants appealed under S. 476-B to the District Judge, who transferred the appeal for hearing to the Additional District Judge. The Additional District Judge allowed the appeal and directed that the complaint should be withdrawn. The plaintiff prays for revision of that order.

Mr. N. K. Prasad, on behalf of the petitioners, suggests that the learned District Judge has not properly applied his mind to the facts of the case; and he suggests that the learned Judge, in finding that there is no probability of a conviction in this case, has set too high a standard as a necessary condition precedent to the preferring of a complaint under S. 476. The prosecution would have to depend on the oral evidence of Beyas Narain, together with the comparison by the Court of the questioned document, with writing made by Beyas Narain for the purpose of comparison with it; and if the learned Additional District Judge thought that this evidence could not be sufficiently relied upon as the basis of a conviction, he acted rightly in directing withdrawal of the complaint. Indeed it appears that the learned Munsif, while he was conducting this enquiry, practically put it out of the power of the party desiring to prosecute to secure a conviction, by returning the questioned document to the party who was about to be prosecuted for using it; and certainly without the questioned document it would be extremely difficult to obtain a conviction under S. 193 or S. 196, I. P. C. In any view of the matter, the learned Additional District Judge had jurisdiction to direct withdrawal of the complaint if he was not satisfied with the case for the prosecution; and it would not be proper to interfere with this order under S. 115, Civil P. C.

Mr. N. K. Prasad suggests that the Additional District Judge had no jurisdiction to hear the appeal, since he is not the Court in which appeals ordinarily lie within the meaning of Ss. 476 and 195, Criminal P. C. Mr. N. K. Prasad cites decisions in which it has been held that appeals from Munsifs under S. 476-B, Criminal P. C., cannot be transferred to Subordinate Judges for hearing, except in those cases where a direction has been made that appeals from Munsifs are ordinarily to be filed in Subordinate Judges' Courts. In the present instance the appeal was preferred in the Court of the District Judge; but an Additional District

Judge had been appointed under S. 8, Civil Courts Act, who had power under the Act to discharge any functions of a District Judge which the District Judge might assign to him, and in the discharge of those functions to exercise the same powers as a District Judge. There is nothing in the Code of Criminal Procedure or in the Civil Courts Act which suggests that the hearing of an appeal under S. 476-B is not one of the functions which the District Judge may assign to the Additional Judge by general or special order in his distribution of business; and when the appeal has in that way been assigned to the Additional Judge, the Additional Judge exercises the same powers as the District Judge. He should be regarded as another officer exercising the functions of the Court of the District Judge in the same manner as an Additional Judge of the High Court exercises the functions of a High Court Judge. I cannot interfere in this case. The application is dismissed with costs. Hearing fee one gold mohur.

R.M./R.K. *Application dismissed.*

A. I. R. 1936 Patna 384

DHAVLE, J.

Jugesh Chandra Bose—Appellant.

v.

Maqbul Hussain—Respondent.

Appeal No. 1288 of 1932, Decided on 22nd November 1935, from decision of Sub-Judge, Purnea, D/- 24th June 1932.

(a) Landlord and Tenant—Under-raiyat—Interest of under-raiyat with occupancy rights is not heritable.

The interest of an under-raiyat with occupancy rights is not heritable under the law, and the question whether an under-raiyat who acquires occupancy rights acquires also the rights of an occupancy raiyat as defined by the Tenancy Act depends entirely on the local custom: 1925 *Cal* 956 and 1930 *Pat* 562, *Foll.*; 1926 *Cal* 163, *Dissent.* [P 385 C 1]

(b) Practice — Second appeal — Question whether tenancy permanent or precarious—Question must be decided by Court in second appeal.

Effect of a proved fact being a question of law, the question whether a tenancy is permanent or precarious is, in cases where question depends upon the proof of local custom a legal inference from facts and not itself a question of fact, and accordingly the Court in second appeal must decide the case for itself on the facts found by the lower appellate Court, instead of saying that the Courts below were at liberty to presume, if they thought fit, that the interest in question was of a permanent character: 1927 *P C* 102 and 1929 *Cal* 37, *Foll.* [P 385 C 1,2]

(c) Landlord and Tenant—Heritability—Equitable estoppel.

The lessor is not restrained by any rule of equity from bringing a suit for eviction merely by reason of the tenant having erected permanent structures on the land leased, such building having been within the knowledge of the lessor, and there not having been any interference on his part to prevent it; to raise an equitable estoppel against the lessor precluding him from suing for possession on the determination of the tenancy, the tenant should show facts sufficient to justify the legal inference that the lessor has by plain implication contracted that the right of tenancy should be changed into a right of permanent occupancy. The same principle applies to an heir of an under-raiyat with occupancy rights. And the fact that he has constructed a pucca structure would not enable him to call in aid equitable estoppel without giving evidence sufficient to justify a legal inference that the lessor had contracted that the tenant's right should be changed into a heritable right: 21 *All* 496 (*P C*), *Foll.*; *Ramsden* v. *Dyson*, (1865) 1 *E* and *I A* 129, *Ref.* [P 385 C 2; P 386 C 1]

S. N. Bose—for Appellant.

H. R. Kazimi—for Respondent.

Judgment.—This is an appeal by the plaintiff in a suit for ejectment. That the plaintiff purchased the two plots in suit from the occupancy raiyat to whom they belonged is no longer in dispute, nor is any capital now sought to be made out of the fact that the plaintiff is also the holder of an eight-annas sepatni interest in the mouza. In the record of rights, which was finally published in 1907, Mt. Sabjan, who has been found as a fact to have been the wife of the defendant, was shown as in possession of the two plots in suit in the capacity of a shikmi-dakhalkar tenant, an expression meaning an under-raiyat with occupancy rights. The only point which is now contested is whether Mt. Sabjan's interest was heritable. The lower Courts have concurrently held that the defendant has failed to prove that the interest of an under-raiyat with occupancy rights is heritable either under the law or under any custom in force in the locality and established in the case. They have nevertheless dismissed the suit on what the lower appellate Court calls equitable considerations. The plaintiff contends before me that in doing so the lower Courts were in error, and further that the question whether Mt. Sabjan had a permanent, i. e. heritable, interest is a question of law which can be raised in second appeal notwithstanding the concurrent finding of the lower Courts.

That the interest of an under-raiyat with occupancy rights is not heritable under the law is clearly established by 29 C W N 733 (1) in which Greaves, J., and Cuming, J., reversed on a Letters Patent appeal the view to the contrary taken by B. B. Ghose, J. A similar view was taken in 42 C L J 560 (2). In our own Court, James, J., sitting with Chatterji, J., also took the same view in 11 P L T 539 (3), where he observed (the case he dealt with was under the Chota Nagpur Tenancy Act which however does not in this respect differ materially from the Bengal Tenancy Act):

> Heritability is a right which has been attached by legislation to the tenure of an occupancy raiyat in Bengal, Bihar and Orissa, but it is not a necessary condition attaching to the enjoyment of an occupancy right for life. The question of whether an under-raiyat who acquires occupancy right acquires also the rights of an occupancy raiyat, as defined by the Tenancy Acts, depends entirely on local custom. It is only by the operation of local custom that an under-raiyat can acquire a right of occupancy for life; and in order to ascertain what are the incidents attaching to that right of occupancy, it is necessary to ascertain what is that local custom on the point.

The law therefore is quite clear, and it has not been urged before me on behalf of the respondent that the finding of the lower Courts as regards his failure to prove a local custom making such interest heritable is open to question. Are there then any equitable considerations on which the view of the lower Courts can be supported that Mt. Sabjan's was a heritable interest so as to disentitle the plaintiff to eject her husband and heir, the defendant? It was faintly urged on behalf of the respondent that the finding of permanence by way of heritability was a finding of fact. But as was pointed out by Rankin, C. J., in 56 Cal 738 (4), their Lordships of the Judicial Committee held in 8 Lah 573 (5) that the proper effect of a proved fact being a question of law, the question whether a tenancy is permanent or precarious is, in cases of this kind, a legal inference from facts and not itself a question of fact, and that accordingly the Court in second appeal must decide the case for itself on the facts found by the lower appellate Court, instead of saying that the Courts below were at liberty to presume, if they thought fit, that the interest in question was of a permanent character. The only facts found by the lower appellate Court are that the Musammat had a house on the land in suit, built after filling up a ditch, and that she or the defendant had planted 7 or 8 mango trees and also some kathal trees on the land. Upon this the learned Subordinate Judge observes:

> It is manifest that the conduct of the raiyats under whom Mt. Sabjan held the land was such that it induced a belief in her mind that she had a permanent right in the land or else she would not have thought of constructing a house after filling up a ditch and would not perhaps have planted trees even. It is also apparent that the raiyats under whom she held stood by and allowed her to construct a structure over it sinking her money in it.

The learned advocate for the appellant has had no difficulty in shewing that these observations are based on an erroneous view of the law. In 21 All 496 (6) their Lordships of the Judicial Committee held that the lessor is not restrained by any rule of equity from bringing a suit for eviction merely by reason of the tenant having erected permanent structures on the land leased, such building having been within the knowledge of the lessor, and there not having been any interference on his part to prevent it. That was a case of a tenant the term of whose lease has expired, but this makes no substantial difference because in the present case we are dealing not with the under-raiyat with occupancy rights but with her heir. Their Lordships also pointed out that to raise an equitable estoppel against the lessor precluding him from suing for possession on the determination of the tenancy, the tenant should show facts sufficient to justify the legal inference that the lessor has by plain implication contracted that the right of tenancy should be changed into a right of permanent occupancy. The learned Subordinate Judge merely infers conduct on the part of the Musammat's immediate landlords including the belief in her mind that she had a permanent

1. Sudhanya Kumar Das v. Saik Ismail, 1925 Cal 956=90 I C 844=29 C W N 733.
2. Iswar Sant v. Torendra Nath Kuila, 1926 Cal 163=92 I C 981=42 C L J 560.
3. Muchi Ram Bagal v. Balaram Bhumij, 1930 Pat 562=127 I C 835=11 P L T 539.
4. Kamal Kumar Datta v. Nanda Lal Dule, 1929 Cal 37=116 I C 378=33 C W N 211=56 Cal 738.
5. Dhanna Mal v. Moti Sagar, 1927 P C 102=101 I C 355=54 I A 178=8 Lah 573.
6. Beni Ram v. Kundan Lal, (1899) 21 All 496=26 I A 58=7 Sar 523 (P C).

right, basing the inference on the consideration that she would not otherwise have thought of constructing the house after filling up a ditch and would not perhaps have planted trees even.

That plainly is not a legal inference from the fact of the building of the house and the planting of the trees. As Cranworth, L. C., pointed out in (1865), 1 E and I A 129 (7), the tenant knew the extent of his interest, and it was his folly to expend money upon a title which he knew would or might soon come to an end. The learned Subordinate Judge was aware that there was no pucca structure raised on the land, and says that obviously a pretty good amount had been sunk by the Musammat as she had to fill up the hollow before she raised structure.

But even the existence of a pucca structure would not have enabled the tenant to call in aid the equitable estoppel without giving evidence sufficient to justify a legal inference that the lessor had by plain implication contracted that the tenant's right should be changed into a heritable right. No evidence of this kind has been referred to by either of the lower Courts. The trial Court laid some stress on the fact that in the Record of Rights it was noted that the tenant had acquired a haq-muqa-bazat by 12 years' occupation in accordance with local custom, but there is no warrant for holding (as was done by that Court) that this right implies

some permanent sort of interest in the land which would carry the incidence and right of transmitting that to the heir,

nor was that the view that the learned Subordinate Judge was invited to take. The haq-maqa-bazat was plainly no more than the familiar occupancy right of the Bengal Tenancy Act an occupancy right, be it remembered, acquired in the present instance by an under-raiyat in accordance with local custom. It seems to me perfectly clear that the view of the lower Courts, that Musammat Sabjan had a heritable right in the plots in suit, is erroneous in law. The consequence is that the defendant has no right to continue in occupation and that the plaintiff is entitled to eject. The appeal is accordingly allowed and the suit of the plaintiff decreed with costs in all Courts.

V.B./R.K. *Appeal allowed.*

7. Ramsden v. Dyson, (1865) 1 E & I A 129= 1 H L 129=12 Jur (N S) 506=14 W R 926.

---

* A. I. R. 1936 Patna 386

WORT, J.

Maheshwar Charan and *another*—Appellants.

v.

Dineshwari Charan—Respondent.

Appeal No. 176 of 1935, Decided on 14th October 1935, from appellate order of J. C., Chota Nagpur, D/- 16th April 1935.

(a) Part payment — Alleged payment by judgment-debtor by arrangement with *A*, judgment-debtor's debtor—Relationship of debtor and creditor between *A* and decree-holder—Arrangement embodied in document signed by judgment-debtor—No indication in document that payment made by or on judgment-debtor's behalf — Document held not acknowledgment.

A payment towards a decree was alleged to have been made by the judgment debtor to the decree holder not directly or in cash but by an arrangement with *A* who was a debtor of the judgment-debtor. Relationship of debtor and creditor also existed between *A* and the decree-holder. The arrangement, by which set off was to be made between *A* and decree-holder, was embodied in a document which was signed by the judgment-debtor. There was no indication in the document to show that any payment was made to the decree-holder by or on behalf of the judgment-debtor:

Held: that there was no acknowledgment of payment in the handwriting or writing signed by the person making the payment.

[P 386 C 2; P 387 C 1, 2]

*** (b) Limitation — Execution—Certificate of payment of decretal amount is not 'application' within Art. 182, Limitation Act.**

A certificate by the decree-holder certifying payment of the decretal amount by the judgment-debtor is not an 'application' within the meaning of Art. 182, Limitation Act: 1929 *P C* 19, *Rel. on*; *Case law discussed.*

[P 387 C 2; P 388 C 2]

B. P. Sinha—for Appellants.

Baldeo Sahay and *Nawal Kishore Sahai*—for Respondent.

Judgment.—This is an appeal from a decision of the Judicial Commissioner of Chota Nagpur and raises an interesting question of limitation. In plain language what happened was this. The decree-holder appellant who is represented by Mr. Sinha, obtained a decree on 10th September 1931 against the judgment-debtor respondent represented by Mr. Baldeo Sahay in this Court. About 4th March 1932 a payment is alleged to have been made by the judgment-debtor respondent in part satisfaction of the decree: exactly what date is for the moment immaterial; but it is on the date mentioned that the decree holder applied to

the learned Judge to certify the payment, and 8th September 1934 was the date upon which the application for execution was made. It will be seen at once that unless the decree-holder can take advantage of the so-called application of 4th March 1932, his application for execution is hopelessly barred by limitation. It is necessary for the purpose of the case, and particularly for the purpose of the first point that has been argued to make one further statement of fact. The payment by the judgment-debtor to the decree-holder was not made direct or in cash, but was made by an arrangement with a third party. Shortly stated it was this. The third party was a debtor of the judgment-debtor. The relationship of debtor and creditor also existed between the third party and the decree-holder before this Court, and by an arrangement a set off was to be made between the third party and the decree-holder which was to enure to the benefit of the judgment-debtor. Now the document by which this arrangement was made is not before this Court, but it is agreed by the learned Advocates representing both the decree-holder and the judgment-debtor that there is no reference in that document to the judgment-debt, nor is it mentioned anywhere in that document that the payment was made in connection with the judgment-debt. But it does appear that the signature of the judgment-debtor before me is on that document. The matter can be best stated by saying that if a person reads the document knowing nothing of the facts of the case he will find nothing in the document to disclose the fact that any payment had been made by or on behalf of the judgment-debtor.

The learned Judge in the Court below had decided on the evidence that by this arrangement payment was made to the decree-holder on behalf of the judgment-debtor; but he has held that this does not assist the decree-holder and cannot be taken into consideration in determining the question of limitation. Mr. Sinha appearing for the decree-holder raises two questions: first, that the arrangement comes within S. 20, Limitation Act, and secondly, that the certification of the so-called payment was a step-in-aid of execution and time therefore began to run from 4th March 1932 and not from 10th September 1931, which was the date of the decree as I have already stated. So far as the first point is concerned I do not think there can be any kind of doubt. The matter is governed by the proviso to S. 20, sub-s. (1), Limitation Act. It will appear that the first part of the section deals with payment of interest on a debt or legacy or part payment of a principal of a debt before the prescribed period of limitation. Shortly stated any such payment so long as it complies with the section gives a fresh start for limitation, but the proviso states that an acknowledgment of the payment must be in the handwriting of or in the writing signed by the person making the payment. The proviso contemplates two facts: one, an acknowledgment in the handwriting of and signed by the debtor, or an acknowledgment in the handwriting of another person but signed by the debtor. As I have pointed out there is no acknowledgment, and indeed there is nothing in the document, which would in any way indicate that the judgment-debtor acknowledged the payment supposed to have been made on 4th March 1932; all that appears is his signature. To repeat myself there is no indication that any payment was made by or on behalf of the judgment-debtor. It cannot be said therefore in my judgment that there is an acknowledgment of payment in the handwriting or in a writing signed by the person making the payment. In my opinion therefore the first point fails.

The second question is whether the matter comes within Art. 182, namely whether the so-called application was an application in aid of execution. In the recent case of 56 I A 30 (1) their Lordships of the Privy Council had to consider certain part payments in the light of Art. 181, Lim. Act, under a compromise decree. In that case the important point of fact was whether on a certain date (which was April 1922) there was a sum of Rs. 60,000 owing to the judgment-debtor and it was when such a sum was due that execution could be taken out by agreement between the parties. There it was argued on behalf of the judgment-debtor that certain part payments amounting to some lakhs of rupees could not be certified by the Court and there-

1. Prakash Singh v. Allahabad Bank Ltd., 1929 P C 19=114 I C 581=56 1 A 30=3 Luck 684 (P. C).

fore had to be ignored as the certification had been made out of time. If that argument had been acceded to, it would have shown that there was more than Rs. 60,000 due in April 1922, or in other words, that a debt of Rs. 60,000 which was a condition precedent to execution being taken out, had existed a long time before and therefore the application for execution which was before the Court was barred.

The point therefore which their Lordships of the Judicial Committee had to decide, on an appeal by the judgment-debtor, was whether his case came within Art. 181. Art. 181 is a residuary Article as has been pointed out and deals with applications other than those provided for. The expression just made "other than those provided for" is in my own words but it is justified by the words of the section itself which are "application for which no period of limitation is provided elsewhere in the schedule etc." Now their Lordships of the Judicial Committee had before them a number of decisions of the various High Courts in India, but they declined to decide the merits of those decisions for the reason that they came to the conclusion that the certification of the payments made prior to April 1922 could in no sense be described as an application within the meaning of Art. 181. Sir Lancelot Sanderson who delivered the opinion of their Lordships of the Privy Council, discussed O. 21, R. 1 and showed that where a decree-holder wished to have a sum paid by his judgment-debtor on account certified, such certification was in no sense an application and not being an application could not come within Art. 181. Their Lordships therefore advised His Majesty to dismiss the appeal as the application in the circumstances which I have related was not barred by limitation. Their Lordships of the Privy Council expressly stated that some decisions in India had come to the conclusion that where a decree-holder certified a payment he had taken a step in aid of execution within the meaning of Art. 182, Cl (5), but they expressly said that it was unnecessary for the purposes of the appeal to decide this question.

Now at this moment, the matter is in this position. Mr. Sinha rightly contends that their Lordships of the Privy Council did not decide the question with regard to Art. 182 which was not before them. Mr. Baldeo Sahay on the other hand relying upon the decisions of the High Courts, although agreeing that they have not decided the matter expressly has contended that a decision in his favour is the only decision that can be arrived at having regard to their Lordships opinion in the case which I have referred to in some detail. The argument of Mr. Baldeo Sahay is this : that Arts. 181 and 182 used the expression 'application' and there has been a change since 1927 and the articles now read "application or order." If the matter had to be decided I suppose I should hold that limitation ran either from the application or from the order in the present rule. But formerly the question was whether an application in aid of execution was an application or order. I agree with Mr. Baldeo Sahay that this makes no difference. If there was an order there must be an application and if there was an application there must be an order. Their Lordships of the Privy Council have pointed out that in the case of certification there is neither, it is merely a certification impliciter. If the decree-holder calls his certificate an application it is not such merely by his using that expression. I cannot help agreeing at any rate to some extent with Mr. Baldeo Sahay's argument that their Lordships of the Judicial Committee once having decided that 'application' is not an expression which is apt in the case of certification they almost decided the point which we have before us. At any rate Mr. Baldeo Sahay has contended that since the decision of the Privy Council the tendency has been the other way and indeed the decisions have all been entirely different since the case referred to. 59 Cal 760 (2) is a decision in point where Ghose, J., in coming to his conclusion said :

> In my view the observations of their Lordships of the Judicial Committee conclude the matter and it is unnecessary to pursue the matter further.

It is well understood that a decision is only an authority for what it decides. But as I understand Ghose, J.'s statement it is this: that once the Privy Council have decided that there is no such

2. Amarkrishna Chaudhuri v. Jagatbandhu Biswas, 1931 Cal 719=134 I C 922=54 C L J 201=35 C W N 1192=59 Cal 760 (F B).

thing as "application" in the matter of certification by a decree-holder, they decided the question which came before the Calcutta High Court and comes before me. At any rate the decision to which I have just referred was come to on the footing that the word "application" could have no reference. By reason of O. 21, R. 1, as pointed out by Sir Lancelot Sanderson, it is merely a certification. The Madras High Court have come to the same conclusion in 50 Mad 49 (3). This decision as well as that of the Calcutta High Court just referred to is expressly in point.

Now all I am offered on the other side is the line of decisions of the Calcutta High Court dealing with this matter, and the question is whether I should follow those decisions which have been described as the cursus curiae or adopt the recent decisions of the Calcutta High Court, the Madras High Court and what seems to be the irresistible conclusion to be derived from the decision of the Privy Council. I just briefly state what the effect of the decisions is. There are only four of the Calcutta High Court which have been expressly referred to in the Full Bench decision reported in 59 Cal 760 (2). The first that I propose to deal with is the case of 10 C L J 467 (4), a decision of 1909 rather later than the one to which I shall refer to afterwards, but I mention it for the purpose of disposing of it. It cannot be said that that decision is anything more than obiter. Mookerji, J., and the other learned Judge, in discussing the question as to the starting point of limitation at the end of their judgment, having decided the question immediately before them, stated that there was another difficulty in the way of the appellant; and then they refer to this particular point and have stated in substance that it is a step in aid of execution. In those circumstances the decision was merely obiter.

The next case to which I refer is the decision in 56 I A 30 (1), where the point was decided but without any serious discussion by the learned Judges of the matter. The decision in 20 Cal 696 (5) was another short judgment in which the learned Judges stated that the point was not free from doubt, but they thought that they ought to follow the rulings of the Court and of the High Court in Allahabad. No detailed discussion had ever been made on this point until the recent Full Bench decision of the Calcutta High Court. In 43 Cal 207 (6), the only question decided was whether the decree-holder had done all that was necessary by notifying to the Court, at the time of the application in execution, the fact of payment by the judgment-debtor. There is a further decision, viz. the case of 46 Cal 25 (7). The head-note correctly states the decision to the effect that after part payments within three years from the date of the decree an application in execution is in time within the meaning of Art. 182. There is no express decision on the point that it is a step in aid of execution, although the inference to be drawn from the decision I suppose must be to that effect. If I am to choose between the authorities the question is which view I must adopt. There is no detailed discussion excepting in the latest decisions of the Calcutta and the Madras High Courts, and even apart from those decisions I agree with Mr. Baldeo Sahay that in coming to the conclusion whether there has been an application or, to use the words of the amendment, "or order" in aid of execution, the decision of their Lordships of the Privy Council assists Mr. Baldeo Sahay's case that in case of certification by the decree-holder the expression "application or order" has no relevance. Once I come to that conclusion, quite apart from authorities, it seems to me that the matter is concluded as against the decree-holder. For these reasons I hold that the learned Judicial Commissioner was right in his decision and I would dismiss the appeal with costs. There will be leave to appeal under the Letters Patent.

S.R./R.K. *Appeal dismissed.*

3. Krishna Patter v. Seetharama Patter, 1926 Mad 1178=98 I C 156 = 50 Mad 49 = 51 M L J 480.
4. Rakhal Das v. Jogendra Narain, (1909) 10 C L J 467=3 I C 391.
5. Wasi Imam v. Poonit Singh, (1893) 20 Cal 696.
6. Eusuffzeman Sarkar v. Sanchia Lal, 1916 Cal 451=34 I C 606=43 Cal 207=23 C L J 390=23 C W N 272.
7. Umesh Chandra v. Akrur Chandra, 1919 Cal 253=50 I C 15=46 Cal 25.

A. I. R. 1936 Patna 390

COURTNEY-TERRELL, C. J. AND VARMA, J.

Mahabir Prasad Marwari—Plaintiff—Appellant.

v.

Syed Shah Mohammad Yehia and *another*—Defendants—Respondents.

Appeal No. 140 of 1932, Decided on 23rd September 1935, from decision of Sub-Judge, Monghyr, D/- 8th August 1932.

(a) Trusts—Liability of trust property—Debt incurred by trustee—Creditor cannot recover against trust property unless trustee, if he pays debt, can claim indemnity out of trust property—Right of trustee to be indemnified out of trust property differs in different cases.

Where a trustee has incurred debt, the creditor cannot recover against the trust property unless the trustee, if he had paid the debtor, could have claimed indemnity out of the trust property. In other words the principle of subrogation applies; the creditor can only claim to stand in the shoes of the trustee as against the trust property and his rights are no greater than those of the trustee. The right of a trustee to be indemnified out of the trust property for expenses incurred by him is a matter of the particular trust concerned and of the rules applicable to a trust of the class to which it belongs. [P 390 C 2]

(b) Mahomedan law—Wakf—Power to bind trust funds to pay debts incurred—Sajjadanashin stands in same position as Mutawalli—He can borrow money and incur debts for prevention of trust property but only with sanction of Kazi—Carrying out objects of wakf is not a purpose for which he may bind trust property—In matter of limitation on his powers, his position is different from that of Mahant of Hindu math.

In the matter of his power to bind the trust funds to pay debts incurred by him, a Sajjadanashin of the Kankah, who is also a mutawalli, is in no better position than that of any other mutawalli. In that capacity he may borrow money and incur debts for the preservation of the trust property, but even then only with the sanction of the Kazi (whose modern representative is the District Judge), and the Kazi may authorize him to create an incumbrance upon the wakf property. If the income from the property should decline he must cut down the payments to beneficiaries. He may not pay the dividends out of the capital and in no case may he mortgage the capital to pay off loans without the consent of the Kazi. In the matter of the limitation upon his powers he is in a position other than that of a Mahant of math who has the power of pledging the credit of the math not merely to preserve it from loss or destruction but for carrying out the daily ordinary objects for which the math was founded. [P 391 C 1, 2]

The carrying out of the objects of the trust is not a purpose for which a mutawalli or sajjadanashin may bind the trust property though it may be that a mahant may have that power. [P 392 C 1, 2]

Where therefore the money borrowed by the mutawalli was not necessary for saving the trust property from extinction, but was required for carrying out the ordinary objects for which the trust was founded, and the borrowing did not constitute a necessity, the amount borrowed does not bind the trust property and cannot be recovered from it, more so when the consent of Kazi had not been obtained while borrowing the sum: 1932 *Pat* 33 and 1932 *Cal* 356, *Rel. on.* [P 392 C 2]

G. P. Das, P. Misra, G. Das and *Chowdhury Mathura Prasad*—for Appellant.

Khurshed Husnain and *Yasin Yunus*—for Respondents.

Courtney-Terrell, C. J.—The following are the reasons for our order dated 7th August 1935, dismissing this appeal with costs. This is an appeal by the plaintiff, who is a merchant, shopkeeper and money lender, from the dismissal of his suit to recover from defendant 2 (a trustee) a sum of Rs. 14,000 in respect of money lent and goods supplied to defendant 1 the trustee-predecessor of defendant 2 on the allegation that the money lent and the goods supplied were lent and supplied for the benefit of the trust and were so in fact applied by defendant 1. It is now admitted that the money and goods were in fact supplied to defendant 1 and a judgment has been given against defendant 1, but defendant 2 and the trust property have been held free from liability. It was contended that in fact the money and goods supplied to defendant 1 were applied by him to the services of the trust. It was held that the plaintiff had failed to establish this. Now where a trustee has incurred debt the creditor cannot recover against the trust property unless the trustee, if he had paid the debt, could have claimed indemnity out of the trust property. In other words the principle of subrogation applies; the creditor can only claim to stand in the shoes of the trustee as against the trust property and his rights are no greater than those of the trustee. This is the law in India as well as in England.

The right of a trustee to be indemnified out of the trust property for expenses incurred by him is a matter of the particular trust concerned and of the rules applicable to a trust of the class to which it belongs. In this case the trust is of the class known as "wakf" and of the variety founded for the perpetuation of a religious

establishment based on the personality of some deceased saint. In this kind of wakf the duty of the mutawalli extends to the performance of religious observance and he is also the religious superior of the establishment. Such a mutawalli is called a sajjadanashin.

Sajjada is the carpet on which prayers are offered and nashin is the person seated thereon. The sajjadanashin is not only a mutawalli but also a spiritual preceptor. He is the curator of the dargah where his ancestor lies buried, and in him is supposed to continue the spiritual line (silsila). These dargahs are the tombs of celebrated dervishes, who, in their lifetime, were regarded as saints: see Ameer Ali's Mahomedan Law, 4th Edn., Vol. I, p. 443.

There is no dispute that the trust is of this character. Defendant 1 at the date of the transactions in question was the sajjadanashin of this trust or kankah. Subsequently to the transactions with the plaintiff he was, on petition, removed from the office of mutawalli by order of the District Judge on account of extravagance and mismanagement of the trust funds. He was allowed to continue in the purely religious capacity of sajjadanashin of the kankah, but defendant 2 was appointed mutawalli and assumed the temporal functions of the trusteeship and the control of the trust property. We have now to consider the position of a mutawalli in the matter of his power to bind the trust funds to pay debts incurred by him. The fact that in this case the mutawalli is a sajjadanashin is of little, if any, importance. Having regard to the nature and object of the trust to perpetuate the memory of a particular saint, the sajjadanashin can only be chosen from among the saint's descendants and he is under an obligation, in addition to his duties as mutawalli (i. e., managing the trust property and out of it any allowance reserved by the trust deed to specified persons or classes of persons) to carry out religious ceremonial. But in the matter of the trust funds he is in no better position than that of any other mutawalli. In this capacity he may borrow money and incur debts for the preservation of the trust property, but even then only with the sanction of the Kazi (whose modern representative is the District Judge) and the Kazi may authorize him to create an incumbrance upon the waqf property. If the income from the property should decline he must cut down the payments to beneficiaries. He may not pay dividends out of capital and in no case may he mortgage the capital to pay off loans without the consent of the Kazi. The learned authorities cited by Mr. Ameer Ali at pp. 470 and 471 of the work referred to establish this limitation upon the power of the mutwalli, and the history and nature of this particular waqf is fully described in the judgment of this Court reported in 12 P L T 817 (1). In the matter of the limitation upon his powers he is in a position other than that of a Mahanth of a Hindu math who appears to have the power of pledging the credit of the math not merely to preserve it from loss or destruction but for the carrying on of the daily ordinary objects for which the math was founded.

Under the trust deed, the duty of the sajjada-nashin in his capacity as mutwalli was to collect the revenues of the property, to distribute therefrom the allowances to certain descendants or as they have been termed in the course of this case, "cosharers" who were collateral descendants of the family to which the saint belonged, to pay for the religious observances and the salaries of the drummers who are employed on ceremonial occasions and out of the surplus, if any, to maintain himself and his family. It would appear that about the time of the transactions when the debts were incurred there was some difficulty in collecting the rents of the property on account of the litigation which was going on with a view to the removal of the sajjada-nashin. It is said that it was on this account that the sajjada-nashin was obliged to borrow the money. The revenues which were actually collected were insufficient to pay the allowances and salaries contemplated by the trust and were insufficient to leave an adequate balance to provide for the sajjada-nashin's family. The collections were also insufficient to pay Government revenues and the moneys borrowed, in particular the specific loan of Rs. 5,000, were borrowed for the purpose of discharging these obligations. It is further said that the plaintiff lent the money and supplied the goods to defendant 1 in his capacity as sajjada-nashin and not to him as an individual. If this were a material factor, and in my opinion it is not, it

1. Md. Kazim v. Abi Saghir, 1932 Pat 33=136 I C 417=11 Pat 288=12 P L T 817.

might be material to decide whether the credit was given to the trust fund or to the borrower personally and further to decide whether the money and goods actually supplied by the plaintiff were in fact applied to the benefit of the trust fund. The attention of the learned Subordinate Judge was not directed to the real point of the case and he thought that these other questions were material: even so he decided in fact against the plaintiff on both of these issues and in any case, in my opinion, his finding of fact was correct.

It is true that the plaintiff must have been well aware that defendant 1 derived such income as he had wholly from the trust estate and it is true that in the plaintiff's books defendant 1 is described by his religious title, but this is only by way of identification of the defendant as an individual. There is no evidence at all that credit was given to the trust fund in the sense that it might have been given to the agent of a disclosed principal. I see no reason whatever to doubt the bona fides of the plaintiff. He lent money to a person whom he thought was in a position to repay and without any thought of taking advantage of the extravagance of the borrower to the detriment of the trust fund. The sympathy of the Court must be with him, but this is no reason why injustice should be done to defendant 2 or the fund of which he is a trustee. The plaintiff has certainly shown that almost immediately after the borrowing of the money the land revenues and other expenses which should fall upon the trust fund were in fact discharged, but this is quite consistent with the borrower having by his extravagance and mismanagement failed to discharge these obligations notwithstanding adequate resources and having been driven to borrow for those purposes. It does not follow that there was in fact a necessity for the borrowing. A part of the indebtedness is due to goods supplied, and it is said that these were for the necessities of persons of the class for whose relief the trust fund was established and also for the necessities of the sajjada-nashin's own family whose support was one of the objects of the trust fund. But there is no evidence that either the money or the goods were necessary for the purpose of saving the trust property from extinction. They were, as admitted by Mr. Das in his able argument on behalf of the plaintiff, required for the carrying out of the ordinary objects for which the trust was founded. This may well be so, but, as I have said, the carrying out of the objects of the trust is not a purpose for which a mutwalli may bind the waqf property though it may be that a Mahanth of a Hindu math might have this power. Moreover in no case was the consent of the Kazi or the District Judge obtained for the purpose. It has been argued that there is no reason why the creditor of a Mahanth should be in a position better than that of the creditor of a sajjada-nashin. But it should be realised that although in so far as the creditors of all kinds of trustees are concerned, they stand in the same position by virtue of the doctrine of subrogation, nevertheless the trustees of two kinds of trusts into whose shoes the respective creditors are called have widely different powers with respect to the trust fund. The two principles are clearly enunciated by the judgment in the leading case of 36 C W N 193 (2) at pp. 206 and 207 and at p. 207 the learned Judges say:

> The analogy contended for on behalf of the plaintiff, in our judgment, is neither supported by precedent nor founded on principle, and is by no means perfect. As a general rule of Hindu law property dedicated to religious uses is inalienable, but the shebait or mohunt may, in a case of need or for the benefit of the institution sell or mortgage debutter property or grant a permanent lease thereof. A mutwalli on the other hand has no power, without the permission of the Court, to mortgage, sell or exchange wakf property, unless he is expressly authorised by the deed of wakf to do so; and his power to grant leases is much more restricted, so that he may not grant leases for more than three years in case of agricultural lands or for more than a year in the case of non-agricultural lands unless he is expressly authorised to do so by the deed of wakf or unless he has obtained the leave of the Court for the purpose. To introduce the doctrine of protection of a bona fide lender would be to infringe upon these limitations of the mutwalli's powers. Where an executor borrows money in his capacity as executor (the will of the testator not expressly authorizing him to do so) without creating a charge on the property and the estate under his management is enriched or benefitted by the money so borrowed, the right that the creditor may claim as against the estate is a right to be indemnified out of the estate to the necessary extent and unless the right of the executor

2. Sailendra Nath Palit v. Hade Kaza Mane, 1932 Cal 356=137 I C 500=59 Cal 586=54 C L J 328=36 C W N 193.

to the indemnity is established the creditor has none against the estate.

Even if these differences between the position of a mutwalli and a Mahanth had not existed and they do not seem to have been indicated to the learned Subordinate Judge, I agree with his findings that the plaintiff has failed to establish that the borrowings and the goods were in fact applied to the objects of the waqf or that there was "necessity" in any sense for the incurring of the debts. For these reasons the appeal is dismissed with costs.

Varma, J.—I agree. There was one other point with which I should like to deal. Mr. G. P. Das urged that the appellant was seriously prejudiced in the trial of the case inasmuch as certain account books alleged to be in possession of the receiver were not produced in spite of the request of the appellant. It appears that on 12th August 1931 a petition was filed by the plaintiff for the production of a jamakharach bahi. On the next date for hearing, viz., 16th September 1931, another petition was filed for the production of certain papers by the receiver. On 21st December 1931 the Court ordered certain papers to be filed according to the plaintiff's petition and affidavit filed on that date; but the papers do not seem to have been filed. The case was actually taken up for hearing on 13th June 1932, and the judgment was delivered on 8th August 1932. No steps seem to have been taken under O. 11, R. 21, Civil P. C. It seems that the plaintiff, after filing the petitions mentioned above, did not press the matter any further, nor did he seek the assistance of the Court in getting those documents produced. Therefore this point also fails.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1936 Patna 393

WORT AND ROWLAND, JJ.

Sorabji Dadabhai — Plaintiff—Appellant.

v.

B. N. Ry. Co., Ltd. — Defendant 3—Respondent.

Letters Patent Appeal No. 63 of 1935, Decided on 7th January 1936, from decision of Fazl Ali, J., D/- 26th March 1935.

(a) Railways Act (1890), S. 75 (1), (2)—Suit for compensation for loss of goods while in transit—Plaintiff cannot go behind declaration made under S. 75 (1) and prove real value of whole or portion of consignment—He can recover compensation only for that portion which represents loss sustained.

The law of damages entitles a plaintiff, attempting to recover in contract or in tort only such damages as he has incurred. [P 394 C 2; P 395 C 1]

In a suit against a railway company for compensation for loss of goods while in transit, the plaintiff is not entitled to go behind the declaration made under S. 75 (1) and to prove the real value for the whole or a portion of the consignment even though such value is not in excess of the declared value. He can recover compensation for only for that portion which represents the loss which he has sustained. [P 395 C 2]

The parties having acted on an assumed state of facts the rights between them would depend upon conventional state of facts, namely the valuation placed by the plaintiff upon the goods: *M'Cance* v. *L. & N. W. Ry. Co.*, 3 *H & C* 343, *Rel. on.* [P 395 C 1]

(b) Railways Act (1890), S. 75 (1)—Expression "shall not exceed the value so declared implied that claim may be less than value declared—In case of deterioration of package whole amount declared cannot be recovered as damages.

The expression 'shall not exceed the value so declared' in S. 75 (1) implies that a claim may be less than the value declared under S. 75 (1), and should be read with the context, namely the compensation recoverable in respect of such loss, destruction or deterioration. In the case of deterioration of a package or packages the whole amount so declared cannot be recovered as damages. [P 394 C 2]

(c) Interpretation of statutes — Construction which is not unreasonable and which is in conformity with well-known legal principles must be placed.

In construing a section of an Act, that construction must be placed upon it which is not unreasonable and is in conformity with well known legal principles. [P 394 C 2]

(d) Railways Act (1890), S. 75 (1)—Declaration made by consignor under S. 75 (1) as to value of goods — Railway undertaking to carry goods on basis of declaration — Consignor is estopped from alleging that declared value is not true value.

Where a railway company undertakes to carry the goods of a consignor, upon the basis of a declaration as to the value of the goods made under S. 75 (1) by him and upon that basis fixes the rate of carriage, the consignor is estopped from alleging that the declared value is not the true value of the goods. [P 395 C 2]

(e) Railways Act (1890), S. 75 (1)—S. 75 (1) contemplates declaration as to contents and value of each package.

Per *Rowland, J.*—S. 75 (1), strictly interpreted contemplates a declaration regarding the contents and the value of each package of goods consigned. [P 396 C 2]

(f) Railways Act (1890), S. 75 (2)—S. 75 (2) should be read with Ss. 58 and 78—Declaration under S. 75 is same as 'account' and 'description' referred to in S. 58.

Per *Rowland, J.*—S. 75 (2) must be read in connexion with Ss. 58 and 78 of the Act. The declaration under S. 75 is not a separate thing

from the account and description referred to in S. 58. The provisions in S. 58 are of general application but in special circumstances described in S. 75, the account and description to be given under S. 58 must include a declaration as to value. [P 397 C 1,2]

(g) Railways Act (1890), Ss. 75, 78—Declaration under S. 75 not representing true value of consignment — Declaration forming basis of calculation of per centage payable by way of compensation — Part second of S. 78 applies — Consignor cannot recover more than value of goods according to valuation.

Per *Rowland, J.*—Where a declaration given for purposes S. 75 is false in so far as it does not represent the true value of the consignment and that representation forms the basis of calculation of per centage payable by way of compensation for increased risks, it forms a material part the declaration, account and description of goods and part second of S. 78 applies, and the consignor is debarred from recovering more than the value of goods actually lost, in accordance with the valuation. [P 397 C 2]

Yasin Yunus—for Appellant.

S. N. Bose and *N. C. Ghosh* — for Respondent.

Wort, J.—This is an appeal from a decision of my learned brother Fazl Ali sitting in appeal from an appellate decree arising out of an action in which the plaintiff claimed damages or compensation for the loss of certain goods which were in transit on the defendant railway.

A number of questions arose in the Courts below, but the only matter which comes up for determination in this Court is the proper construction to be placed on S. 75, Railways Act. The goods which were carried on the defendant railway were six packages of ganja the weight of which, according to the declaration, was six maunds, but ultimately the packages proved to weigh eight maunds and twenty-four seers. No question arises now with regard to the matter, and as my learned brother Fazl Ali has pointed out, the defendant company admitted their liability to the extent of Rs. 85.5.0. During transit one of the packages was pilfered and some 11 seers 9 chattaks of ganja was extracted, and for that loss the plaintiff's claim was preferred for Rs. 541 which according to the plaintiff was the value of the goods lost. In pursuance of S. 75 (1), Railways Act, the goods being in value more than Rs. 100, the plaintiff made a declaration that the value was Rs. 1,800. The Rs. 541 claimed in the action did not represent a proportionate value of Rs. 1,800 but a proportion of what they now state to be the true value: in other words, the plaintiff claimed to go behind that declaration of valuation and claimed to be entitled to prove the true value of the goods. In support of the claim for Rs. 541 reliance was placed upon the words of sub-s. (2) of the section which are :

When any parcel or package of which the value has been declared under sub-s. (1) has been lost or destroyed or has deteriorated, the compensation recoverable in respect of such loss, destruction or deterioration shall not exceed the value so declared.

The appellant's case is in substance this: that the declared value merely limits the total amount of the claim, and that amount may be claimed either for the total amount of the consignment or a part, and therefore, he is at liberty to go behind the declaration as to value and to prove the real value for the whole or a portion, so long as the value for the whole or a portion is not in excess of the declared value. In my judgment there is no foundation for that argument. It is an argument which in my opinion ignores the grammatical meaning of the words "shall not exceed the value so declared" and at the same time entirely ignores the context of the section. The words "shall not exceed the value so declared" in my judgment implies that a claim may be less than the value declared. Again, when construing the words "shall not exceed the value so declared," the context is to be taken into consideration, the words of the context being "the compensation recoverable in respect of such loss, destruction or deterioration." It is impossible in my view to say that in the case of deterioration of a package or packages the whole amount so declared should be recovered as damages. On a plain construction of the section it seems to me that the argument of the plaintiff fails.

But assuming for the moment that the construction of the appellant represented here by Mr. Yunus is to be taken as one of alternative constructions of the section, and to that extent the section is ambiguous, that construction must be placed upon the section which at once is not unreasonable and is in conformity with well known legal principles. Now the first principle which we should apply in those circumstances would be this: that the law of damages entitles a plaintiff whether attempting to

recover in contract or in tort, such damages as he has incurred and that only. Now, Mr. Yunus at first admitted that had the Rs. 1,800 been the true value declared he would have been limited to the amount as damages which has been awarded to him. Seeing where that admission led him to he withdrew it, but the withdrawal does not assist him for the principle of the admission is so clear as to be almost unnecessary to state; in other words, it is impossible te contend that the plaintiff could (assuming the declared value to be the true value) recover the whole of the declared value in respect of a portion of the goods only. Once that principle is recognized, it is obvious that the only question which arises (the determination of which determines the question in issue) is whether the plaintiff is entitled to go behind the declaration he has made. One fact is clear and that is that it was on the basis of this declaration that the parties contracted, and the Railway Company relying upon that declaration determined the rate at which the goods should be carried. In the case of valuable goods the Company may fix a rate which to some extent compensates them and insures them for any loss for which they might ultimately be held to be liable. Now, once having stated that principle, it seems to me that the matter is determined by reason of a certain decision which in my judgment is equally applicable in this regard to India as to England. It must be remembered in this connexion that I am determining the matter on the assumption that there are two possible constructions to be placed on the section. In 3 H & C 343 (1) Williams, J., made this observation :

> When parties have agreed to act upon an assumed state of facts their rights between themselves are justly made to depend on the conventional state of facts and not on the truth.

Applying that rule to the present case, we think that both parties are bound by the conventional state of facts agreed upon between them. The conventional state of facts there referred to was the valuation placed upon certain goods carried by the defendant Railway Company. But even apart from any application of any authority in England on the question, the matter seems to be conclusively determined on the principle of S. 115, Evidence Act, which provides :

> When one person has, by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

The well known principle of estoppel seems to me to apply in terms to the facts of this case. It is upon the basis of the declaration that the parties contracted, and it was upon that basis that the Railway Company fixed the rate of carriage, and, that being so, the plaintiff is now estopped from alleging that the declared value is not the true value of the goods. That disposes of the one question on which the matter depends, namely, whether the plaintiff could go behind his declaration; he having admitted and declared the value, he could recover only that portion which represented the loss which he has sustained.

There was another aspect of the case suggested by the Bench in the course of the argument which merely was a comment upon the argument advanced and arises under sub-s. 1, S. 75, Railway Act. The words used in the sub-section are :

> Any parcel or package delivered to a railway administration for carriage by railway, and the value of such articles in the parcel or package exceeds one hundred rupees.

In such a case the consignor or the customer must declare the value of parcel or package. It may very well be that the word "parcel" is used in the technical sense of covering the whole consignment, but it is I think sufficiently clear from the section that the Railway Company could have called upon the plaintiff to value each of these packages. In any event, taking his declared value at Rs. 1,800 there being six packages of approximately the same weight, it is obvious that each of these packages would be approximately Rs. 300 in value according to the declaration of the value of the total. That means this : that the argument which we are asked to accept involves the proposition that the plaintiff could recover with regard to part of one of these packages more than the value of the whole. Whichever way one looks at the matter, it seems to me that the argument of the appellant cannot be supported either in the matter of what is

1. M'Cance v. L. & N. W. Ry. Co., (1864) 3 H & C 343=34 L J Ex 39=10 Jur (N S) 1058=12 W R 1086=11 L T 426.

the true construction to be placed upon the section, or, in the event of there being any ambiguity, the principles which should be applied in construing the section. In my judgment the decision of the learned Judge in the Court below is right. The appeal therefore fails and must be dismissed with costs.

Rowland, J. — The only question for decision in this appeal is to what amount of damages the plaintiff is entitled for loss of 11 seers 6 chhataks of ganja in transit over the defendant railway line. This ganja was contained in a package weighing 1 maund 17 seers being item No. 5 in a consignment of six packages of ganja each containing about 1 maund of ganja and the weight of each package including the packing being 1 maund 17 or 18 seers. The contents of the packages were declared to be ganja and the value of the consignment was declared at Rs. 1,800. The plaintiff claimed compensation at Rs. 46-14-0 per seer based on the cost Rs. 6.14.0 and duty Rs. 40 per seer and was allowed compensation at this rate by the Munsif and the Subordinate Judge, the decree being for a sum of Rs. 533-3-3.

In second appeal a single Judge of this Court accepted the contention of the Railway Company that the value of the entire consignment having been stated as Rs. 1,800 for six maunds the plaintiff was entitled only to so much compensation as was proportionate to the quantity of the ganja lost as compared with the quantity consigned. He therefore modified the decree and awarded the plaintiff compensation at Rs. 7-8-0 per seer corresponding to Rs. 300 per maund or Rs. 1,800 for 6 maunds and passed a decree for Rs. 85.5.0. The contention of the plaintiff in Letters Patent appeal is that the view taken by the Munsif and the Subordinate Judge was correct and the decree passed by them should be restored.

We have not been shown any authority bearing directly on the point for decision and I propose to consider and apply the statutory provisions of the Indian Railways Act. S. 72 is the section defining in general terms the responsibility of a railway administration for loss, destruction or deterioration of animals or goods delivered to the administration for transport. The responsibility is said to be that of a bailee under Ss. 151, 152 and 161 (Contract Act, 1872). Ss. 151 and 152 are the sections requiring of the bailee the exercise of ordinary prudence and care and S. 161 states the rights of parties on failure of the bailee to fulfil his duties. It runs thus :

> If, by the default of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction, or deterioration of the goods from that time.

The Courts of fact have held that the B. N. Ry. Co. were negligent during the transit of the packages in question. We have to consider how far the provisions of S. 161, Contract Act, read with S. 72, Railways Act, which may appear prima facie to impose on the Railway Company liability to make good the entire loss sustained are modified by what we find in other relevant sections. S. 75, Cl. (1) runs as follows :

> When any articles mentioned in the second schedule are contained in any parcel or package delivered to a railway administration for carriage by railway, and the value of such articles in the parcel or package exceeds one hundred rupees, the railway administration shall not be responsible for the loss, destruction or deterioration of the parcel or package unless the person sending or delivering the parcel or package to the administration caused its value and contents to be declared or declared them at the time of the delivery of the parcel or package for carriage by railway, and, if so required by the administration, paid or engaged to pay a percentage on the value so declared by way of compensation for increased risk.

On this sub-section a question may arise as to whether the consignor can be said to have made any declaration regarding the contents and value of the package item 5 of the consignment from which package 11 seers 6 chhataks of ganja were missing. The declaration made was in respect of the entire consignment of six packages. It seems to me that the section, strictly interpreted, contemplates a declaration regarding the contents, and their value, of each package. In the circumstances of this case it appears to have been understood between the consignor and the railway that each package contains one maund of ganja and the whole of the proceedings have gone on the assumption that all the ganja in all the packages was of the same quality and value. It seems to me that if there was any declaration regarding the package item 5 at all it was an implied declaration that the value of each package, and therefore of this pac-

kage was Rs. 300. As a result of this the plaintiff, if he succeeded in his main contention, would not be entitled at the utmost to more compensation than Rs. 300. The only alternative to this view would be to hold that there was no declaration as to the value of the contents of any particular package of the consignment, and if that view was taken the plaintiff would be entitled to no compensation at all having regard to sub-s. (2) of S. 75. This sub-section enacts:

> When any parcel or package of which the value has been declared under sub-s. (1) has been lost or destroyed or has deteriorated, the compensation recoverable in respect of such loss, destruction or deterioration shall not exceed the value so declared and the burden of proving the value so declared to have been the true value shall, notwithstanding anything in the declaration, lie on the person claiming the compensation.

This sub-section has been understood by the Munsif and the Subordinate Judge as merely limiting the total compensation recoverable for loss of the goods or any part of them; and if the section stood alone there might be much to be said for the view that compensation is not to be limited further than it is expressly limited by Statute. My learned brother has discussed the general principle of law applicable upon which he finds such a view not to be tenable. I would like to add that S. 75, Cl. (2) must be read in connexion with certain other provisions of the Act to which I shall now refer. S. 58 requires the consignor if so requested by an authorized railway servant to deliver "an account in writing" containing "such a description of the goods as may be sufficient to determine the rate which the railway administration is entitled to charge." If the account is materially false the provisions of S. 78 of the Act will become applicable. Therefore we have to consider whether a "declaration" made for the purposes of S. 75 is to be regarded as part of the account and description referred to in S. 58. The language used in the two sections is not identical but speaking for myself in my opinion the "declaration" is not a separate thing from the "account" and "description" referred to in S. 58; it appears to me that these provisions in S. 58 are of general application but that in the special circumstances described in S. 75 the account and description to be given under S. 58 must include a declaration as to value. In taking this view I observe that S. 75, Cl. (1) contemplates payment of or engagement to pay a per centage on the value declared by way of compensation for increased risk; while S. 58 speaks of such a description of the goods as may be sufficient to determine the rate which the railway administration is entitled to charge. It is clear that had the full value been declared the railway would have been entitled to charge more. S. 78 though not divided into sub-sections contains two distinct provisions relating to responsibility for the loss, destruction or deterioration of goods with respect to the description of which an account, materially false, has been delivered under S. 58.

First, it is enacted that if the loss, destruction or deterioration is in any way brought about by the false account the railway administration shall not be responsible at all. This covers cases where the nature of dangerous goods has been fraudulently concealed and damage has resulted. Secondly, that in any case the administration shall not be responsible "for an amount exceeding the value of the goods if such value were calculated in accordance with the description contained in the false account." On the facts as found the declaration given for the purposes of S. 75 in the case before us was false in so far as it represented the value of the consignment to be Rs. 1,800 only; and in so far as that representation was the basis of the calculation of per centage payable by way of compensation for increased risk, this was material part of the declaration, account and description of the goods. I am of opinion, therefore, that the second part of S. 78 applies and that the plaintiff is barred from recovering more than the value of 11 seers 6 chhataks calculated in accordance with the description and valuation of the consignment contained in the declaration. On this view I agree that the appeal should be dismissed with costs.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1936 Patna 398

FAZL ALI AND LUBY, JJ.

Sarju Singh and *another*—Appellants.

v.

Bhagwat Prasad—Respondent.

Misc. Appeal Nos. 129 and 175 of 1935, Decided on 26th September 1935, from order of Dist. Judge, Patna, D/- 24th April 1935.

Limitation Act (1908), Art. 183—Order of Master of High Court for transmission of decree to another Court for execution or notice by him under O. 21, Rr. 16 and 22, Civil P. C., is not revivor.

An order of the Master of the High Court for transmission of a decree to another Court for execution does not constitute a revivor within the meaning of Art. 183; nor does the notice issued by the master and served upon the judgment-debtor before the order for transmission operate as a revivor: 1916 *Cal* 488; 1927 *P C* 73; 1925 *Cal* 23 and 1925 *Cal* 213, *Foll.*; 1929 *Mad* 252 and 1924 *Mad* 673, *not Foll.*

[P 399 C 2]

S. M. Mullick, N. C. Das Gupta, B. N. Rai and *Sambhu Barmeshwar Prasad*—for Appellants.

S. N. Bose—for Respondent.

Luby, J. — These are two appeals against the order dated 24th April 1935 of the District Judge of Patna whereby that Court directed that the execution case filed by Bhagwat Prasad decree-holder (now respondent) should proceed against the appellants in the Court of the 3rd Subordinate Judge of Patna. The decree in question was passed in 1911 by the High Court of Calcutta in favour of some of the partners of a firm called Manabitram Kali Charan. That firm went bankrupt and its affairs were in the hands of a receiver for some years. Between 1930 and 1932 the heirs of the original decree-holders assigned their rights under the decree to Bhagwat Prasad. After the insolvency proceedings had terminated Bhagwat Prasad applied on 28th February 1933 to the Master of the Calcutta High Court for permission to execute the decree. Notices under O. 21, Rr. 16 and 22, were issued to Sarju Prasad Singh and Tapsi Singh (the present appellants), of whom one (Sarju Prasad) is son of one of the original judgment-debtors and the other (Tapsi Singh) is nephew of the other original judgment-debtor. Sarju Prasad and Tapsi Singh did not appear in answer to the notices, whereupon the master made an order in the following terms:

It is ordered that the said applicant as such assignee as aforesaid be at liberty to execute the said decree against the said respondents. And it appearing that the said respondents have got no properties within the local limits of the jurisdiction of this Court but have got properties within the local limits of the jurisdiction of the Court of the District Judge of Patna it is further ordered that a certified copy of the said decree together with a certificate of non-satisfaction and a copy of this order be transmitted to the said Court of the District Judge of Patna for execution.

The decree was then transferred for execution to the third Subordinate Judge of Patna and the judgment-debtors filed an objection in his Court. The Subordinate Judge after hearing the parties dismissed the execution case on the preliminary ground that it was barred by limitation. The decree-holder then filed two appeals in the Court of the District Judge, who has allowed his appeals and set aside the Subordinate Judge's order on the ground that the decree was revived by the Master's order. The question for determination is whether the decree has been revived within the meaning of the proviso to Art. 183, Lim. Act, by the Master's order dated 25th May 1933. The learned Advocate appearing for the appellants has drawn our attention to the observations made by a Full Bench of the Calcutta High Court in 43 Cal 903 (1). In that case it was held that an order of the Court's Registrar for transmission of a decree to another Court for execution did not constitute a revivor within the meaning of Art. 183 and that the Registrar would have no jurisdiction to adjudicate upon any matter such as limitation with reference to the question whether the decree was capable of execution. That decision was approved by the Judicial Committee of the Privy Council in 54 Cal 500 (2) wherein it was held that an order of the Registrar of the Calcutta High Court transmitting a decree to a District Court for execution was a mere ministerial act of an officer of the Court and did not by itself operate to revive the decree so as to extend the time within which under Art. 183 an application to enforce it must be made. It is not disputed that notices under O. 21, Rr. 16

1. Chutterput Singh v. Sait Sumari Mull, 1916 Cal 488=36 I C 602=43 Cal 903=20 C W N 889=23 C L J 645 (F B).
2. Banku Behari Chattarji v. Narain Das Dutt, 1927 P C 73=101 I C 24=54 I A 129=54 Cal 500.

and 22 were issued by the Master and served on the present appellants before the order for transmission was made. But it appears to have been held by the Calcutta High Court in 1925 Cal 23 (3) that a notice under O. 21, R. 16 would not operate as a revivor within the meaning of Art. 183. Again in 1925 Cal 213 (4) the Calcutta High Court pointed out that :

> Order 21, R. 10 expressly provides that if the decree has been transmitted to another Court the application for execution shall be made to that Court and in cases where notice under O. 21, R. 22 has to be given that rule provides that the notice shall be issued by the Court executing the decree. Under the scheme of the Code, the Court transmitting a decree is not the Court to decide objections on the part of the judgment-debtor that the decree is incapable of execution or that execution is barred by limitation. Such objections should be taken before and heard and determined by the Court to which the decree is transmittad as the Court of execution.

The learned Advocate appearing for the respondent has relied upon certain decisions of the Madras High Court. In 52 Mad 590 (5), the Chief Justice and Pakenham Walsh, J., held that though a mere order of transmission would not give a new starting point of limitation, an order of the Deputy Registrar recognising the assignment of a decree after issue of notices under O. 21, R. 16 and transmitting the decree for execution to another Court would operate as a revivor. A perusal of the judgment reveals that the learned Chief Justice came to this conclusion after considerable hesitation and with extreme reluctance. We have also been asked to read the judgment of the Madras High Court in 47 Mad 641 (6). In that case an order for transmission was made after notice to the judgment-debtors, who did not object to the transfer on the ground that execution of the decree was then barred by limitation; it was held that the judgment-debtors were precluded by the doctrine of res judicata from pleading the bar of limitation in a subsequent application for execution filed within three years of the previous application for transfer of the decree.

In my opinion we are bound to follow the decisions of the Calcutta High Court in preference to those of the Madras High Court, and that not for geographical reasons merely. The decree with which we are concerned was made by the Calcutta High Court and the proceedings in connexion therewith must be regarded as governed by the view of the law and the practice prevailing in the Calcutta High Court for the time being. I mean to say that parties who were served with notices to appear in the Calcutta High Court would naturally expect that the Court would follow its own previous decision in dealing with the matter in hand. In this connexion I would invite a reference to the observations made by the Calcutta High Court in 1925 Cal 23 (3) mentioned above where it was held that in the proceedings before the master:

> The only questions which arose were whether there had been a valid assignment of the decree and whether there had been any recorded satisfaction of the decree. Until the application for execution was made there was no need for the judgment-debtors even if notice had been served on them to appear and contest the application; they could well wait until the assignee sought to execute the decree.

In my opinion the master's order dated 25th May 1933 cannot be regarded as operating as a revivor within the meaning of the proviso to Art. 183, because there is nothing to show either that he was asked to consider the question of limitation or that he actually considered it. I would therefore hold that the Master's order did not have the effect of reviving the decree. This however does not conclude the matter, because the decree-holder maintains that there was an earlier revival of the decree when the receiver applied for execution in August 1922 and again in January 1923. And we are told that he mentioned those previous proceedings in the application which he filed before the Master in 1933. If the decree was revived in 1922 or in 1923 as alleged, then there was a fresh starting-point for limitation, and Bhagwat Prasad's application for execution made in 1933 was within 12 years from the date of such revival. This matter does not seem to have received any consideration in the judgment

---

3. Khajeh Salaluddin v. Afzal Begum, 1925 Cal 23=84 I C 68=28 C W N 963=39 C L J 590.
4. Narain Das Dutt v. Banku Behari Chattopadhya, 1925 Cal 213=78 I C 1001.
5. M. P. P. S. Palaniappa Chettiar v. Valliammal Achi, 1929 Mad 252=118 I C 775=52 Mad 590=56 M L J 555.
6. Kalepalli Rajitagiripathy v. Bhavani Sankaram, 1924 Mad 673=80 I C 103=47 Mad 641=47 M L J 4.

of the learned District Judge. The Subordinate Judge has dealt with it in the following words:

The decree-holder's learned advocate relies also on the orders Nos. 4 to 6 in order sheet (Ex. A) in Execution Case No. 1 of 1923. In my opinion these orders are of absolutely no help to the decree-holder in connexion with the question of revivor of the decree. These orders could be of some help to the decree-holder if Art. 182, Lim. Act, had applied to this case.

We have not been able to understand what the Subordinate Judge meant by these remarks. The question whether the decree was or was not revived by the applications made by the receiver in 1922 and 1923 does not seem to have received proper consideration from the lower Courts. I would therefore set aside the District Judge's order dated 24th April 1935 and the Subordinate Judge's order dated 30th April 1934 and I would remand the Execution Case, No. 236 of 1933, to the Subordinate Judge for disposal according to law. Costs will abide the result.

Fazl Ali, J.—I agree.

K.S./R.K. *Case remanded.*

A. I. R. 1936 Patna 400

MACPHERSON AND MOHAMAD NOOR, JJ.

Dinanath Mahatha and *others*—Defendants—Appellants.

v.

Jyoti Prasad Singh Deo Bahadur—Plaintiff—Respondent.

Appeal No. 1676 of 1932, Decided on 7th April 1936, from appellate decree of District Judge, Manbhum-Sambalpur, D/- 11th May 1932.

Landlord and Tenant—Rent—Enhancibility—Jagirdar under zamindar—Sarsikan paper before permanent Settlement is evidence.

Sarsikan paper prior to permanent settlement of 1790 and shortly before it is evidence of the fact that rent had varied ; if alone it is of little value as such but its value is enhanced in combination with quinquennial fehrist.

[P 401 C 1]

R. S Chattarji—for Appellants.

S C. Majumdar—for Respondent.

Macpherson, J. — The Zamindar of Pachet brought the suit out of which this appeal has arisen for a declaration that mauza Tupra held by defendants as "jagirdar" under him is held at an enhanceable rent and that the entry to the opposite effect in the Record of Rights is not correct. The defence was that the entry is correct and Tupra is a Jagir village held at a quit rent and there has been no variation of the existing rent of Rs. 323-3-4 gandas since the time of the Permanent Settlement. The first Court dismissed the suit holding that the plaintiff failed to rebut the presumption attaching to the Record of Rights. The learned District Judge in appeal reversed the decision and decreed the suit. In second appeal his finding of fact is assailed as being vitiated by error of law. He arrived at his finding in favour of the plaintiff's claim on two sets of evidence. Accepting the sarsikan paper of 1197 (1790), which shows the rent at Rupees 127-11-0 sikka, and also the quinquennial fehrist of 1202 (1795) which shows the rent at Rs. 209-12-0, both thus varying greatly from the entry in the Record of Rights, he held that the statements in these documents were valuable and proved beyond doubt that the rental had varied from time to time. He then proceeded to consider certain other evidence in particular Ex. 3, a rent decree of 1846, against Dullam (Dulam) Singh, Ex. 6 a rent decree of 1871 against Lal Singh and Ex. A filed by the defendants which shows that in 1890 Pardul Singh, whose rights the defendants have purchased at auction, established his right to the whole tenure by virtue of the rule of primogeniture. He came to the conclusion that the decree, Exs. 3 and 6, also rebutted the presumption of the correctness of the entry in the Record of Rights as showing the rental to be variable and not fixed.

It is clear that either of these findings would be sufficient. Both have been attacked by Mr. R. S. Chattarji, the second finding successfully in my opinion. It appears that in both the rent suits the defence was that the rent was Rupees 127-11-0. In the first place, this defence was negatived and a full decree at the rate claimed was passed. In the second place, the suits were not brought against Pardul Singh or any of his ancestors or real predecessors in interest. The persons sued had no title to the jagir and they or their descendants and other agnates were the defendants in the suit in which the judgment is Ex. A in which Pardul Singh established his sole right to the jagir by right of primogeniture. In fact Dullan (Dullam) Singh, the defendant in the suit of 1846, was the father of Bhupnath Singh, defendant 4 in the suit of 1892, and Lal Singh, the defendant in the suit of 1871, was father's

brother of Pardul Singh and defendant 1 in the suit of 1892. Any admission or defence made by Dullan or by Lal Singh would not be binding on the owner or the defendants who purchased from him. In any case it is clear from Ex. 3 and Ex. 6 that the Courts in both cases found that the allegation that the rent was Rs. 127-11-0 was not true. Accordingly if the plaintiff-appellant is to succeed, it is upon the first finding that the rent had varied from time to time which finding depended upon the sarsikan paper and the quinquennial fehrist of 1795.

It has been argued that the former of these was prior to the Permanent Settlement of 1793. But as it was very shortly before that date, the fact would not prevent it from being evidence and though it might be of very little value if it stood alone, it may be of enhanced value in combination with the quinquennial fehrist of 1795. It might well be held by a Court of fact to be strongly corroborative of the latter, especially in view of the great difference from Rs. 323-3-4 decreed in 1846 which would have been an improbably high rent in 1793. It cannot be said, therefore, that the lower Court had not before it evidence upon which it could legally hold that the fact was that the rent of the jagir had been lower after 1793 than it was in 1846 and onwards. Upon this view the appeal fails and is dismissed with costs.

Mohamad Noor, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1936 Patna 401

MOHAMAD NOOR AND ROWLAND, JJ.

Thakur Prasad Singh—Appellant.

v.

Babui Harpeari Kuar—Respondent.

Appeal No. 93 of 1935, Decided on 6th February 1936, from original order of Sub-Judge, Gaya, D/- 25th March 1935.

Compromise — Record of compromise — Procedure—Compromise should be recorded at once—Passing of decree based on compromise may be postponed, but not actual recording of compromise.

A Court to whom a petition of compromise is presented should not delay passing order for recording the compromise. Under O. 23, R. 3, Civil P. C., the Court is to pass an order directing the compromise to be recorded and this should be done at once. The Court is also to pass a decree in accordance with the compromise so far as it relates to the suit and the passing of the decree may, if necessary, be postponed till the hearing of the suit if there is a question how the interests of other parties to the suit, who have not entered into the compromise, would be affected by it, but this is no reason to defer the actual recording of the agreement of compromise. [P 401 C 2]

Ganesh Sharma—for Appellant.

Khurshed Husnain and *Phulan Prasad Varma*—for Respondent.

Rowland, J.—This is an appeal under O. 43, R. 1 (m), Civil P. C., from an order under R. 3, O. 23 recording a compromise between the plaintiff and defendant 1 in a suit which was instituted on 2nd January 1932. The petition of compromise bearing the signature of defendant 1 and of his pleader was presented on 2nd May 1932, but the order directing the compromise to be recorded was not passed until 25th March 1935. I would like to say at the outset that a Court to whom a petition of compromise is presented should not thus delay passing an order for recording the compromise. Under O. 23, R. 3 the Court is to pass an order directing the compromise to be recorded and this should be done at once. The Court is also to pass a decree in accordance with the compromise so far as it relates to the suit, and the passing of the decree may, if necessary be postponed till the hearing of the suit if there is a question how the interests of other parties to the suit, who have not entered into the compromise, would be affected by it, but this is no reason to defer the actual recording of the agreement or compromise. Had a correct procedure been followed in this instance a good deal of trouble would have been avoided. The hearing of the suit commenced on 15th February 1935, and on 1st March 1935 defendant 1 presented a petition asking for leave to file a written statement contesting the suit. His case is that he never entered into a compromise, that on the date when the petition was presented he was not in Gaya at all, that he had put his signature on a blank paper for the purpose of having a written statement in this very suit written out upon it, and by fraud of his karpardaz a forged petition of compromise was written on the paper instead of the written statement and was filed in the suit. The point for decision in the appeal is the simple question of fact whether the defendant had entered into the alleged agreement or not. (His Lordship then examined the evidence

and held that he did enter into the compromise and the judgment concluded.) I would dismiss the appeal with costs. Let the record be sent down to the lower Court at once for further proceedings in the suit.

Mohamad Noor, J.—I agree.

R.W./R.K. *Appeal dismissed.*

A. I. R. 1936 Patna 402

MACPHERSON, J.

Kameshwar Singh — Plaintiff — Petitioner.

v.

Mahabir Pasi—Defendant — Opposite Party.

Civil Revn. Nos. 687 to 689 of 1935, Decided on 26th February 1936, from order of Dist. Judge, Darbhanga, D/- 18th July 1935.

Bengal Tenancy Act (1885), S. 153—Refusal to revise by District Judge—High Court can exercise powers of revision in proper case.

Where a District Judge has failed to revise an order under S. 153, the High Court has power in a proper case to act in revision under its powers of revision. [P 402 C 2]

Murari Prasad and *S. P. Srivastava* —for Petitioner.

Hareshwar Prasad Sinha for *P. Jha* and *R. K. Chaudhury* — for Opposite Party.

Order.—These three applications in revision relate to three suits brought under the Bengal Tenancy Act for recovery of the several amounts payable on settlement (by auction) of date and palm trees in April 1930 with three sets of Pasis for the year 1337 F.

They were brought on 8th September 1933, which date was within three years of the 30th Bhado (that is the last day) of the year 1337. It was contended on behalf of the landlord that the suits were brought within the period of limitation since even though the payments by the Pasis are not "rent" as defined in the Bengal Tenancy Act, yet under S. 193, Bengal Tenancy Act, the provisions of the Act applicable to suits for recovery of rent are, so far as may be, to apply to suits for recovery of anything payable or deliverable in respect of any rights of pasturage, forest right, rights over fisheries and the like and the contention is that these payments for the date and palm trees are payable in respect of "forest-right" or are something analogous to forest-right covered by the words "and the like." The expression which the plaintiff would use is "phalker." If that contention is sound, then the plaintiff would come under Sch. 3. Art. 2, Cl. (b) Bengal Tenancy, Act and would be entitled to recover on the date of suit, though, of course, as the claim is not for "rent" the interest could not be at 12½ per cent as for rent.

The plaintiff adduced evidence that there was an oral contract that the so called "thika jamas" would be payable on the 30th Bhado 1337, but that claim was not established. The defence was that the suit were barred under Art. 110, Limitation Act, and the Munsif accepted and dismissed the suits. The District Judge entertained an application for revision under the proviso to S. 153, Bengal Tenancy Act, but holding that the suits were nothing but ordinary suits for recovery of the settlement money and did not fall under the provisions of S. 193 Bengal Tenancy Act, he rejected the applications in revision.

These rules have apparently been issued to consider the question which I have set out. A complication is introduced by the objection raised on behalf of the defendants opposite party, that this Court has no power to act in revision over the District Judge's failure to revise. As at present advised, I am not inclined to hold that this is really an obstacle to the consideration of the question since this Court may in a proper case itself act under its powers of revision. The question itself is, of course, of considerable importance; various recent decisions of this Court which are referred to appear to be in conflict. I may mention 1936 Pat 102 (1) and 17 P L T 170 (2) and there may be others. I accordingly refer these applications in revision to a Division Bench.*

V.B./R.K. *Order accordingly.*

---

1. Jhakur Sahu v. Rajkumar Tewari, 1936 Pat 102=160 I C 186=17 P L T 88.
2. Moti Singh v. Deoki Singh, 1936 Pat 66=160 I C 1054=17 P L T 170.

* For judgment of Division Bench, see p. 403.

A. I. R. 1936 Patna 403

AGARWALA AND ROWLAND, JJ.

Kameshwar Singh — Plaintiff — Petitioner.

v.

Mahabir Pasi—Defendant—Opposite Party.

Civil Revn. Nos. 687 to 689 of 1935, Decided on 30th March 1936, from order of Dist. Judge, Darbhanga, D/- 18th July 1935.

Limitation Act (1908), Art. 110—Suit to realise money due on settlement by auction of date and palm trees is suit of Small Cause nature—It is governed by Art. 110—It is not suit between landlord and tenant and does not come under Bengal Tenancy Act.

Money due on a settlement by auction of date and palm trees, under which the Settlement holder obtains the right to collect the juice of the trees for the season, does not amount to rent, and suit to realize such money is cognizable by a Court of Small Causes and is governed by Art. 110, Limitation Act. Such a suit is not one between a landlord and tenant and does not come within the provisions of the Bengal Tenancy Act: 1927 *Rang* 94; 1914 *Mad* 362; 1936 *Pat* 102; 1920 *Cal* 733 and 6 *W R Civil Ref* 8, *Ref.* [P 403 C 1, 2]

Murari Prasad, *R. Misra* and *S. P. Srivastava*—for Petitioner.

Ratikant Chowdhury and *H. P. Sinha* —for Opposite Party.

Rowland, J.—These three applications raise the question whether limitation should be calculated under Art. 110, Lim. Act, as has been done in the Courts below or under Art. 2 (b) of Sch. 3, Ben. Ten. Act. The suits were brought to realise money due on settlement by auction of date and toddy palm trees made in April 1930 for the year 1337. The settlement holders got the right to take the juice from the trees for the season. The applications have been referred by Macpherson, J., to be decided by a Division Bench. As pointed out in the order of reference the payments by the pasis are not rent. This is settled by a long line of authority beginning with 6 W R Civ Ref 8 (1), a decision which has been followed in 59 I C 595 (2) and recently by a single Judge of this Court in 1936 Pat 102 (3). The last mentioned case referred to mahua fruits but the principle is the same. According to these decisions the payments sued for are not rent and suits to realize them ought to be brought in a Small Cause Court. It follows, I may add, that the Munsif to whom the plaints were presented ought not to have entertained them but should have returned them for presentation to a Small Cause Court. This view of the nature of the suits is held in other High Courts also: 4 Rang 503 (4) decided that suits for the price of the juice of toddy trees are Small Cause Court suits, following a decision in 38 Mad 883 (5), where it was held that a lease of palmyra trees was not a lease of immoveable property. That decision cited S. 3, Registration Act, where moveable property is defined as including "juice in trees." But it was argued that S. 193, Ben. Ten. Act. makes the provisions of that Act applicable to suits for recovery of anything payable or deliverable in respect of any rights of pasturage, forest-right, rights over fisheries and the like. The answer to this argument is that such suits to come within this section must be suits between landlord and tenant. The title and preamble of the Bengal Tenancy Act show that it was an Act to amend and consolidate enactments relating to the law of landlord and tenant. It was said in 4 C W N 605 (6).

It is clear that the Bengal Tenancy Act, according to its preamble, is an Act relating to the law of landlord and tenant in Bengal, and that, therefore, all its provisions, including the schedules and the period of limitation laid down in the schedules, must be applicable only to suits in which the parties stand in the relation of landlord and tenant.

The expression "landlord" and "tenant' are defined in S. 3 of the Act. The definitions make it clear that no one is a tenant who does not hold land under another person. In the cases before us it cannot be said that the defendants by taking settlement of the toddy trees were admitted to occupation of any land: they did not hold land under the plaintiff; they are not his tenants and no part of the provisions of the Act applies to these suits. The Courts below have correctly applied the limitation under Art. 110, Lim. Act. In the order of reference of

1. Deb Nath Ghose v. Pachoo Mollah, (1866) 6 W R Civil Ref 8.
2. Jatindra Mohon Lahiri v. Abdul Azir Meah, 1920 Cal 733=59 I C 595=32 C L J 83.
3. Jhakar Sahu v. Raj Kumar Tewari, 1936 Pat 102=160 I C 186=17 P L T 88.
4. Maung Kywe v. Maung Kala, 1927 Rang 94 =99 I C 996=4 Rang 503.
5. Natesa Gramani v. Tangavelu Gramani, 1914 Mad 362=23 I C 102=38 Mad 883.
6. Mohendra Nath Kalamoree v. Koilash Chandra Dogra, (1900) 4 C W N 605.

Macpherson, J., a decision in 17 P L T 170 (7) is referred to; but there is nothing in that decision which has any application to the facts of the cases before us. All that was there decided was that for the purposes of a partition suit palm trees might be treated as immoveable property. I would therefore dismiss all these applications with costs. Hearing fee one gold mohur in each case.

Agarwala, J.—I agree.

R.M./R.K. *Applications dismissed.*

7. Moti Singh v. Deoki Singh, 1936 Pat 66= 160 I C 1054=17 P L T 170.

A. I. R. 1936 Patna 404

COURTNEY-TERRELL, C. J. AND DHAVLE, J.

Kedar Nath Goenka and *another*—Plaintiffs—Appellants.

v.

Bhagwat Prasad Kumar and *others*—Defendants—Respondents.

Appeal No. 175 of 1931, Decided on 30th September 1935, from original decree of Sub-Judge, Monghyr, D/- 10th September 1931.

Mortgage—Discharge—Mortgagee taking sale of some of mortgaged properties in discharge of entire mortgage debt—Partial failure of consideration by mortgagee not getting part of property purchased—Mortgage held completely discharged—Clause in sale deed that mortgage would be kept intact held merely preserved shield to mortgagee against claims of persons setting up subsequent charge.

The mortgagee accepted a sale of some of the mortgaged properties from the mortgagor in satisfaction of the entire mortgage debt. There was a clause in the sale deed that the effect of the mortgage would be kept intact. There was a partial failure of the consideration for the sale by the mortgagee not getting part of the property purchased. He sued on the mortgage:

Held: that the mortgage debt was extinguished by the execution of the sale and the relationship of mortgagor and mortgagee came to an end and the remedy of the mortgagee was one for breach of contract; [P 405 C 2]

Held further: that the clause that the mortgage would be kept intact was intended merely to preserve to the mortgagee a shield against the claims of persons setting up a subsequent charge upon the same property: 1932 *Cal* 772, *Disting.*; 1922 *All* 76, *Rel. on.* [P 405 C 1]

S. M. Mullick, *S. M. Niamatullah*, *Nital Chandra Ghosh* and *J. C. Sinha*—for Appellants.

S. N. Bose—for Respondents.

Courtney-Terrell, C. J.—This is an appeal from the decision of the Subordinate Judge of Monghyr in a suit to enforce a mortgage. The essential facts may be very shortly stated. The mortgagees' suit is on a mortgage executed on 5th October 1917, for a sum of Rs. 6,291. It has been dismissed on the ground that the mortgage debt has been satisfied by the sale by the mortgagors to the mortgagee plaintiffs of the equity of redemption of the mortgage deed. The mortgage in question came about in the following way: On 4th October 1909, defendants 1, 2 and 3 executed a mortgage bond to the plaintiffs for Rs. 19,000 odd. On 5th October 1917 calculation was made as to the amount which remained due on this bond in respect of principal and interest and the sum so found was Rs. 38,000 odd. A new transaction was entered into. The mortgagors borrowed from the mortgagees another Rs. 5,300 odd and then executed in favour of the mortgagees two documents one of them a simple mortgage bond (the mortgage bond now sued upon) for Rs. 6,291 and seven properties were mortgaged by that deed. As to two of these properties the mortgagees were given an anomalous usufructuary mortgage for Rs. 37,000 odd. The debt on these mortgages continued swelling up, and, on 24th October 1928, the total dues by the defendants to the plaintiffs amounted to Rs. 49,500 odd. Therefore the mortgagees and the defendants entered into a deed of sale and the defendants conveyed properties 1 and 2 out of the seven properties, the subject of the original mortgage, to the mortgagees for and in respect of the said sum of Rs. 49,500 odd and the mortgage debt was put an end to. In the sale deed the following expression occurs: after reciting that the consideration price for the conveyance of the properties 1 and 2 was to be Rs. 49,500, the deed continued thus:

> Keeping intact the effects of the mortgage created under the mortgage (simple) and sudbharna (usufructuary) mortagage bonds aforesaid; (and we) put the said purchaser in possession of the vended property in our place, admitted him to be the absolute owner, and set off the whole and entire consideration in respect of the dues of the said purchaser under both (his) said bonds.

The reference to the keeping intact of the effects of the mortgage has been relied upon by the plaintiffs in this case, and it is argued on their behalf that it

was intended that, notwithstanding the deed of sale and the apparent extinction of the mortgage debt, the mortgagees should remain in possession of the full rights under their mortgage bond. In other words, the argument amounts to the contention that by virtue of the sale deed the mortgagees became not only mortgagees again, but further, proprietors by virtue of the conveyance. This would be an entirely anomalous situation for which I am sure there is no precedent. The words as to keeping alive the mortgage bond are merely an assertion of the same rights that are conferred by reason of S. 101, T. P. Act, and they are intended merely to preserve to the mortgagee a shield against the claims of persons setting up a subsequent charge upon the same property. They have no reference in their proper construction either in the deed or in the Act to the maintenance of any mortgage rights by the mortgagee against the mortgagor. Properties 1 and 2, which were the subject of the sale deed, consisted of a three annas odd share in mauza Sikandarpur which was the property mortgaged. After the execution of the sale deed the plaintiffs registered themselves as proprietors of the property conveyed.

They subsequently found out the position of the defendants second party. These are persons who had obtained a money decree against defendant 3. Defendant 3, who is one of the mortgagors, had a one anna odd share in the said properties and the plaintiffs found that they were in a position of doubt as to whether these defendants second party, (who in execution of their money decree had attached that one anna odd share of defendant 3), had any right to do so and they took up the position in their plaint that they had not received that which they had bargained to receive under the sale deed and therefore the sale deed had no effect upon the rights under the mortgage deed sued upon and they therefore purported to sue defendants 1, 2 and 3 impleading the defendants second party and claiming a mortgage decree for sale of the said properties. The defendants second party, as I have said, having attached this one anna odd share of defendant 3, put it up for sale on 6th August 1928, before the date of the sale deed in question and bought it in and got delivery of possession. The case on behalf of the plaintiffs is put, I think, in two alternative ways. First of all, it is contended that under the sale deed the rights of the plaintiffs were preserved as mortgagees notwithstanding that they also became proprietors under the sale deed. This contention I have already dealt with. Secondly, it is said that owing to the failure of the defendants first party to deliver the property contracted to be delivered, that is to say, the three annas share and being only in a position to deliver a two annas share in Shikandarpur, there has been a total failure of consideration.

For a short time during the argument I was, speaking for myself, attracted by this proposition, but an examination of the fact shows that it is not a case of total failure of consideration, but a failure of consideration with regard to a quantum only. Unless it could be satisfactorily argued that the sale deed was of no effect on a total failure of consideration the decision cannot be otherwise than that the mortgage debt was extinguished by the execution of the sale deed. This proposition has been clearly exemplified by the decision in 66 I C 203 (1) and the learned Judges in that case pointed out that there had been a partial failure of consideration; but where a person contracts to sell something and fails to carry out the contract partially there is an appropriate remedy for breach of contract and the contract is not wholly void, and they pointed out that in such circumstances the execution of the sale deed put an end to the mortgage debt. In short, a new contract is entered into by which the former relationship of a mortgagor and mortgagee is terminated and the new relationship of a vendor and vendee is substituted.

For a breach of that new contract a remedy is open to the person who is damaged by its breach, but there can be no question of the rights under the old contract surviving. The case principally relied upon by Mr. Mullick on behalf of the plaintiffs 36 C W N 696 (2), is clearly distinguishable. There was no question of merger there of the rights of the mortgagee by reason of the transfer, because

1. Lachman Prasad v. Lachmeshwar Prasad, 1922 All 76=66 I C 203=20 A L J 151.
2. Upendra Nath Samanta v. Saroda Prosad Ghosh, 1932 Cal 772=140 I C 589=36 CWN 696.

the property which was purported to be transferred was not the property which had been mortgaged. There having been no merger, therefore, the rights of the mortgagee survived the contract of sale. Here the property actually transferred, though not actually delivered, was the property which was the subject of the equity of redemption and was the property which had been the subject of the mortgage. For these reasons, in my opinion, the appeal fails, the learned Subordinate Judge having rightly dismissed the suit on the ground that it was not maintainable, the mortgage bond having been discharged by the execution of the sale deed. I would, therefore dismiss the appeal with costs.

Dhavle, J.—I agree. The appellants took the sale deed in satisfaction of the moneys due under the mortgage and the sudbharna. It is not their case definitely that the sale deed has failed in part, but they brought the suit on the footing that the defendants second party claimed a prior title in respect of the share of defendant 3 who was one of the mortgagors. Whether those defendants have a good title or not as against the appellants has not yet been determined; they asserted it against the appellants in the land registration proceedings, and there it was the appellants that succeeded. That title involves questions of fact on which no issue was framed in the lower Court nor any evidence given. Assuming, however, that the sale deed taken by the appellants does fail in respect of the part claimed by the defendants second party, it is impossible to let the plaintiffs sue on the mortgage, while keeping the bulk of the property conveyed to them by the sale deed. As a matter of fact they stand registered at present in the collectorate registers as owners of the entire mortgaged property. The provision in the sale deed regarding "keeping intact the effects of the mortgage created under the mortgage (simple) and sudbharna (usufructuary) bonds" does not seem to me to have the effect of keeping up the mortgage as against the mortgagors: indeed, it is conceded that it was not open to the appellants by any arrangement with the mortgagors to constitute themselves mortgagees and owners at one and the same time. Plainly, that provision was made in the sale deed merely in view of S. 101, T. P. Act, which entitled the "owner" of a mortgage, by express words or necessary implication, to provide that the mortgage shall continue to subsist. The section makes the mortgage available not as against the mortgagor but as against puisne incumbrances and others occupying the same position; while as against the mortgagor, the mortgagee's rights are replaced by his rights under the sale deed taken in discharge of the mortgage debt.

Mr. Mullick for the appellants has contended that no distinction was made in 8 Cal 530 (3), between total failure of consideration and partial failure of consideration for a sale deed taken by the mortgagee. In the particular case there was a total failure of consideration, and their Lordships held that the mortgagee was accordingly entitled to fall back upon the mortgage. When however, as in the present case, there is only a partial failure of consideration, the position is entirely different. So far as the mortgagors as such are concerned, they are discharged by the sale deed, though it may be that the mortgagees as purchasers will be entitled to damages for the failure of the vendors to make out a good title to some part of the property conveyed. The sale not failing as a whole, the relation of mortgagor and mortgagee, which was replaced by that of vendor and purchaser, cannot be recalled as against the mortgagors-vendors, cf. 66 I C 203 (1), even irrespective of the consideration that the purchaser cannot both approbate and reprobate the sale. The appellants cannot, therefore, in view of their acceptance of the sale deed sue on the mortgage, making the mortgagors the defendants first party nor could they have sued on that document leaving out the mortgagors. The suit brought by them was, therefore, defective not merely in a technical sense but on a matter of substance, and was rightly dismissed by the lower Court.

K.S./R.K. *Appeal dismissed.*

3. Gopal Sahoo v. Gunga Pershad Sahoo, (1882) 8 Cal 530.

A. I. R. 1936 Patna 406

WORT, J.

Kukur Sahu—Defendant—Petitioner.

v.

Bibi Salihan — Plaintiff — Opposite Party.

Civil Revn. No. 413 of 1935, Decided on 20th January 1936.

(a) Provincial Small Cause Courts Act (1887), Arts. 8 and 31 — Recovery of payments under kabuliyat executed by usufructuary mortgagee releasing part of zarpeshgi and stipulating to pay fixed sum as profits on account of raiyati right — Suit does not fall under Art. 8 or Art. 31.

A suit by a purchaser of arrears of payments under a kabuliyat entered into by a usufructuary mortgagee who released part of his zarpeshgi lease and stipulated to pay a fixed sum as profit on account of raiyati right, is neither a suit for accounts, nor one for rent, and does not come under Art. 8 or Art. 31. [P 407 C 1]

(b) Provincial Small Cause Courts Act (1887), S. 16—Small Cause suit within pecuniary jurisdiction and not excluded by articles—Court exercising jurisdiction as Small Cause Court and Munsif — Appeal from decree does not lie.

Where a suit is within the pecuniary jurisdiction of the Judge and is not excluded by the articles, whether the Judge announced that he was trying it as a Munsif or not makes no difference, for neither the agreement of the parties nor will of Judge can make it anything other than Small Cause Court suit, and there will be no right of appeal. [P 407 C 2]

A. N. Lal—for Petitioner.

Rajkishore Prasad — for Opposite Party.

Order. — This Rule is directed against the order of the learned Judge in the Court below against his decision with regard to a matter of jurisdiction. The suit was tried before the Munsif and an appeal was preferred against the decision of the Munsif to the Subordinate Judge. It appears that the Additional Subordinate Judge came to a conclusion in favour of the petitioner who was appellant before him, but dismissed his appeal on the ground that the suit originally was a suit cognizable by the Judge of Small Cause Court and in consequence no appeal lay to him.

It is now contended by the learned advocate on behalf of the petitioner that the suit was beyond the jurisdiction of a Small Cause Court Judge inasmuch it came under Art. 8 or Art. 31, Small Cause Courts Act. It is quite clear that Art. 31 did not apply to the suit as it was not a suit for account, nor was it a suit to recover surplus collections received by the mortgagee after the mortgage had been satisfied. It is clear that if the petitioner was to succeed, his argument must be based on Art. 8, and under that article he is limited to the argument that it was an action for rent. Prima facie it was certainly not a suit for rent. The plaintiff was the purchaser of arrears of payment under a kabuliyat dated 4th July 1922. Under what circumstance or for what reason the defendant contracted to pay that amount, seeing that he was a usufructuary mortgagee, it is difficult to see but in any event quite irrelevant for the purposes of this case. He released a part of his zarpeshgi lease and then agreed to pay as profit on account of raiyati right the sum of Rs. 28.

Now it is clear that he was paying as mortgagee and not as a tenant (there being no relationship of landlord and tenant between the parties), the relationship of mortgagee and mortgagor existed. If it became necessary to decide that point one would assume that payments made as the profits of the land were in excess of the interest payable by the mortgagor to the mortgagee : or, to put it more exactly, the amount of interest in respect of which the mortgagee would be entitled to recoup himself. It is impossible in my judgment to hold that it was a payment of rent ; and that brings me to the only other question, whether the Judge trying the case under the Small Cause Courts Act would give the petitioner a right of appeal ? That matter in my judgment is concluded by S. 16, Small Cause Courts Act. Neither the agreement of the parties nor the will of the Judge can make this anything other than a Small Cause Court suit. It was within the pecuniary jurisdiction of the Judge and not excluded by the Articles to which I have referred or any other Article. Whether the Judge announced that he was trying as a Munsif or not, makes no difference, as S. 16 excludes Munsif's jurisdiction and gives jurisdiction as a Small Cause Court and Small Cause Court only. The learned Judge, was therefore, right in coming to the conclusion that he had no jurisdiction to hear the appeal. I regret to come to this conclusion, as there were points which might have been decided in favour of the defendant-petitioner ; but nothing that I say must in any way influence other actions in future regarding the matter, as materials are not before me which would enable me to come to any conclusive decision with regard to the point. The Rule is discharged with costs : hearing-fee two gold mohurs.

V.B./R.K. *Rule discharged.*

A. I. R. 1936 Patna 408

AGARWALA AND ROWLAND, JJ.

Bengal Coal Co., Ltd.—Petitioner.

v.

Brijdeo Narayan Singh — Opposite Party.

Civil Revn. Nos. 676 to 681 of 1935, Decided on 23rd March 1936, from order of Deputy Magistrate, Sub-Judge of Palamau, D/- 13th November 1935.

Inherent power — High Court — Stay of suit—Mining lease — Lessee covenanting to develop mine as early as possible—Suit by lessor for breach of covenant—Lessee applying for stay of suit, pending suit by Secretary of State against lessor and lessee claiming declaration that lessor had no title to minerals—High Court's inherent powers invoked for stay of suit—Lessor's suit stayed by High Court pending decision of other suit.

A mining lease was granted in respect of certain land, the lessee covenanting to start the development of the prospective coal mine as soon as possible after the commencement of the lease. The lessee having failed to do so, the lessor brought a suit against him for damages for breach of the covenant. The lessee applied for stay of the suit pending the disposal of another suit instituted by the Secretary of State against the lessor and the lessee, claiming a declaration that the lessor had no right to the minerals in the land and that the lessee had not acquired any title to them. The trial Court declined to stay the suit and the High Court's inherent powers to stay the proceedings were invoked:

Held: that under the circumstances it was desirable that the lessor's suit against the lessee should be stayed on proper terms pending the suit by the Secretary of State: 1926 *All* 212, *Ref.* [P 408 C 1, 2; P 409 C 1]

P. R. Das, S. M. Mullick and *N. N. Roy*—for Petitioner.

Govt. Pleader—for Opposite Party.

Agarwala, J.—In 1921 the Chainpur Estate which was then and is now under the Court of Wards granted to the petitioner, The Bengal Coal Company, six mining leases in respect of the Hutar Coal field, The lessees covenanted to start the development of the prospective coal mine as soon as possible after the commencement of the term of the lease, and also undertook not to despatch coal or allow it to be despatched otherwise than by railway. Up to that time there was no railway near and it is now still six miles from it. In 1935 six suits were instituted by the lessor in respect of the six leases claiming to recover from the lessee, by way of damages for breach of the covenant in respect of the commencement of the working of the mines a sum of one lakh fifty-two thousand and odd. The defendant in that suit, namely the lessee, applied to the Court below for stay of the hearing of the suit pending the disposal of another suit which had been instituted in 1933 by the Secy. of State against the Chainpur Estate and its lessee. In that suit the Secy. of State prays for declaration that defendant 1 has no right in the minerals and that defendant 2 has acquired no valid title to them; and also prays for direct vacant possession on the adjudication of his rights. The Court below declined to stay the suit. It is admitted by the learned Advocate who appears for the petitioner, the lessee, on this present application, that he cannot ask us to interfere with the order of the Court below on either of the grounds mentioned in S. 115, Civil P. C., on which our revisional jurisdiction is based. But the learned Advocate contends that this Court has inherent power to stay proceedings where that course is desirable or necessary in the interest of justice or to prevent an abuse of the process of the Court. This he contends is an instance in which it is eminently in the interest of justice that the suits against him by his lessor should be stayed pending the decision of the rights of the lessor in the suit instituted by the Secy. of State. Reference was made to two decisions in which the inherent power of the Court was invoked namely 48 All 356 (1), and a decision of the Lahore High Court in 10 L L J 470 (2). The latter case was very obviously one in which it was desirable for the Court to exercise its inherent power to prevent an abuse of its process. No question arises with regard to the abuse of process of the Court in the present instance; but there is a serious question which arises on the construction of the leases granted to the petitioner as to his liability for the claim made against him in the present case. Should the Secy. of State's contention, that the Chainpur Estate has no right in the minerals be proved to be correct, the present petitioner would be a trespasser so far as the underground rights are concerned and therefore would not be entitled to work the minerals.

---

1. Harnand Lal v. Chaturbhuj, 1926 All 212= 93 I C 285=24 A L J 375=48 All 356.
2. Kadu Mall-Jetha Nand v. Tilak Ram, 1929 Lah 12=113 I C 783=10 L L J 470.

Taking into consideration all the circumstances of the case, this appears to me to be one in which it is desirable that the lessors suit against the lessee should be stayed on proper .terms pending the decision of the suit brought by the Secy. of State. I would therefore order suits Nos. 2 to 7 of 1935 in the Court of the Deputy Magistrate, Subordinate Judge, Palamau, be stayed pending the decision of title suit No. 18 of 1933 in the same Court, on the present petitioner furnishing, to the satisfaction of the Court below, security in immoveable property for the amount claimed in suits Nos. 2 to 7. The Subordinate Judge will be at liberty from time to time to call upon the present petitioner to increase the amount of the security in the event of an inordinate delay in the disposal of the title suit resulting in the accumulation of heavy interest on the claim in the present suit. The parties will bear their own costs of this application.

Rowland, J.—I agree.

R.M./R.K. *Order accordingly.*

A. I. R. 1936 Patna 409

MACPHERSON, J.

Mahabir Prasad Chaudhuri and *another*—Petitioners.

v.

Dhanushdhari Prasad Singh and *others*—Opposite Parties.

Criminal Revn. No. 680 of 1935, Decided on 23rd March 1936, from order of Sub-Divisional Magistrate, Barh, D/- 28th September 1935.

Criminal P. C. (1898), Ss. 133 and 139—Application for removal of latrine constructed near well used by public — No denial on part of owner of latrine of existence of public right in well—Inquiry under S. 139 is not feasible—S. 133 applies if Magistrate thinks removal of nuisance necessary.

Where certain persons apply for removal of a latrine constructed near a public well, on the ground that its continuance in the place would render the water of the well insanitary and unfit for use, and there is no denial on the part of the owner of the latrine of the existence of public right in the well and the atmosphere surrounding it, an inquiry under S. 139 is not feasible. S. 133 applies to the case if the Magistrate thinks that the nuisance mentioned should be removed from the public place, i. e. the well. [P 409 C 2; P 410 C 1]

Chandreshwar Prasad Sinha—for Petitioners.

G. P. Singh—for Opposite Parties.

Order.—A petition by the pleaders' advocates and others resident in Mahalla Chondi in Barh town filed on 28th August last made mention of a public well under the control of the Municipality, which is used by the petitioners and many others of the locality for drinking and household purposes and of a latrine made adjoining it by these petitioners in their house and asserted

that the service-door of the privy facing east is situated at a distance of one cubit only from the platform of the well and the filthy water of the privy is drained over the platform of the well and a foul smell is felt by persons who go to draw water for drinking and other purposes, and if the privy be allowed to continue the water of the well will be polluted and will be quite insanitary and unfit for use and hence the removal of the same is urgently necessary.

The well adjoins the east of the petitioner's house and the privy is just to the north-west of the well while immediately to the north of the well and east of the privy there is an extension of the petitioners' land on which there is a service room 4′—4″ + 5′ and a walled but not covered passage to the service room 4′—4″ x 8′—6″. North of the three erections which are in line are an earthen drain and the passage to the girls' school. The Subdivisional Magistrate issued notice under S. 133 in which he speaks of the petitioners' latrine adjoining which there is a well, the water of which the public drink and states there is danger of injury to the health of the public and directs them to remove the latrine (paikhana) or show cause. They appeared in accordance with the order and showed cause, and also applied for appointment of jury to try whether the order was reasonable or proper. The Magistrate pointed out that the cause shown was irrelevant and appointed a jury and the petitioners accepted the order and presented their case to the jury. The jury held that the order should be made absolute. It is now urged that the order absolute is vitiated because the Magistrate made no inquiry under S. 139, Criminal P. C. But the circumstances were such that no inquiry was feasible since there was no denial of the existence of the public right in the well and the atmosphere surrounding it. The only other point is whether S. 133 is applicable. Clearly the Magistrate thought that the nuisance mentioned should be removed from the public place, that is the well. That is sufficient, al-

together apart from the general nuisance on the Bandh Road and the Bowstead Road adjoining. In my judgment there is no ground for interfering with the order of the Magistrate. The rule is discharged.

I may, however. mention that while the paikhana as at present situated must be removed, the petitioners are entitled to use their premises not only for any normal purpose but also as a paikhana provided that by the use of engineering or sanitary skill or special expenditure it does not constitute a nuisance to the public places adjoining.

R.M./R.K. *Rule discharged.*

A. I. R. 1936 Patna 410

DHAVLE AND AGARWALA, JJ.

Acharaja Singh and *another*—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Nos. 650 and 651 of 1935, Decided on 10th January 1936, against order of Judicial Commissioner, Ranchi, D/- 14th October 1935.

Criminal P. C. (1898), Ss. 177, 531—S. 177 can be read along with S. 531—Trial taking place in wrong district—Conviction will not be set aside unless accused shows that he has been prejudiced by such trial.

Section 177 only provides for the ordinary place of inquiry and trial and can be read along with S. 531, the result being that a conviction cannot be set aside merely on the ground that the trial has taken place in a wrong district, unless the party aggrieved shows such error has, in fact caused a failure of justice and that the accused have been prejudiced by the trial having taken place in a wrong district. The policy of the Criminal Procedure Code is to uphold in most cases the order passed by the criminal Court which lacked jurisdiction or which had committed illegalities or irregularities unless failure of justice has been occasioned or is likely to be occasioned thereby: 1921 *Cal* 114 and 1920 *Mad* 824, *Rel. on* ; 1925 *Pat* 187, *Disting.* [P 411 C 1]

R. B. Lal—for Petitioners.

Asst. Govt. Advocate—for the Crown.

Order. — The two petitioners have been found guilty in two separate trials of two offences under S. 420, I. P. C., and sentenced by the Sub-divisional Magistrate of Ranchi to various terms of imprisonment and fines. In each trial they were charged with offences under Ss. 366, 366-A and 420, I. P. C., but acquitted on the charges under the first two of these sections. The prosecution story was that the petitioners had taken two Munda girls or young women, Giribala and Budhi, from Sonahatu, in the district of Ranchi, to Dumarkela, in the district of Monghyr, and passed them on to two Rajputs Gouri Singh and Nunu Singh as brides for a consideration of Rs. 200 each. The charges of cheating referred to these sums of money. The only question raised before us is whether the conviction is not bad because the Magistrate had no jurisdiction to try the offences of cheating which were committed in the district of Monghyr. This question was not raised before the Magistrate except during the arguments at the end of the trial, and we are told that the reason why it was not raised earlier was that charges under Ss. 366 and 366-A were being tried at the same time and the Magistrate clearly had jurisdiction to try them. The objection was repeated on appeal to the Judicial Commissioner of Ranchi, who however took the view that though, strictly speaking, the trial under S. 420 should have taken place in Monghyr, the defect was cured under S. 531, Criminal P. C., as the charges under Ss. 366 and 366-A were triable in Ranchi, the cheating originated from there, and the appellants could not have been prejudiced by being tried in their own district.

This view of the law is assailed by the learned Advocate for the petitioners who has cited 83 I C 577 (1) and contended that the trials were without jurisdiction in respect of the charges of cheating and that therefore the convictions should be set aside. The case cited does not however lay down any such proposition. It was a case in which the High Court quashed an order of commitment to the Court of Session at Arrah in respect of a bigamy which was committed at Nilphamari outside this Province altogether. S. 531, Criminal P. C., was referred to, and Bucknill, J., (with whom Adami, J.. agreed) observed :

> It is however not at all clear that the provisions of this section contemplate a case in which there has been an order by a Court which had no territorial jurisdiction at all, such as in a case in which jurisdiction could only properly have been exercised by some Court outside the territorial limits of the jurisdiction of a provincial High Court.

That consideration does not arise in the present case; nor is there anything

1. Mt. Bhagwatia v. Emperor, 1925 Pat 187= 83 I C 577=26 Cr L J 49=3 Pat 417.

in the wording of S. 531 to support the contention of the learned Advocate that 'the section cannot be so given effect to as to abrogate S. 177.' The latter section only provides for the ordinary place of inquiry and trial, and there is no difficulty whatsoever in reading it along with S. 531, the result being that a conviction cannot be set aside merely on the ground that the trial has taken place in a wrong district but that the party aggrieved is entitled to have the conviction set aside if he shows that "such error has in fact occasioned a failure of justice." It was also contended that the error has in fact occasioned a failure of justice in that the petitioners were unable to defend themselves properly and ascertain facts about the prosecution witnesses from Monghyr and adduce defence witnesses who could properly be from that district. That does not seem to have been so much as suggested before the trying Magistrate, who after pointing out that no objection as to jurisdiction was taken till the arguments, adds that in his opinion the accused were not prejudiced to any extent by the trial held in that Court. The learned Judicial Commissioner also came to the conclusion that the petitioners could not have been prejudiced by the trial in the wrong district. Nothing has been said before us to show that the lower Courts were in error in taking that view. The application of S. 531 of the Code was considered in 34 C L J 200 (2), to which Mr Jafar Imam referred us, and several other cases, such as 42 Mad 791 (3), in which Sadashiva, Ayyar, J., pointed out that the policy of the Criminal Procedure Code as shown by Ss. 531 to 538 is:

> To uphold in most cases the orders passed by the criminal Court which lacked local jurisdiction or which had committed illegalities or irregularities unless failure of justice has been occasioned or is likely to be occasioned thereby.

In our opinion, S. 531 is thus a complete answer to the contention that the convictions of the petitioners ought to be set aside because the charges under S. 420 may possibly have been triable in Monghyr and not in Ranchi. It may be added that while it is clear that the charges under S. 420 ought to have been tried in Monghyr, if they had stood by themselves, it is by no means certain that the facts of the present case taken with the charges under Ss. 366 and 366-A were not properly tried in Ranchi, and it does not seem to us very material that the latter charges failed in the end. The learned Advocate has also urged that the sentences are excessive. But the cheating was of a character which requires severe treatment. The passing off of the Munda girls as Rajput brides must mean trouble in several families and was as despicable as it was difficult at the time to detect. We must therefore discharge the Rules and dismiss these applications in revision. As soon as the above was pronounced from the Bench at the end of the arguments, it was brought to our notice that out of the two cases dealt with, Criminal Revision No. 650 of 1935 alone was on the board for today, and that the learned Advocate for the petitioners in that case also appears for the petitioners in Criminal Revision No. 651 of 1935, which was not on the board only because the papers were not yet complete. We have it however from the learned Advocate that he may be taken to have argued both the revisional applications, and accordingly the orders above must be taken to have disposed of both the applications.

R.M./R.K. *Applications dismissed.*

2. Kali Charan Kundu v. Emperor, 1921 Cal 114=63 I C 458=22 Cr L J 666=34 C L J 200.
3. Ganapathy Chetty, In re, 1920 Mad 824=51 I C 468=20 Cr L J 484=42 Mad 791=37 M L J 60.

A. I. R. 1936 Patna 411

WORT, AG. C. J.

Mt. Puna Bibi and *others* — Defendants—Appellants.

v.

Sri Sri Keshab Rai Ji Thakur—Plaintiff and *another*—Defendant — Respondents.

Appeal No. 1159 of 1933, Decided on 7th April 1936, from appellate decree of Dist. Judge, Manbhum, D/- 4th March 1933.

(a) Hindu Law—Idol—Idol or deity in position of perpetual minor — Still no analogy between next friend of minor and shebait or person bringing suit on behalf of idol.

An idol or deity is in the position of a perpetual minor but the analogy between a minor and his next friend and an idol and the person through whom the action is brought is not entirely parallel. There are some distinctions and one of them is that in the case of a minor, neither the cause of action nor the defences which might be urged against that cause of

action are in any sense personal to the next friend. That cannot be said, however, in all instances in the case of a shebait bringing an action on behalf of an idol. [P 412 C 2]

(b) Civil P. C. (1908), S. 100 — Whether new tenancy has been created is mixed question of fact and law.

Whether a new tenancy has been created can never be said to be a pure question of law ; it is a question of mixed fact and law and a question which certainly depends upon a number of facts. [P 412 C 2]

S. M. Mullick and *Nazrul Hasan*—for Appellants.

P. R. Das—for Respondents.

Judgment.—This is an appeal by the defendant arising out of an action in which the plaintiff claims to resume certain property under a lease which it was contended was invalid. The plaintiff has succeeded and the defendant, as I have said, appeals.

There were several questions argued in the Court below and the case was the subject-matter of various decisions as it was remanded in the first instance by the first Court of appeal for the determination of certain questions. The matter was retried and came before the appellate Court on the second occasion. Three main points were then argued : first whether the property was debutter property ; secondly whether the action was barred by limitation ; and thirdly whether there had been any estoppel or waiver as it was called. The argument put up by Mr. Sushil Madhab Mullick on behalf of the appellant arises out of certain facts to which I shall now have to make reference. The action was brought by an idol through a shebait. A lease was originally granted by one Ram-Chandra Acharya Goswami and he was succeeded by Raj Gopal Acharya Goswami. The latter died and during the course of this action the present shebait was substituted.

It was contended during the course of the argument (and this is the only substantial point argued in this appeal) that the successor of the grantor waived all his rights with regard to resumption of the property by reason of having done certain acts (I put it in that somewhat vague manner) which amounted to a waiver. The learned Judge in the Court below in disposing of this question has concluded the matter by this statement, referring to the acts to which I have referred: " These cannot, however, in my opinion, show any recognition by Raj Gopal Acharya Goswami." That finding in my judgment is conclusive. The parties in the Court below relied upon what they described as estoppel or waiver, but, as I understand the argument advanced, it was rather that they were relying upon facts which in substance would have established a new tenancy as between the Shebait Raj Gopal Acharya Goswami and the defendant.

Now one of the contentions addressed to me by Mr. P. R. Das, who appears for the respondent, was that this point of waiver or estoppel does not arise by reason of the fact that the action was not by the shebait but by the idol through the shebait and that therefore in substance the acts of the shebait could in no way bind the idol. That in substance was the argument. It has been said that an idol or deity is in the position of a perpetual minor, but the analogy between a minor and his next friend and an idol and the person through whom the action is brought is not entirely parallel. There are some distinctions and one of them is that in the case of a minor, the next friend appearing for the minor, neither the cause of action nor the defences which might be urged against that cause of action are in any sense personal to the next friend. That cannot be said, however, in all instances in the case of a shebait bringing an action on behalf of an idol, and if the case in any way depended upon the distinction which Mr. Das seeks to draw, I should be quite clearly of the opinion that the point failed ; but the case does not depend upon that. Whether a new tenancy has been created can never be said to be a pure question of law ; it is a question of mixed fact and law and a question which certainly depends upon a number of facts.

Now the learned Judge in the Court below, as I have already pointed out, comes quite clearly to the opinion that in the circumstances there was no waiver and that, in my judgment, is sufficient to dispose of the matter. But I propose to refer to another question briefly, which, in my opinion, assists the respondent materially with regard to this question. It has been pointed out that this matter in its present form was raised only at a late stage in the action. The learned Judge in the Court below has certainly framed an issue to the effect, " Is the

suit barred by the law of estoppel and acquiescence," and the plea upon which that issue is based is quite clearly contained in para. 4 of the written statement which has no reference to the particular matter put before me in this Court. I am not prepared to say that had the learned Judge in the Court below allowed the parties to give evidence on the point directly in issue before him, and if that evidence had established the contention of the defendant, I would not be prepared to hold that the learned Judge was not entitled to decide the question.

But having regard to the course of events in the Court below and having regard to the decision of the learned Judge in appeal, I am quite clearly of the opinion that the point cannot succeed: I have already held that the matter is partly a question of law and partly a question of fact. In so far as it is a question of fact, the learned Judge has decided against the defendant and in any event the facts as stated in the judgment and the facts relied upon by the defendant are insufficient to establish a case such as the defendant would be obliged to establish in order to defeat the plaintiff in this action. For these reasons, in my judgment, the appeal fails and must be dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1936 Patna 413

MACPHERSON, J.

Kameshwar Singh Bahadur of Darbhanga—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 33 of 1936, Decided on 25th March 1936, from order of Dist. Magistrate of Bhagalpur, D/- 18th July 1935.

(a) Bengal Embankments Act (2 of 1882), S. 89—District Magistrate cannot set aside order of Subordinate Magistrate except on appeal.

An order of a District Magistrate as such passed under the Embankments Act, otherwise than in appeal, directing that the order of a Subordinate Magistrate need not be carried out is without jurisdiction and is liable to be set aside in revision. [P 414 C 1]

(b) Bengal Embankments Act (2 of 1882), S. 79—Accidental breach filled up—Collector not averse to repair but sanction not obtained — Offence technical and order under S. 79 is not proper.

In the case of accidental breaches in the embankment, where persons commit technical offences by filling up the breaches without sanction, which sanction they would have easily obtained or at any rate there are indications that Collector is not averse to repairs, an order under S. 79 is not appropriate. [P 414 C 1,2]

(c) Bengal Embankments Act (1882)—Cases under Act should be heard by experienced Magistrates.

The cases under this Act ought preferably to be heard by Magistrates of experience. [P 414 C 2]

S. M. Gupta and *S. Prasad Srivastava*—for Petitioner.

S. C. Mazumdar—for Opposite Party.

Order.—At the instance of the Maharajadhiraj of Darbhanga, who, alleged that certain tenants of the Barwari estate had filled up two openings in the Barwari embankment through which the water of the Tiljuga could escape and asked for action under the penal sections of the Embankments Act, an inquiry was directed by the Collector of Bhagalpur, and it was found that the bandh was a ring bandh for the protection of the area inside it and had on the west the Tiljuga on the opposite side of which is a bandh of the Darbhanga Raj. The opening filled up were ordinary breaches due to earthquake and flood and were quite recent, at least after 1933. But under the notification as to the area under the Embankments Act, even such breaches could not be filled up without the permission of the Collector. The Collector lodged a complaint before the Sub-divisional Officer of Supaul against five tenants and the case was made over to a Sub-deputy Magistrate who on 4th December 1934 convicted them on their own admission under S. 76 (b), Embankments Act, for repairing the embankment without the sanction of the Collector and fined them Rs. 5 each for what he described as a technical offence. No investigation was held and the Magistrate, without apparently giving much of any consideration to the matter, added an order "to remove the obstruction within a fortnight."

Later the persons convicted protested to him that they were afraid to cut the embankment and the Magistrate asked the Sub-Inspector of Police to get the obstruction removed. This brought up the Manager of the 9 annas Barwari estate, but the Magistrate set out that he had no jurisdiction to revise his order and directed him to the District Magistrate. The District Magistrate on 18th

July 1935, long after the period of appeal had expired, modified the order of the Magistrate by setting forth that the direction to remove the "obstruction" within a fortnight need not be carried out, remarking that the accused had actually done a good service in filling up the breaches. Against this order the Maharajadhiraj has obtained the present rule. When the rule came up for hearing, this Court issued a rule upon the Maharajadhiraj and the other persons concerned to show cause why the order of the Sub-Deputy Magistrate "to remove the obstruction within a fortnight" apparently passed by him under S. 79, Bengal Embankments Act, 1882, should not be set aside. Mr. Gupta for the Maharajadhiraj urges that it is late in the day to set aside the Sub-Deputy Magistrate's order and that there are other ways in which its effect may be nullified. The District Magistrate now submits that both orders should be set aside. In my judgment the District Magistrate is correct. Quite clearly the order of the District Magistrate dated 18th July 1935 passed otherwise than in appeal that, an order of the Subordinate Court need not be carried out, was without jurisdiction and must be set aside. It should be noted that the District Officer definitely acted as and signed himself as District Magistrate. He did not purport to act as Collector for which reason when an effort was made by the Maharajadhiraj to have his order set aside by the Commissioner the latter was unable to interfere.

Equally clearly the order of the Sub-Deputy Magistrate to remove the obstruction as he called it was in the circumstances entirely improper, and it is set aside. That order under S. 79, Bengal Embankments Act, 1882, was most ill-considered. The system of embankment in North Bihar is very complex, and it is, as indeed the Commissioner pointed out,

> extremely hazardous to interfere with them in any way without the advice of a competent engineer and full enquiry.

There was here a case of accidental breaches in the embankment and the offence was a technical one as the Sub-Deputy Magistrate himself set out. That no order under S. 79 could appropriately be passed is manifest from the attitude of two different District Officers, who apparently would, as Collectors have given sanction to repair if asked for it. What the Collector desired to penalize was repair without his sanction : there is every indication that he was not averse to the repair of the breaches in itself, if his formal sanction had been taken. Accordingly the order of the Sub-Deputy Magistrate, dated 4th December 1934, is set aside in so far as it directs the persons convicted to remove the "obstruction" within a fortnight. Both rules are therefore made absolute. It may be observed that cases under this Act ought preferably to be heard by Magistrates of experience.

V.B./R.K. *Rules made absolute.*

A. I. R. 1936 Patna 414

ROWLAND, J.

Lal Behari Singh—Appellant.

v.

Mahabir Mahton and *others*—Respondents.

Appeals Nos. 195 to 199 of 1934, Decided on 16th October 1935, from appellate decree of First Sub-Judge, Patna, D/- 30th November 1933.

(a) Bengal Tenancy Act (8 of 1885), S. 38—Suit for rent by landlord—Tenant is entitled to raise plea for abatement of rent—Principle of S. 38 applies to such plea.

The principle of S. 38, Ben. Ten. Act, applies not only to suits instituted by a tenant for abatement of rent but also to a plea for abatement of rent taken by a tenant in a suit for rent by the landlord, in which he is a defendant. The tenant is entitled to raise such a plea and what he has to show is permanent deterioration leading to failure of outturn : 1933 *Pat* 441, *Foll.* [P 415 C 2]

(b) Bengal Tenancy Act (8 of 1885), S. 38—"Permanent" must be read with reference to circumstances of each case—Deterioration must be such as would continue from year to year.

The word "permanent" must be read with reference to the circumstances of the case. The deterioration must be such deterioration as would continue to have effect from year to year unless and until something is done to remedy it. The fact that it can be remedied by expenditure of capital and labour will not prevent its being regarded for the purposes of S. 38 and similar provisions of law as a permanent deterioration. [P 416 C 1]

(c) Bengal Tenancy Act (8 of 1885), S. 38—Suit for rent—Tenant taking plea of reduction of rent—Court should not give effect to plea to greater extent, than is warranted by written statement.

Where in a suit for rent by a landlord the tenant takes a plea of reduction of rent, the Court should not give effect to the plea to a greater extent than is warranted by the writ-

ten statement submitted by the defendant. The Court is not entitled to make its own calculations. [P 416 C 1]

(d) Bengal Land Registration Act (7 of 1876), S. 78—Co-sharer in possession of larger share than his registered share in some mauzas of estate and less share in others—He is not debarred from suing for rent due to him so long his total interest does not exceed his registered share.

A co-sharer who by an amicable arrangement among the co-sharers has been put in possession of a larger share than his registered share in some mauzas of an estate and a less share or no share in others, is not debarred from obtaining a decree for the rent due to him, so long as the total interest which he holds in all the mauzas represents his registered interest in the entire estate : 30 *Cal* 773, *Foll.* [P 416 C 2]

Khurshed Husnain—for Appellant.

Dasu Singh—for Respondents.

Judgment.—These are five analogous appeals together with a cross-appeal in each case. The appellant here is the plaintiff who claims to be sixteen annas landlord of the holding in suit. The claim was for rent of 1338 in four of the cases and of 1337 and 1338 in one. There was also a claim for enhancement. The first Court decreed the rents claimed which are cash rents but refused enhancement. A plea that had been taken was that as the landlord had neglected to maintain irrigation facilities for the lands in suit, the lands had deteriorated, could not produce such crops as were formerly produced and therefore the full rent should not be decreed much less any enhancement be allowed. The first Court found that in the Record of Rights it was entered that the full cash rents recorded were payable so long as the landlord maintained irrigation arrangements and that such irrigation arrangement had not been maintained and kept in order. On this ground the Munsif refused enhancement, but did not give the defendants any abatement of the cash rental.

On appeal the lower appellate Court affirmed the finding that Gilandazi had been completely neglected by the malik and held that the lands in suit had so deteriorated as to be in their present condition capable of producing only one-third of the outturn on which the existing cash rents were presumably based. Accordingly he reduced the amounts of the rent decree to one-third in each case of the cash rents claimed. This is the subject of the appeals of the plaintiff. It is contended that the plea of suspension of rent was not available to the defendants on the pleadings, still less should the abatement of rent to one-third have been allowed. That the evidence of the plaintiff regarding maintenance of Gilandazi had not been considered by the lower appellate Court and it was further contended that this Court might remand the suits for further findings after considering evidence regarding rent suits relating to subsequent years and the results of the deputation of a Commissioner in subsequent years to examine and report on the condition of the land. I can find no substance in the contention that the plea for suspension or abatement of rent was not available to the defendants. It is well settled that the principle of S. 38, Ben. Ten. Act, applies not only to suits instituted by a tenant for the abatement of rent but to a plea taken by a tenant in a suit in which he is a defendant.

The decision in 14 P L T 368 (1), relied on by the lower Court, is in point. The tenant can certainly raise such a plea, and what he has to show is permanent deterioration leading to failure of outturn. As regards the alleged failure of the lower appellate Court to consider the plaintiff's evidence regarding the Gilandazi done by him, that evidence consisted of the uncorroborated statement of the plaintiff himself unsupported by papers, and the lower appellate Court may be considered to have adopted the reasoning of the Munsif who demonstrated adequately that the evidence of the plaintiff alone could not be relied on for this matter. As regards the prayer for admitting additional evidence Mr. Khurshed Husnain said that he asked for this under O. 41, R. 27 (b); but I am unable to find that this falls within that rule. The argument was that as the lands in suit were found to produce good crops in subsequent years, it cannot be held that there was permanent deterioration. Therefore the conditions for abatement of rent in the years in suit are not fulfilled. It appears, however, that between the date of the years in suit and the subsequent date at which the lands were found to be bearing good crops, there had been action taken for restoring the means of irrigation. That being so the fact that after the restoration of the means of irrigation the lands could bear

1. Dhanukdhari Singh v. Mt. Bibi Amma, 1933 Pat 441=145 I C 431=14 P L T 368.

good crops will not by itself negative the finding of a permanent deterioration. As pointed out in previous decisions of this Court the expression "permanent" must be read with reference to the circumstances of the case.

The deterioration must, as I understand it, be such deterioration as would continue to have effect from year to year unless and until something is done to remedy it. The fact that it can be remedied by the expenditure of capital and labour will not prevent its being regarded for the purposes of S. 38 and similar provisions of the law as a permanent deterioration. This point, therefore, fails. It was, however, contended that the lower appellate Court should not have reduced the rent for the years in suit to the extent of two-thirds, that is to say, decreeing the suits for only one-third of the recorded rents because in the written statements of the defendants it was not stated that the productive capacity of the lands had deteriorated to the extent of two-thirds but to the extent of one-half. What the written statements say is that the lands now are producing or are capable of producing not more than one-half of what they produced at the time when cash rents were fixed. The defendants in evidence have gone further than this by giving figures from which the lower appellate Court has calculated that the present productive capacity is only one-third of the former capacity. In my opinion the plea of reduction of rent should not have been given effect to a greater extent than is warranted by the written statements, that is to say the rent to be decreed should be the cash rent of the holding subject to a deduction of one-half and not a deduction of two-thirds. This covers all the points raised in the appeal.

The respondents have presented a cross-objection in which they contend that the suit is not maintainable for the entire rents of the holdings. The contention is based on S. 78, Land Registration Act, the fact being that the plaintiff is a recorded proprietor in the tauzi in which the lands are situated to the extent of one anna odd whereas he has sued for sixteen annas rent of the holdings. It is argued that he cannot get rent to the extent of more than the share for which he is registered. This objection is fully dealt with in the judgments of the Courts below and it has been shown that by civil Court partition the holdings in suit have fallen entirely in the takhta of the plaintiff. Therefore the defendants are liable to pay the whole rent to this plaintiff. A similar objection was raised in 30 Cal 773 (2), and it was explained that a co-sharer who, by an amicable arrangement among the co-sharers, has been put in possession of a larger share than his registered share in some mauzas of an estate and a less share or no share in others is not debarred from obtaining a decree for the rent due to him so long as the total interest which he holds in all the mauzas represents his registered interest in the entire estate. The case is covered by that decision and in my opinion the decree of the Courts below is in this respect correct. The result is that the cross-objection is dismissed with costs. The appeal succeeds to the extent indicated above. The plaintiff will get a decree accordingly. Costs of the lower Courts will be calculated as they would have been calculated if the decree had been for one-half rent instead of one-third. Parties will bear their own costs of the appeal in this Court.

R.M./R.K. *Order accordingly.*

2. Parshmoni Dassi v. Nabokishore Lahiri, (903) 30 Cal 773.

A. I. R. 1936 Patna 416

MOHAMAD NOOR, J.

Mahadeb Marwari—Appellant.

v.

Sailaja Kanta Mitra and *others*—Respondents.

Appeal No. 255 of 1935, Decided on 23rd March 1936, from appellate order of Dist. Judge, Manbhum, D/- 6th June 1935.

Decree—Execution — Decree entered as satisfied through decree-holder's mistake—No execution can be taken out for sum left out.

Once a decree has been entered as satisfied due to certain mistake committed by the decree-holder execution cannot be taken out for any sum which may have been left out as long as the order of satisfaction stands : 1929 *Cal* 670 ; 1933 *Bom* 364 and 16 *P L T* 906, *Rel. on.* [P 417 C 1]

R. S. Chatterji—for Appellant.

S. C. Mazumdar—for Respondents.

Judgment.—This appeal arises out of an execution proceeding. The appellant

on 26th May 1926 obtained from the Munsif of Purulia a decree against the respondents for Rs. 1,999-10-0 with future interest at 6 per cent per annum. Out of the decretal amount a sum of Rs. 400 appears to have been realised some time in the year 1927. Thereafter, in June 1933, at the instance of the decree-holder, the decree was sent for execution to the Small Cause Court of Calcutta. The certificate which was sent by the Munsif of Purulia to Calcutta stated the decretal amount due to be Rs. 1,599-10-0 after giving credit for Rs. 400 which was realised in 1927. Future interest was also mentioned in the certificate but it was not clearly specified whether the future interest was to run from the date of the decree or from the date of the certificate. The decree-holder put in an application for execution at Calcutta but in doing so he calculated the interest on the decretal amount not from the date of the decree to which he was obviously entitled but from the date of the order of transfer of the decree passed by the Munsif of Purulia, namely 5th June 1933. The decree was thus executed for a lesser amount than what was actually due. The amount for which the execution was taken out was realised. Thereafter the Calcutta Small Cause Court certified the complete execution or, in other words, the satisfaction of the decree to the Munsif of Purulia where the decree was shown as fully satisfied. Later on the decree-holder seems to have realised the mistake and put in an application for execution to realise interest for the intervening period, that is for the period between the date of the decree (26th May 1926) and the date of the order of transfer (5th June 1933). This execution was disallowed by the Court of first instance and the order has been upheld by the lower appellate Court. The decree-holder has preferred this appeal.

In my opinion the view of law taken by the Courts below is correct. The position is that the decree stands satisfied. It may be due to a certain mistake committed by the decree-holder. As long as the order of satisfaction remains no further execution can be taken out. Whether the order of satisfaction is liable to be set aside is quite a different matter on which I express no opinion. But here we are concerned whether the Courts below were right in refusing to execute the decree. The cases referred to by the learned District Judge of Manbhum are all to the point. 1929 Cal 670 (1) and 1933 Bom 364 (2) have laid down the principle that once a decree has been entered as satisfied, execution cannot be taken out for any sum which may have been left out as long as the order of satisfaction stands. This principle has been accepted in this Court also in 16 P L T 906 (3). I accordingly dismiss this appeal with costs.

V.B./R.K. *Appeal dismissed.*

1. Dwijendra Krishna Dutt v. Kedar Nath Poddar, 1929 Cal 670=124 I C 79=33 CWN 739.
2. Panaji Girdharlal v. Ratanchand Hajarimal Marwari, 1933 Bom 364=146 I C 343=35 Bom L R 620=57 Bom 468.
3. Phulchand Ram Marwari v. Naurangi Lal Marwari, (1935) 16 P L T 906.

A. I. R. 1936 Patna 417

SPECIAL BENCH

COURTNEY-TERRELL, C. J.,
MACPHERSON AND FAZL ALI, JJ.

Dhanu Pathak and *others*—Appellants.

v.

Sona Koeri—Respondent.

Letters Patent Appeal No. 13 of 1935, Decided on 11th March 1936, from decision of Mohammad Noor, J., D/- 17th December 1934.

Estoppel — Estoppel by representation — Suit for ejectment after notice—Defendant setting up raiyati lease—Plaintiff representing himself to be tenure-holder—Held no question of estoppel by statute arose—Plaintiff held bound to his representation.

In a suit for ejectment of an under-raiyat by the raiyat, after notice to quit, the under-raiyat denied that the plaintiff was a raiyat and resisted the suit on the ground that the plaintiff representing himself as a tenure-holder had inducted him on the land and had made a raiyati settlement with him thereof. The terms of lease correctly described, the plaintiff as raiyat; the defendant paid rent as raiyat and in receipts the defendant was described as raiyat. In the record of rights, however, the plaintiff was described as raiyat and defendant under-raiyat; nor could plaintiff grant permanent right under Chota Nagpur Tenancy Act:

Held: that there was no question of estoppel by statute, the defendant having denied that the plaintiff was a raiyat and alleged that he was as represented by him a tenure-holder, an issue of fact whether plaintiff is or is not a tenure-holder was raised, and the plaintiff having represented that he was a tenure-holder, he would not be permitted to enter into the discussion of that question but will be bound by his representation. [P 418 C 1, 2]

B. C. De and *L. K. Chaudhury*—for Appellants.

Janak Kishore—for Respondent.

Judgment.—This is a Letters Patent appeal from a judgment of Mohammad Noor, J., in a suit to eject the defendant from a piece of land in Chota Nagpur on the allegation that he, the defendant, was an under-raiyat of the plaintiffs who were raiyats and that he did not vacate the land after the service of notice to quit.

The defence was that the plaintiffs representing themselves as tenure-holders had inducted the defendant on the land and had made a raiyati settlement thereof. The finding of the trial Court and the lower appellate Court was that the plaintiffs had in fact made the representation alleged. The defendant pleaded that the plaintiffs by reason of their representation, that they were tenure-holders, were estopped from denying that he was a raiyat. A plea of limitation was also raised on the basis that the defendant, whatever his position may have been at the inception of the tenancy, had acquired occupancy rights by adverse possession against the plaintiffs.

In the Record of Rights of 1910, the plaintiffs were undoubtedly recorded as raiyats. The settlement of the land with the defendant took place in 1908 or 1909 and the defendant was entered in the Record of Rights as a dar-raiyat. The defendant, however, paid rent as a raiyat and got receipts from the plaintiffs describing him as a raiyat. It is not denied that under the Chota Nagpur Tenancy Act a raiyat cannot grant any permanent rights. The plaintiffs contend that the lease is void and the learned Judge of this Court has held that there cannot be any estoppel against the statute. There is an aspect of the matter, however, which does not seem to have been brought to the learned Judge's notice. Had the terms of the lease described the plaintiffs correctly as raiyats, the defendant could not have set up a plea that the plaintiffs were precluded from denying their title to confer a permanent right upon the defendant. This would have been a genuine case of an application of the principle that there cannot be an estoppel against a statute. In this case, however, the defendant denies that the plaintiffs are raiyats and alleged that they are, as represented by them, tenure-holders. This raises an issue of fact and it is not until that issue of fact is concluded in favour of the plaintiffs that any question of the operation of the statute can arise. It is true that the Record of Rights describes the plaintiffs as raiyats, but this is a piece of evidence only to which is attached the statutory presumption of correctness which is subject to rebuttal. The first issue, therefore, is as to whether the plaintiffs are or are not tenure-holders and it is at this stage that the doctrine of estoppel operates. The plaintiffs having represented themselves as tenure-holders cannot be permitted to enter into a discussion of this question of fact but must be held bound by their own representation. No question, therefore, of the operation of the statute can arise. The plaintiffs are prevented from proving the fact which is indispensable before the matter of the statute can be considered.

It is hardly necessary to add that there would have been no estoppel, if there had been any collusion between the plaintiffs and the defendant, and if it had been established that the former had deliberately misrepresented themselves to be tenure-holders to the knowledge of the latter to defeat the provisions of the Chota Nagpur Tenancy Act. The appeal should be dismissed and the plaintiff's suit for possession dismissed with costs throughout.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1936 Patna 418
SPECIAL BENCH

COURTNEY-TERRELL, C. J., MACPHERSON AND FAZL ALI, JJ.

In the matter of B, *a Pleader of Gaya.*

Civil Ref. No. 4 of 1935, Decided on 20th February 1936.

Legal Practitioner—Pleader decree-holder correcting mistakes in record after certain papers had become part of record—No mala fides—Conduct held unprofessional.

Tampering with public records is a serious matter and when it is done by a person who has peculiar facilities afforded to him, by reason of his position, for handling such records the conduct cannot be easily excused. Absence of any mala fide intention in the sense that by doing so he did not try to gain any advantage over his adversary but made the corrections to avoid any objections regarding regularity or legality of particular process of Court being raised in future, may be an extenuating circumstance. [P 419 C 2]

Where a pleader decree-holder made correction in an execution petition filed by him, by

altering name of pargana of the residence of the judgment-debtor in execution petition, writ of attachment, notice under O. 21, R. 66, as well as peon's report on the notice under O. 21, R. 54, after the attachment had been made and after the paper had become part of the record, without any mala fide intention :

Held : that the conduct amounted to professional misconduct ; but taking into account inexperience of the pleader and want of mala fides, the pleader be suspended for one year.

[P 419 C 2; P 420 C 1]

Mahabir Prasad, *Raj Kishore Prasad* and *Dhyan Chand*—for Petitioner.

Govt. Advocate—for the Crown.

Fazl Ali, J.—This matter comes before us upon a report submitted by the District Judge of Gaya under the Legal Practitioners' Act against a pleader B, under the following circumstances. The pleader had obtained a money decree against a judgment-debtor who was a resident of village Jamuawan in pargana Samai and in connection with the decree he filed an execution petition on 12th August 1934, in which he sought to attach certain lands belonging to the judgment-debtor. These lands are admittedly situated in village Jamuawan in pargana Samai but by mistake they were described in the execution petition as being situated in village Jamuawan, Pargana Narhat and a similar mistake was committed in describing the residence of the judgment-debtor. It appears that the pargana was also wrongly described in several important processes such as the writ of attachment and notices under O. 21, R. 66, as well as in the peon's report on the notice under O. 21, R. 54. Notwithstanding this mistake however the writ of attachment as well as the notice under O. 21, R. 66, appear to have been served upon the judgment-debtor and the property which was in fact sought to be attached was attached. The charge against the pleader is that he altered the name of the pargana from "Narhat" into "Samai" in the execution petition, the writ of attachment, the notice under O. 21, R. 66, and the peon's report on the notice under O. 21, R. 54, after the attachment had been made and after these papers had become part of the Court-record.

The pleader in defending himself before the District Judge somewhat feebly tried to show that the execution petition had been corrected before it was filed in Court and that the various processes in which the alteration was said to have been made had also been corrected before they were filed. His explanation was that the mistake had in first instance, been made by his clerk but when the papers were put up before him, he corrected the mistakes and initialled the corrections in order to show that they had been made by him. Now this explanation was not accepted by the learned District Judge and it is clearly impossible to accept it, because if it is a fact that the execution petition was corrected before it was filed, it is difficult to account for the mistake being repeated in the various processes which were filed long after the filing of the execution petition. It is still more difficult to account for the mistake being committed in the peon's report. There can, therefore be no doubt that the conclusion arrived at by the learned District Judge is correct and the pleader who undoubtedly had access to the record of the case, surreptitiously made the alteration in question long after the filing of the execution petition. The Munsif as well as the District Judge while pointing out that the conduct of the pleader was most reprehensible, have also referred to certain extenuating circumstances in their report. The learned District Judge has stated in his report that the pleader has very little practice in the Courts and is a comparatively young man of little experience and similarly the learned Munsif recommended to the District Judge that considering the inexperience of the pleader and the absence of any mala fide intention on his part, a lenient view might be taken of his case.

It is perhaps true that the pleader had no mala fide intentions in the sense that he did not try to gain any undue advantage over his adversary and he made these corrections probably with a view to avoid any objection being raised by the judgment-debtor in future ; but at the same time it cannot be overlooked that to tamper with public records is a serious matter, and when it is done by a pleader who has peculiar facilities afforded to him by reason of his position for handling such record, the conduct cannot be easily excused. In my opinion we cannot take a more lenient view of the matter than what has been suggested by the learned District Judge and taking his recommendation as well as that made by the Munsif into consideration, we think that in this case the pleader concerned

should be suspended from practice for a period of one year and we order accordingly.

Courtney-Terrell, C. J.—I agree.

Macpherson, J.—I agree.

V.B./R.K. *Order accordingly.*

A. I. R. 1936 Patna 420

AGARWALA AND ROWLAND, JJ.

Joti Lal Sah and *others*—Appellants.

v.

Sheodhayan Prashad Sah and *others*—Respondents.

Appeals Nos. 232 to 234 of 1933, Decided on 23rd March 1936, from Appellate Decree of Sub-Judge, Chapra, D/- 9th August 1932.

(a) Mortgage — Equity of redemption—Mortgagors bringing suits for redemption—Suits ending in decree fixing amount to be paid by them within stipulated time — Amount not paid within stated time—Their successors subsequently filing suit for redemption—Held that right of redemption was not extinguished nor the suit barred by res judicata.

The mortgagors brought suits for redemption of their usufructuary mortgages. The suits ended in a decree fixing the amount to be paid by them within a stated time. The payment was not made within that particular time. A suit for redemption was subsequently filed by their successors. It was contended that the right of redemption was extinguished and the suit barred by res judicata:

Held: that final decree not having been passed the right of redemption was not extinguished and the suit was not barred by res judicata: 25 *Mad* 300, *Disting.*; 24 *All* 44 (*F B*), *Approved*; 22 *W R* 172; 1918 *Bom* 1 and 1925 *P C* 63, *Rel. on.* [P 421 C 1, 2]

(b) Suit—Continuance of — Devolution of interest of plaintiff pending suit — He can still prosecute suits to its conclusion.

Person who institutes a litigation may prosecute it to its conclusion notwithstanding a devolution of his interest in the property. The litigation will continue in his name for the benefit for his successors : 1915 *Cal* 103, *Foll.* [P 422 C 1]

(c) Civil P. C. (1908), O. 22, R. 10—Leave should not be unreasonably refused.

No doubt O. 22, R. 10 gives the Court a discretion in allowing or refusing an application by the successors in interest to continue the litigation, but leave should not be unreasonably refused. [P 422 C 1, 2]

S. N. Dutt—for Appellants.

A. B. Mukharji and *Hareshwar Prosad Sinha*—for Respondent.

Rowland, J.—These three second appeals arise out of three analogous suits in which the plaintiff claimed a declaration of his right of redemption of properties covered by usufructuary mortgages in favour of the predecessors of the principal defendants. The plaintiff alleged that the mortgage money had been satisfied by the usufruct of the properties and claimed in the alternative that an account be taken and the plaintiff given a fixed time for depositing the amount. The suits were dismissed by the Munsif as being barred by the principle of res judicata and the appeals were dismissed by the Subordinate Judge on the ground that they were not maintainable at the instance of the plaintiffs. During the pendency of the litigation the whole equity of redemption in the mortgage properties had become vested by virtue of a partition in Parmeshar Prashad Sah who had been impleaded as a defendant in the suits. His application to be transferred as an appellant, and to be allowed to maintain the appeals, was rejected. In second appeal it is contended that the suits should have been tried on merits.

I take first the question of res judicata. The predecessors in interest of the plaintiffs brought suits 335 and 354 of 1914 for redemption of these very mortgages on similar allegations. The suits ended in decrees fixing the amount which was to be paid by the plaintiffs to redeem the mortgages and giving a period of grace for payment. It is contended for the respondents that payment not having been made within the stated time the right of redemption is extinguished. Section 60 Transfer of Property Act, declares the right of a mortgagor to tender the mortgage money and redeem the mortgage "provided that the right conferred by the section has not been extinguished by act of the parties or by decree of a Court." The decision in the previous suits affirmed the mortgagor's right of redemption and did not couple with this declaration any order directing the right of redemption to be extinguished in default of payment. O. 34, Civil P. C., preserved the right of redemption even in a suit for sale until the actual confirmation of the sale (R. 5); and in a suit for redemption until the mortgagee has applied for and obtained a final decree debarring the mortgagor from his right to redeem (R. 8). Whether such a final decree can at all be passed in connection with an usufructuary mortgage I need not examine here. It is sufficient to say that no such

final decree has been applied for or passed. Therefore the mortgage subsists and the equity of redemption is still alive.

It was then suggested for the respondent that the plaintiff should have come by way of application under S. 47, Civil P. C., and not by a fresh suit. The contention receives some support from the decision of the Madras High Court in 25 Mad 300 (1), but that decision expressly distinguishes the cases in which there had been a direction for foreclosure or sale in default of redemption from cases in which there has been no such direction; so that this Madras decision has no application to the facts before us even if it be accepted to be good law. A different and in my opinion more correct view of the law was taken by the Full Bench of the Allahabad High Court in 24 All 44 (2). Knox, A. C. J., observed :

> It is true that where a Court has once adjudicated upon a mortgagor's right to redeem, so many of the issues as bore upon that, and were heard and determined, become res judicata and cannot be re-opened, but unless there has been a determination that the mortgagor has no right to redeem, there would still remain one other issue in a subsequent suit which would not be res judicata, and which would have to be heard and determined. In a second suit for redemption there would always be the question to be tried whether the plaintiff has or has not a right to redeem reserved to him by law until the mortgagee has applied for an order for sale. This issue would naturally not have been, and could not have been, in issue in the former suit ;

and Aikman, J., in the course of his judgment cites the following passage from the Calcutta decision in 22 W R 172 (3) :

> It seems to us plain that the principal cause of suit is the relation which subsists between the parties as mortgagor and mortgagee, and the consequent right on the part of the mortgagor at all reasonable times to ask for an account from the mortgagee . . . . . Now the former suit effected an adjustment of accounts up to the date of 18th April 1868. The substantial cause of action within the meaning of S. 2, Act 8 of 1859 in the present suit, that which the plaintiff desires to have heard and determined, is the state of accounts which has arisen since 18th April 1868—obviously and entirely a fresh cause of action. The matter which the Court is asked in this suit to hear and determine, is a matter which has arisen and come into being since the matter of the last suit was heard and determined.

To the same effect was the decision of the Full Bench of the Bombay High Court in 43 Bom 334 (4), Scott, C. J., observed :

> A second redemption suit must recognize the binding effect of the previous redemption decree nisi in so far as it settles the accounts up to the date of that decree, and the duty of the Court in the second suit would be limited to the ascertainment of the amount due at the date of the second suit or decree and to give such consequential relief as the law permits.

This view and these observations are more consistent than the Madras view with what was said by Lord Atkinson in delivering the judgment of the Privy Council in 47 All 250 (5) which (though the subject matter of that litigation may not be entirely on all fours with the present suits) is nevertheless pertinent :

> One asks oneself what was the res that was adjudicated upon, either on 25th November 1903, or in the appellate Court on 3rd July 1906 ? The things in dispute in the first case were : (1) the right of the plaintiffs to recover immediate possession of the land in suit ; (2) the amount of dower and (3) the rate of interest. The two latter matters have been decided in that suit and cannot be re-opened. The suit out of which this appeal arises only asks for an adjudication as to the account since 1903. The right to get immediate possession of land at the date when a suit to recover it is, in fact, instituted, is a wholly different thing, a wholly different res from the right to recover it at some future time, and possibly under wholly altered circumstances.

I have no doubt that the Munsif was in error in dismissing the entire suit as barred by res judicata. He should have held that the mortgagors had a subsisting right to redeem after having the state of account as between them and the mortgagees worked out by the Court. In dealing with the account the Court would of course be bound to respect the decision in the 1914 litigation on any questions in the present litigation which were identical with questions previously decided.

I now turn to the question of maintainability. The Munsif had given another reason for dismissing the entire suits, namely, that they had been dismissed against the minor defendants for want of prosecution. It was the plaintiff's case that these minor defendants

1. Veda Puratti v. Vallabha Valiya Raja, (1902) 25 Mad 300=12 M L J 128 (F B).
2. Sita Ram v. Madho Lal, (1901) 24 All 44= 1901 A W N 194 (F B).
3. Roy Dinkur Doyal v. Sheo Golam Singh, (1874) 22 W R 172.
4. Ramji v. Pandharinath, 1918 Bom 1=49 I C 894=21 Bom L R 56=43 Bom 334 (F B).
5. Maina Bibi v. Chaudhuri Vakil Ahmad, 1925 P C 63=86 I C 579=52 I A 145=47 All 250 (P C).

had no interest in the mortgage property and were not necessary parties. If that was so the suit need not fail because of their being struck off. But the defendant would be entitled if so advised to raise an issue whether these minor defendants in fact had an interest and were necessary parties in whose absence the suit could not be decreed. This alleged defect is not referred to in the judgment of the Subordinate Judge which proceeds on another ground. At the time of the institution of the present suits there was pending a partition suit in the Court of the Subordinate Judge, First Court, Chapra, affecting properties of the family of the plaintiff. By a compromise in that suit the mortgage properties of the present litigation were assigned to Parmeshar Prasad Sah who was impleaded in these suits as defendant 8. The compromise agreement was effected on 25th July 1931. The present suits were dismissed on 14th August 1931. The decree passed on compromise in the partition suit was dated 15th September 1931, and the appeals by the plaintiffs were presented on 19th September 1931. The respondents' objection to the appeals was that they were not maintainable at the instance of the plaintiffs because the plaintiffs had parted with their interest in the property. This does not appear to be a correct view of the law. The true position is as explained in 20 C L J 107 (6), that the plaintiff who has instituted a litigation may prosecute it to its conclusion notwithstanding a devolution of his interest in the property. The litigation will continue in his name for the benefit of his successor. In the alternative the Civil Procedure Code, O. 22, R. 10 provides that by leave of the Court the successor in interest may get himself substituted as plaintiff. This is a provision against the danger that the original plaintiff being no longer interested in the proceedings may not vigorously prosecute them or may even collude with the adversary.

In such a case the successor-in-interest who has not got himself substituted is bound by the decision and has no remedy. No doubt O. 22, R. 10 gives the Court a discretion in allowing or refusing such an application by the successor-in-interest, but leave should not be unreasonably refused. It is not necessary for this Court to pass any order regarding Parmeshar's application under O. 22, R. 10. The order that I propose is that the decisions of both the Courts below be set aside and the suits remitted to the Munsif for disposal on the merits. It will be open to Parmeshar to make a fresh application under O. 22, R. 10 to the Munsif. The costs of the appeal and second appeal will be borne by the defendants. The costs of the first Court will abide the result.

Agarwala, J.—I agree.

R.W./R.K. *Suits remanded.*

6. Rai Charan Mandal v. Biswa Nath Mandal, 1915 Cal 103=26 I C 410=20 C L J 107.

A. I. R. 1936 Patna 422

WORT, J.

Alijan Mian—Plaintiff—Appellant.

v.

Jatan Thakur and *others*— Defendants —Respondents.

Appeal No. 789 of 1933, Decided on 18th February 1936, from appellate decree of Addl. Dist. Judge, Muzaffarpur, D/- 29th April 1933.

Partition—Right to—Mere fact that member of the family was not in actual possession does not disentitle him to partition.

Unless there is a definite case of a member of the family relinquishing entirely his interest in the family property or a definite case of ouster established, the mere fact that he was not in actual possession does not disentitle him to partition. Hence the mere fact that the member sells his interest and goes to live in another place does not prove relinquishment of his interest and the purchaser is entitled to partition : 1929 *P C* 231, *Rel. on.* [P 423 C 1, 2]

S. S. Bose and *Syed Hasan* — for Appellant.

Sant Prasad—for Respondents.

Judgment.—This appeal arises out of a partition suit brought by the purchaser of the undivided share of defendant second party, who was defendant 5 in the action and is the son of one Adya. There was no question in this suit that the share purchased was the interest of Adya as both the Courts below have found that Adya's interest was sold more than 30 years ago. The share which has been purchased by the plaintiff is that share in the family property which at one time belonged to Bir who, it will be seen from the genealogical table at the head of the trial Court's judgment, is the brother of Adya. Now the case has been dismissed substantially on one point that Adya and his son, after his interest in the family

property had been sold, went away and lived in another place and took no further interest in the family concerns particularly in the family property. That is what I understand from the judgment of the learned Judge in the Court below in his statement that the story of the defendants that there had been an abandonment was correct.

The defendants had relied however upon the contention that the vendor of the plaintiff had been ousted from his interest in the family property and that they were in adverse possession. The matter I think is concluded by the decision of the Privy Council in 56 I A 316 (1) and by reason of the decision of the learned District Judge confirming the decision of the trial Court that there was no actual evidence of ouster. Prima facie therefore the defendant second party and the plaintiff would be entitled to partition subject to limitation as provided by Art. 127, Lim. Act. The Judge in the Court below however has decided the case on the question of abandonment and the fact that the plaintiff came into Court asserting actual possession of the interest of himself and of defendant second party, his vendor. Having failed to make that out, and that having been quite clearly disproved, the Courts below disallowed the plaintiff's claim. The learned Subordinate Judge relied upon a decision of the Calcutta High Court to the effect that where the plaintiff comes forward with the allegation of actual possession and fails to prove that, there is no ground for allowing him to rely upon the presumption that the defendants' possession is his possession also.

It is with some reluctance that I come to the conclusion in this case that the Judge was wrong in this regard. Unless there is a definite case of a member of the family relinquishing entirely his interest in the family property or a definite case of ouster established, the mere fact that the plaintiff failed to prove that he was in actual possession does not disentitle him to partition. The Judge in the Court below here has, as I have already said, relied partly on the story of abandonment and partly on the ground which I have just referred to, namely that the plaintiff failed to prove his possession. The only case of abandonment that was made out, it appears, was that Adya, after his interest had been sold, went to live in another place. I can hardly accept that as proof or sufficient in law to establish that that member of the family had relinquished all his interest in the property. There was no question in this case that the family was joint, although it has been argued by the learned advocate on behalf of the respondents that the assertion by the plaintiff that he bought one-sixth interest indicated that the members of the family were separate.

But, as I have said, it is quite clear from the decisions of the learned Judges of the Courts below that the family was joint. That being so, and there being no case of ouster and no sufficient case of the plaintiff or his vendor having relinquished his interest in the property, in spite of the fact that the plaintiff failed to make out the case which he attempted to prove, he was entitled to partition. I say I come to this decision with reluctance having regard to the fact that the plaintiff well knew that he was not in possession as he alleged. But in the circumstances of the case the plaintiff was entitled to partition, and therefore the judgment of the learned Judge in the Court below will be set aside and the plaintiff will be entitled to a preliminary decree for partition. Having regard to the fact that he failed to prove his case which he set out to prove, he will not be entitled to costs.

Leave to appeal under the Letters Patent is granted.

V.B.B./R.K. *Appeal accepted.*

1. Raghoba Baloba Vagh v. Aburao Bhagwantrao Shirole, 1929 P C 231=118 I C 1=56 I A 316=53 Bom 699 (P C).

A. I. R. 1936 Patna 423

SPECIAL BENCH

COURTNEY-TERRELL, C. J., MACPHERSON AND FAZL ALI, JJ.

In the matter of D, a Pleader—Petitioner.

Civil Ref. No. 2 of 1935, Decided on 25th February 1936.

Legal Practitioner—Visiting Police Officer at his house and opening conversation with him about case in official investigation under him, is misconduct.

Visiting a Police Officer engaged in official investigation of a case at his house and opening conversation with him about the case, even though without any intention to offer a bribe or influence the officer, is conduct from which the Police Officers must be protected, and amounts to professional misconduct, irrespec-

tive of whether the person on whose behalf the pleader visits is a client, friend or a relation of the pleader. [P 424 C 2; P 425 C 1]

K. P. Jayaswal and *Brahmadeo Narayan*—for Petitioner.

Govt. Advocate—for the Crown.

Courtney-Terrell, C. J.—This matter comes before us on a report of the District Judge of Bhagalpur relating to the conduct of a Pleader Babu D. The evidence has disclosed the following facts: There were certain criminal charges pending against one Babukant Chaudhri, Chaukidari, Assessor Panch, under Ss. 420 and 384 of the Penal Code. In connexion with those cases certain chaukidari receipts alleged to have been granted by Babukant Chaudhri were produced before the Police. Babukant Chaudhri denied that he had in fact signed the receipts in question. Thereupon the investigating Sub-Inspector having taken specimen signatures of Babukant Chaudhri forwarded them with the disputed receipts to the Superintendent of Police for examination and they were forwarded from the office of the Superintendent of Police on 10th November 1934, to the Deputy Inspector-General of Police, Criminal Investigation Department, by the Police Officer at Bhagalpur.

This man Babukant Chaudhri, whose conduct was under investigation in the criminal cases, is a relative of the Pleader. The Pleader made inquiries of the Court Sub-Inspector at Bhagalpur to find out who were the Officers at Patna who had to deal with the investigation of disputed writings and the Officer at Bhagalpur, imagining that the inquiries could have no sinister purpose inasmuch as they were being made by a Pleader, supplied the necessary information. The Pleader wrote down the names of the Officers at Patna and then proceeded to Patna where he had also business of another kind altogether unconnected with legal affairs. But during his visit to Patna he called at the house of Babu Sailendra Nath Sen, who is the Assistant Government Handwriting Expert and whose name had been discovered by him by his inquiries at Bhagalpur, and saw him on the verandah of his house. Babu Sailendra Nath Sen asked him on what business he had called and who he was. The Pleader then said that he had come in connexion with a matter connected with Babukant Chaudhri against whom false charges were being made and was proceeding to make inquiries as to whether a report on the genuineness of the writings had been made. This immediately excited the suspicion, and justifiably excited the suspicion of Babu Sailendra Nath Sen and he asked the Pleader whether he had come to influence him. The Pleader then got very alarmed, attempted to apologise and said that if the Police Officer thought that, he would go away at once. Nothing more was said on the matter of the handwriting and the Pleader after a few minutes desultory conversation, having nothing to do with the case of Babukant Chaudhri, left.

Now we accept the view of the District Judge who inquired into this matter that there is no proof that the Pleader complained against had any intention of influencing the expert or offering to him a bribe, but the clear and admitted fact remains that the Pleader had gone to the house, not to the office, of the Police Officer and had begun a conversation about a case in which the Police Officer was engaged in official investigation. It appears that in fact later on Babu Sailendra Nath Sen investigated the matter of the disputed handwriting and reported in favour of the accused man Babukant Chaudhri that the documents attributed to him were in fact forgeries; but that fact does not excuse in the least the conduct of the Pleader. Indeed the Police Officer, had he not reported the conversation which was begun by the Pleader, might have found himself in a most invidious position; for, had it come out that he had made a favourable report, but prior to the investigation of the matter had had an interview with the Pleader who was not there professionally but on account of family obligation had been representing the person accused, a very unfavourable opinion might have been formed of Babu Sailendra Nath Sen's trustworthiness as an expert.

Accepting the view that there was no intention to offer a bribe, that there was no intention to influence the officer, the conduct of a Pleader in visiting such an officer in such circumstances on behalf of a person, whether he be a client or a mere friend or relation the Pleader was representing, is conduct from which

Police Officers must be protected and it must be clearly known to the profession. Indeed I have little doubt that it is clearly known to the profession that such conduct is, to say the least of it, highly irregular. Had we taken the view that there was any attempt to influence the Police Officer or, worse still, to offer him a bribe, the result would probably have been that the Pleader would have permanently ceased to exercise his profession. In the circumstances, however, and accepting the view of the District Judge in his favour, we must mark the disapproval of the Court of his conduct by suspending him from practice for a period of six months.

Macpherson, J.—I agree.

Fazl Ali, J.—I agree.

V.B./R.K. *Order accordingly.*

A. I. R. 1936 Patna 425

MOHAMMAD NOOR AND ROWLAND, JJ.

Emperor

v.

Azhar Mian—Accused.

Death Ref. No. 5 and Criminal Appeal No. 28 of 1936, Decided on 20th February 1936, from Sess. Judge, Purnea, D/- 15th January 1936.

(a) Criminal Trial—Accused convicted of murder of his step-son by throttling—Conviction resting on circumstantial evidence—No eye-witness available—Post mortem appearance consistent with death by epilepsy—No motive and conduct proved—Accused held not guilty.

The accused was convicted of murder by throttling of his step-son. The conviction was not supported by any direct evidence of the act, and rested on inferences from circumstantial evidence. There was no eye-witness of the crime. The post mortem appearances were consistent with those of death by epilepsy:

Held: that accused was not guilty. [P 426 C 2]

(b) Criminal Trial — Proof of guilt — Avoiding police inquiry is not necessarily indication of guilt.

A police inquiry is always regarded as a harassment. Hence anxiety to avoid it is not necessarily an indication of guilt. [P 426 C 2]

K. N. Lal—for Accused.

Asst. Govt. Advocate—for the Crown.

Rowland, J.—Azhar Mian has been convicted by the Sessions Judge of Purnea of the murder by throttling of his step-son Yusuf, a boy of 3 or 4 years of age. The case comes before us on reference for confirmation of the sentence of death and also on appeal by the prisoner. The conviction is not supported by any direct evidence of the act and rests on inferences from circumstantial evidence.

The undisputed facts are that the accused Azhar, a widower with two children, in Savan last, married Tamidan, a widow with three children, of whom the eldest remained living with her brother and the two younger ones, Hali aged 5 and Yusuf, came with her to live with the accused. On 30th September 1935, in the afternoon Azhar went out taking with him his own son Basiruddin and step-son Yusuf for the purpose of bringing home his cattle grazing in the field. He returned carrying Yusuf and leading Basiruddin by the hand. Tamidan says that Yusuf was already dead. The accused says that the boy died soon after. At any rate some attempts were made to revive him by giving him water and by pushing wick up his nostrils to make him sneeze but to no effect. The accused stated then what he has adhered to throughout that the boy had fallen down and had a fit from which he died. This explanation was at first accepted. The witnesses Samad, Turab, Bahar Ali and Musan attended at the burial of the boy which Azhar performed that evening. Bahadur Ali was told by Tamidan that Azhar had taken a healthy child with him but brought him back dead and had gone to bury him. To another witness Sheikh Mahru, however, she said that the accused had killed her son. Mahru and Bahadur Ali then caused a message to be sent through Mahamuddin to the Police outpost at Gunjuria from whence word was sent to the Police Station at Islampur. Meanwhile Azhar who did not abscond was detained. The police after obtaining the necessary order from a Magistrate got the body exhumed and sent for post mortem examination. The whole prosecution case hangs on the result of that examination.

The Sessions Judge thought that the appearances as found could only be explained by homicidal strangulation and that the accused was the only person who could have had the opportunity to commit the crime. The four assessors with whose assistance the trial was held were all of the contrary view and gave their opinion that the accused is not guilty. As I have said there is no eye-witness of the crime. The boy Basir

who must have been present has not been examined and it does not appear that the police made any attempt whatever to obtain his statement. It may have been assumed that he was too young to be examined but the attempt should certainly have been made. The post mortem appearance were those of death by asphyxia, that is to say, there was frothy blood coming out of the mouth and nostrils; the tongue was protruded and had been bitten by the teeth; the veins of the face, neck and upper part of the chest were dilated; there was congestion in the scalp membrances, brain, larynx, trachea and lungs. There were four bruises, one was just outside the left eye, one was on the left side of the lower jaw, one over the right angle of the lower jaw and one on the centre of the front of the neck. It is extraordinary that whereas the accused had said at once and had repeated before the Magistrate and the Sessions Judge that the boy had died by a fit, the pleader who defended him at the trial put no question to the doctor to test whether the post mortem appearance were consistent with those of death by epilepsy. He directed his cross-examination to the possibility of death by snake-bite for which there does not appear to have been any foundation whatever.

We have referred to the works on medical jurisprudence by Chevers, Taylor and Lyon from which we find that epilepsy causes death by asphyxia with symptoms of suffocation such as I have described. The bruises on the neck no doubt suggest violence but the medical works I have referred to describe cases in which epileptics have been known in the struggles of choking to clutch at their own throats and the marks on the jaw and neck are therefore not entirely conclusive. Taylor points out that in homicidal strangulation one usually finds a much greater degree of violence used than is necessary to cause death. The bruises on the deceased boy were small in area and no injury to the larynx and trachea was found. At the trial the inferences from the post mortem appearances were sought to be supported by some evidence as to motive and conduct. Tamidan says that accused looked after his own children and neglected hers, that he used to threaten to kill her children if she neglected his children and that he used to beat her. It seems to be true that accused beat his wife; she was found to have some bruises on her left leg, but her brother Gauhar Ali's evidence does not support the story of ill-treatment of Yusuf, and it is unsafe to rely too much on Tamidan's statement that accused had threatened the boy's life.

The conduct of accused in bringing the boy straight home and attempting to revive him does not suggest guilt. The burial the same night is referred to as indicating haste to suppress evidence of a crime, but it does not seem to have been so regarded at the time. I have pointed out that four witnesses against whom no suggestion of complicity is made assisted at the burial. There was one incident that evening; the accused took six silver ornaments (tars) from his wife and gave them to Mahru. It is said that this was done to induce Mahru to hush up the matter. This certainly suggests that accused was anxious to avoid a police inquiry but a police inquiry is always regarded as a harassment, and anxiety to avoid it is not necessarily an indication of guilt. On consideration of all circumstances it seems to me by no means certain that the accused committed the crime with which he was charged. The Assistant Surgeon who held the post mortem examination gave his opinion in these terms: "Death was probably caused by asphxia which may have been caused by throttling." The caution with which he expressed himself was justified. I would accept the opinion of all the assessors and hold the accused not guilty. I would allow the appeal, discharge the reference and acquit the accused. The tars Exs. 1 to 6 should be returned to the accused.

Mohammad Noor, J.—I agree.

V.B.B./R.K. *Appeal allowed.*

A. I. R. 1936 Patna 426

WORT, J.

Jageshwar Singh and *others*—Defendants—Appellants.

v.

Modnarain Singh and *another*—Plaintiffs—Defendants—Respondents.

Appeal No. 418 of 1933, Decided on 20th February 1936, from appellate decree of Sub-Judge, Monghyr, D/-27th September 1932.

Hindu Law—Alienation—Female — Necessity is mixed question of law and fact—Lower Court not having misdirected itself on question of law—There is no justification for disturbance of its finding on fact.

The Hindu law recognizes the validity of the dedication or alienation of a small fraction of property by a Hindu female for continuous benefit of the soul of last owner. There can be no general statement of principle of law that a pilgrimage to a holy place can never be considered a justifying necessity for alienation of a woman's estate. But where the limited owner has alienated certain portion of property and the lower Court finds a substantial consideration for the sale-deed to be invalid and excessive and the lower Court has not misdirected itself on any question of law, the question as to the necessity is partly one of law and partly one of fact and the finding as to absence of necessity should not be set aside : 8 *M I A* 529 (*PC*) ; 1916 *Cal* 792 and 1922 *P C* 261, *Rel. on.* [P 427 C 1,2 ; P 428 C 1]

L. N. Sinha and *P. Zha* — for Appellants.

Abani Bhusan Mukharji and *Rajeshwari Prasad*—for Respondents.

Judgment.—When analysed, the argument of Mr. Sinha appearing on behalf of the defendant-appellants is chiefly concerned with that item of the considerations, the sale-deed of 26th September 1929, which is referable to the pilgrimage to Benares. The learned Judge in the Court below has held on the authority of the decision therein quoted that the pilgrimage to Benares could not be considered legal necessity. So far as the learned Judge's statement purports to be a statement of a principle of law that a pilgrimage to Benares can never be considered a justifying necessity for alienation of a woman's estate, the Judge is clearly wrong. But even assuming that the learned Judge intended so to express himself, the reversal of his decision on that particular point would not save the alienation which was the subject-matter of this action and which related to five items, the three principal ones being Rs. 378 for the payment of a sudbharna bond, Rs. 500 for certain religious ceremony performed by the lady, and Rs. 84 odd for the payment of a promissory note.

The argument of Mr. Sinha can be well understood having regard to the findings of fact of the learned Judges in the Courts below. I might say in this connexion that the judgment of the lower appellate Court is a judgment of affirmance and it is on no question of law that the Courts below have decided against the defendant, but on questions of fact. It would appear that Mt. Keshobati Kumri was the widow of one Hirday Narain and after the death of Hirday Narain, Chhedi, his son, came to possess the estate, and it was after the death of Chhedi that the Musammat came into possession. She was, therefore, not in possession of a widow's estate but that of a mother.

Now taking the principal item of Rs. 500, the learned Judge in the Court below has held that the Kartik Brat Uddyapan ceremony was not conducive to the benefit of the son's soul, and, therefore, on that ground and on the ground that the amount in the circumstances was excessive, has held against that particular item. So far as Rs. 378 was concerned, the trial Court came to the conclusion also on facts that the item was not justified and the same may be said in respect of Rs. 84 odd. Now it is important to notice that the learned Judge in the trial Court came to the conclusion that the defendants who were the appellants before this Court and who advanced the money and were the purchasers, acted most carelessly without ascertaining whether the Musammat had any necessity for it or not. Now that finding was that there was no proper and bona fide enquiry. The appellants appear to have been content with that finding because we see from their notice of appeal to the lower appellate Court that he makes no grievance with regard to it, but bases his case, as he did partly in the trial Court, on the ground that necessity in fact existed. Now the principles of law applicable to a case of this kind are to be found first of all in the leading case of 8 M I A 529 (1) in the decision of the Calcutta High Court in 43 Cal 574 (2) and the decision quoted with approval by the Privy Council in 44 All 503 (3). In the last named case the following statement appears :

> In their Lordships' opinion the Hindu Law recognizes the validity of the dedication or alienation of a small fraction of the property by a Hindu female for the continuous benefit of the soul of the deceased owner.

In the case before me the most substantial consideration for the sale-deed

1. The Collector of Masulipatam v. Cavaly Vencata Narainapah, (1859-61) 8 M I A 529 =2 W R 61 (P C).
2. Khub Lal Singh v. Ajodhya Misser, 1916 Cal 792=31 I C 433=43 Cal 574.
3. Sardar Singh v. Kunj Bihari Lal, 1922 P C 261=69 I C 36=49 I A 383=44 All 503 (P C).

is held to be invalid by reason of the fact that it was not conducive to the benefit of the soul of the last owner, namely the son and that in the circumstances of the case, it was excessive. This was partly a question of law and partly a question of fact. The only decision of the learned Judge in the Court below which could in any way be criticised is the somewhat general statement regarding the religious pilgrimage to which I referred in the earlier part of my observations. It is not seriously contended by Mr. Sinha that as regards the other items, the learned Judge has misdirected himself on any question of law. It is clear from the finding of the learned Judge in the Court below that, in all the circumstances of the case, he has found as a fact that there was no justifying necessity, and on the fact it could hardly be contended that there was. For these reasons it seems to me that the appeal fails and must be dismissed with costs.

V.B.B./R.K. *Appeal dismissed.*

A. I. R. 1936 Patna 428

SAUNDERS, J.

Bharosa Singh and *others*—Petitioners.

v.

Jhauri Sao and *others*—Opposite Parties.

Civil Revn. Appln. No. 690 of 1935, Decided on 27th February 1936, from order of Small Cause Court Judge, Patna, D/- 19th July 1935.

(a) Practice — New plea—Plea not taken either in trial Court or in application for revision—Plea cannot be raised in revision.

A new plea which was not taken either in the trial Court, or in the application for revision, cannot be allowed in the revision proceedings : 1930 *Bom* 361, *Rel. on.* [P 429 C 1]

(b) Jurisdiction — Small Cause Court — Facts stated in plaint showing action wrongful or illegal, but not necessarily penal—Jurisdiction of Small Cause Court is not barred.

When upon the case laid in the plaint it is clear beyond any shadow of doubt that the defendant had committed an offence punishable under Chap. 17, Penal Code, the jurisdiction of the Small Cause Court to try such a suit is barred ; but where upon the facts stated in the plaint the cause against the defendant is that his action was wrongful or illegal, but was not necessarily penal so as to bring him within the purview of the Penal Code, the jurisdiction of the Small Cause Court is not at all barred. In short and without referring to the other circumstances, if upon the plaint a question of bona fide claim on behalf of the defendant is obvious, then Art. 35 (ii) will have no application. [P 429 C 1]

Where a suit is brought for compensation for a crop of paddy, which the petitioners are alleged to have wrongfully cut while it was in the possession of usufructuary mortgagees, and it is apparent from the plaint that the petitioners were asserting a bona fide claim to be entitled to appropriate the crop, no criminal action would have been taken on it. The suit is cognizable by the Court of Small Causes, and Art. 35 (ii) has no application : 1930 *Pat* 575, *Rel. on.* [P 429 C 1]

(c) Minor — Decision based not upon alleged compromise, but upon evidence in case —Minor is bound by decree.

Where it was urged on behalf of petitioners, who were minors that they were not bound by a decree, as it was passed on a compromise, and no leave was given by the Court to their guardians to enter into a compromise on their behalf, but it was found that the decision was not based upon the compromise, but upon evidence in the case :

Held : that they were bound by the decree. [P 429 C 2]

(d) Minor—Admission by father — Minor, represented by pleader, not denying it—Minor held bound by admission.

Where the father of minors made certain admission on behalf of the minors and the latter, represented by the pleader did not deny them :

Held : that they were bound by the admission. [P 429 C 2]

(e) Minor — Suit for wrongful misappropriation of crops against minors and their father — Decree can be passed against minors.

Where the suit against the father and his minor sons was not for damages for breach of contract, but for wrongful misappropriation of crops :

Held : there could be a decree against the minors in such a suit. [P 429 C 2]

S. N. Banerjee—for Petitioners.

B. N. Mitter and *B. N. Mukherjee* — for Opposite Parties.

Order.—This is an application under S. 25, Small Cause Courts Act, against the decree in a suit brought for compensation for a crop of paddy which the petitioners are alleged to have wrongfully cut while it was in possession of the plaintiff-opposite party as usufructuary mortgagees, the petitioners having been the mortgagors. The petitioners appear to have taken the crop on the strength of a claim that a settlement of the land had been made with them by the plaintiffs. One of them admitted in the suit that the plaintiffs had obtained a usufructuary mortgage from the petitioners and the Court found, relying on the evidence of one of the plaintiffs, that no settlement of the land had been made with the petitioners. The claim for com-

pensation was, however, considered to be excessive and a smaller sum was decreed on that account.

The main ground on which I am asked to revise the decision of the trial Court is that the suit purports to be a suit for compensation for an act which would have been punishable under Chap. 17, Penal Code, and is, therefore, not cognizable by Court of Small Causes by reason of the provisions of S. 15 of the Act, and Art. 35 (ii), Sch. 2, of the Act. A sufficient reply to this contention is that the plea was not taken either in the trial Court or in the petitioners' application for revision. As was observed by the Bombay High Court in 1930 Bom 361 (1) it is not open to an unsuccessful litigant to raise in revision a new plea of this character even as regards his own pleading, much less with regard to the pleading of his successful adversary. But there is also no substance in the contention. It has been held by this Court in 11 P L T 741 (2) that :

> When upon the case laid in the plaint it is clear beyond any shadow of doubt that the defendant had committed an offence punishable under Chap. 17, Penal Code, the jurisdiction of the Small Cause Court to try such a suit is barred ; but where upon the facts stated in the plaint the case against the defendant is that his action was wrongful or illegal, but not necessarily penal so as to bring him within the purview of the Penal Code, the jurisdiction of the Small Cause Court is not at all barred. In short and without referring to the other circumstances, if upon the plaint a question of a bona fide claim on behalf of the defendant is obvious, then Art. 35 (ii) will have no application.

In the present case it is clear that if the plaint had been presented to a criminal Court as a complaint, no action would have been taken on it. It is argued on behalf of the petitioners that it alleges facts that would constitute the offence of theft. The crop, however, was not removed until after an order was passed by a Magistrate against the plaintiffs in a case under S. 144, Criminal P. C., to which the petitioners also were parties. It is apparent from the plaint itself that the defendants were asserting a bona fide claim to be entitled to appropriate the crop. It is stated that during the investigation made by the Police in connexion with the dispute that was dealt with under S. 144, Criminal P. C., the petitioners induced the Sub-Inspector to believe that they were in occupation of the land as bataidars under the plaintiffs.

It is next contended that those of the petitioners who are minors are not bound by the decree because it was passed on a compromise and no leave was given by the Court to their guardians to enter into a compromise on their behalf. There is a reference in the order-sheet to a compromise. It is stated that the "parties agree to a compromise," but there is no further mention of this compromise and afterwards evidence was taken, one of the defendants who is the father of the minors and one of the plaintiffs being examined as witnesses. The decision is not based upon the compromise, but upon the evidence given in the case. It is also urged that the minors are not bound by an admission made by their father. But I am unable to appreciate the force of this contention. They were parties to the case and they were represented by a pleader appointed by their guardian. It was open to them to deny the admission if it was not correct. Their father, however, was obviously the person best qualified to say whether the plaintiffs were usufructuary mortgagees or not. It is not even now asserted that they were not usufructuary mortgagees.

Finally, it is contended that there ought to be no decree against the minors because they are not liable for a breach of the contract embodied in the mortgage-deed. There is also no substance in this contention. The suit was not for damages for breach of a contract, but for wrongful misappropriation of the crop. Moreover, this ground of objection to the decree of the trial Court was not taken in the application for revision. The result is that the application is dismissed with costs. I assess the hearing fee at two gold mohurs.

V.B.B./R.K. *Application dismissed.*

1. Sakhya Baba Lataka v. Sadashiv Parsharam Sathe, 1930 Bom 361=125 I C 440=32 Bom L R 181.
2. Damodar Jha v. Baldeo Prasad, 1930 Pat 575=127 I C 843=9 Pat 569=11 P L T 741.

A. I. R. 1936 Patna 429

DHAVLE, J.

Nisan Singh—Petitioner.

v.

Ramchandra Sao—Opposite Party.

Civil Revn. No. 6 of 1936, Decided on 30th March 1936, from order of Small Cause Court Judge, Jahanabad, D/- 18th September 1935.

Provincial Small Cause Courts Act (1887), Sch. 2, Arts. 41 and 15—Suit for recovery of money advanced by *A* to *B* as contribution by *A* for purchase of certain land—Suit held did not come under Art. 41 or Art. 15, Small Cause Courts Act, nor under S. 66, Civil P. C.

A advanced to *B* a certain sum of money as a share contribution by *A* for purchase of certain land in which *A*, *B* and other parties were concerned as ijaradars and which was going to be sold in Court-auction ; *A* sued *B* for the recovery of money advanced :

Held : that Art. 41 did not apply as the suit was not for contribution, but for recovery of money advanced and because the suit was not in respect of a payment made by *A* of money due from *B* as a co-sharer. Art. 15 also did not apply as *A* did not ask for the specific performance of any contract. What *A* desired to obtain from the Court was not the rescission of the contract, but the recovery of money advanced. S. 66, Civil P. C., also was no bar to the suit as *A* did not challenge the title of *B* to the property purchased by him at the Court sale. The suit was based on the footing that *B* had no longer any title to keep the money that had been advanced to him by *A*.

[P 430 C 1, 2]

Anand Prasad—for Petitioner.

Rajkishore Prasad — for Opposite Party.

Order.—This application must be dismissed. It arises out of a suit for recovery of money. The sum comprised two items out of which we are only concerned with one, namely, Rs. 62, which the opposite party claimed and has been found by the Court below to have advanced to the petitioner. The case of the opposite party was that this was the share contributed by him for the purchase of certain land in which he, the petitioner before me, and other parties were concerned as ijaradars and which was going to be sold in a Court-auction. The learned advocate for the petitioner has urged that the suit should not have been tried by the Small Cause Court at all because it comes either within Art. 41 or within Art. 15, Sch. 2, to that Act. Art. 41 deals with suits for contribution by a sharer in a joint property in respect of a payment made by him of money due from a co-sharer. The present was not a suit for contribution, but for recovery of money advanced. Nor was it a suit in respect of a payment made by the plaintiff of money due from the petitioner before me as a co-sharer. The payment made by the opposite party was made to the petitioner himself. On a plain reading of Art. 41 it seems clear that the suit was not within this article. Art. 15, the other article referred to by the learned advocate, deals with suits for the specific performance or rescission of a contract. In the present case the opposite party admittedly did not ask for the specific performance of any contract, but the learned advocate has contended that his claim for the recovery of the money advanced by him was based on the rescission of a contract and was, therefore, covered by the article. The claim for the recovery of money, however, arises rather out of the advance made by the plaintiff than out of what may be called the rescission of a contract ; and it seems to me that the article contemplates cases where rescission of a contract is the relief asked for, while in the present case what the opposite party desired to obtain from the Court is not so much of the rescission of the contract as the recovery of the money advanced. The learned advocate has also urged that the suit was not maintainable in view of the provisions of S. 66, Civil P. C. Now, this section provides that :

> No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims.

Was the present a suit of that character ? The opposite party did not even seek to challenge the title of the petitioner to the property purchased by him at the Court-sale. He did undoubtedly say that the arrangement was that the property was to be purchased for all the ijaradars who contributed the purchase money, but he did not in this suit endeavour to assert his title to his share of the land. The suit was based on the footing that the petitioner before me had no longer any title to keep the money that had been advanced to him by the opposite party ; and that clearly is not a suit within S. 66, Civil P. C., at all. The application is accordingly dismissed with costs. Hearing fee one gold mohur.

D.S./R.K. *Application dismissed.*

A. I. R. 1936 Patna 430

WORT, AG. C. J. AND DHAVLE, J.

Mt. Jagtaran Kuer—Objector—Appellant.

v.

Mt. Gaitri Debi—Petitioner—Respdt.

Appeals Nos. 241 and 242 of 1935, Decided on 5th May 1936.

Succession Act (1925), S. 373 (4)—Applications for certificate by wife and daughter —S. 373 (4) has no application,

Section 373 (4) is confined to cases where there are more applicants than one for a certificate and it appears to the Judge that more than one of such applicants are interested in the estate of the deceased. [P 432 C 2]

The daughter and another claimant both applied for succession certificate. The other claimant was the wife of the deceased:

Held: the daughter was not interested in the property at all, as the widow took the estate exclusively for the time being. The case therefore did not fall within sub-s. (4) of S. 373. [P 432 C 2]

N. N. Sen—for Appellant.

Ananda Prasad—for Respondent.

Dhavle, J.—These appeals are from a decision of the District Judge of Patna allowing the application of Gaitri Debi and disallowing the application of Jagtaran Kuer for a succession certificate in respect of a debt of about Rs. 1,300 due to one Sheonandan Prosad Chaudhury, who died on 8th February 1934. Gaitri Debi claimed as Sheonandan's widow, and Jagtaran as his daughter. About Jagtaran's parentage there was no dispute at all, but regarding Gaitri's claim, it is alleged on behalf of Jagtaran that she was not a wife but only a cook and concubine of Sheonandan. This was overruled by the learned District Judge, and Gaitri's claim was accepted. The learned advocate for the appellant has taken us into the evidence produced in the case, and laid much stress on the fact that the record does not show that Sheonandan, who was admittedly a Kalwar, belonged to the Jayaswal section of that caste. The point of the criticism is that Jayaswal Kalwars recognise sagai, while evidence was adduced on behalf of Jagtaran that among Kalwars (meaning that section of Kalwars to which Sheonandan belonged) sagai was not recognised. That Gaitri had been married to another husband previously was not disputed. We understand from the learned advocate for the respondent that what happened in the lower Court was that it was common ground during the arguments there that Sheonandan belonged to the Jayaswal section of Kalwars. Indeed it is difficult to understand the reference of the District Judge to 'Bhattacharjya's Hindu castes and Sects' as regards sagai among Jayaswal Kalwars unless that had been the case.

The evidence that was adduced on behalf of the appellant that Sagai was not recognised in Sheonandan's caste was belied by the actual doings of several of her witnesses. Baldeo Prasad, her second witness, for instance, admitted that Gaitri had been invited to his house on the occasion of the Chhat; and it is not easy to imagine that a young woman of twenty who had lost her former husband, and had been engaged by an old man of the age and position of Sheonandan as a cook and kept as a mistress, was invited on an occasion of this kind out of mere regard to his position. Rambilas Prasad, another witness for Jagtaran, had to admit that Gaitri had been invited to his house to attend the marriage ceremony of his brother Raghubir, and here again the same reflection is inevitable. Whatever the position of Sheonandan, is it likely that though his caste did not recognise the custom of Sagai, Rambilas invited Sheonandan's cook and mistress of twenty years of age to a marriage ceremony? Then there is the husband of Jagtaran. It is unnecessary to refer to his obvious interest in the success of Jagtaran. But the postcard that he admittedly wrote to his father-in-law conveying respects to Sri Maiji and speaking of Naniji as well tells its own tale. There is no dispute that Maiji in the postcard refers to Gaitri.

It has been suggested by the learned advocate that Gaitri was on that occasion referred to as Maiji (a term of respect) on account of deference to Sheonandan; but is it likely that the deference would be carried so far as to extend to a cook and mistress? As regards the reference to Naniji, it has been urged on behalf of the appellant that there is nothing to show that this reference is to the mother of the Maiji; that it may have referred to another maternal grand mother; and that as the postcard asks Sheonandan to write where and how Naniji is, and as the mother of the cook and mistress had no other house to go to, it should be taken that the Naniji, whoever it was, was not the mother of the Maiji. Now Ramchandra Prasad, the son-in-law, who wrote the postcard, was not questioned in detail about the Naniji. At the same time there is no indication in the record that there was at that time in the house of Sheonandan any lady other than

Gaitri's mother, who could have answered even approximately to the description of Naniji. But it is not only the actings of these witnesses that belied the story that sagai is not recognized in the caste and that Gaitri was not the wife of Sheonandan but only his cook and mistress. Independent evidence was forthcoming in the story of the postmaster who acted for Sheonandan in the matter of the shares of the Bihar Cotton Mills. That Company made a fourth call for money due on certain shares, and the money was sent by money order the acknowledgment form (Ex. 2) being filled up by or on behalf of the sender. This was actually done by the postmaster, who entered the name of the remitter in the space reserved for the purpose as "Gaitri Debi, wife of Babu Sheonandan Prasad Chaudhury, etc.," and the witness said that he did it at the instance of Sheonandan. It is suggested that Sheonandan for the sake of his own prestige might have been anxious to pass off "Gaitri" as his wife, though in fact she was his cook and mistress. But one does not usually find even old men with young cooks and mistresses buying share for them.

Comment was made by the learned advocate on the admission of Gaitri's mother that no enquiries were made about the former children of the husband when it was arranged that Gaitri was to be married to Sheonandan. But I have before now come across cases where young girls, even younger than Gaitri, have been given in marriage to old men of means without any enquiries about their family; money often imports everything that is sought in such cases. And in the present case the mother says that she did not object to the match as she thought that Sheonandan was a rich man and would maintain her daughter very well. There is also the evidence that the marriage was settled by the wife of Banarasi Prasad, a relative of wealth and standing in the Kalwar community.

The mother's admission therefore that no enquiry was made does not in my opinion throw any doubt on the story that Gaitri was in fact married to Sheonandan. Judging by the doings of the defence witnesses themselves, to which I have specifically referred, it seems perfectly clear that Gaitri was received in the community as Sheonandan's wife, and was treated as such even by Sheonandan's son-in-law, the husband of the appellant. It does not seem worth while in these circumstances to go further into the matter of the reference by the learned District Judge to Mr. Bhattacharya's book about the prevalence of sagai among Jaiswal Kalwars, though we find from Risley's classical work on the same subject that sagai prevails or did prevail at the time the book was written in several, if not all, sections of the Kalwar caste. In my opinion the learned District Judge arrived at a perfectly correct finding on the evidence that Gaitri was the wife and not the cook and mistress of Sheonandan. It follows that the order to grant a succession certificate to her in preference to the daughter who only claims on the footing that Gaitri was not the widow is also correct.

I should have referred to one more point raised by the learned advocate for the appellant, and that is that S. 375, Succession Act, required the District Judge in this case to take security from Mt. Gaitri Debi. Reference was made to sub-sections (3) and (4) of S. 373, the former of which has no application in the present case. As to the latter, it is confined to cases where there are more applicants than one for a certificate and it appears to the Judge that more than one of such applicants are interested in the estate of the deceased. The contention is that Gaitri was not the only person interested in the estate of Sheonandan, but that Jagtaran was also interested in it. Jagtaran, however, is not at present interested in the property at all if, as has been found by the learned District Judge, Gaitri was the widow of Sheonandan and took the estate of her husband exclusively for the time being. It seems clear therefore that Jagtaran cannot at the present moment be regarded as interested in the estate of the deceased. The contention that this was a case within sub-s. (4), S. 373 must therefore be overruled. The result is that both these appeals are dismissed with costs. There will be one consolidated hearing fee in the two appeals.

Wort, Ag. C. J.—I agree.

V.B.B./R.K. *Appeals dismissed.*

A. I. R. 1936 Patna 433

FAZL ALI AND ROWLAND, JJ.

Narain Pasi—Appellant.

v.

Nanhu Mistri and *others* — Respondents.

Second Appeal No. 295 of 1934, Decided on 14th January 1935.

(a) Civil P. C. (1908), O. 41, R. 10—Party owning property—But not paying costs awarded by lower Court—Held he should furnish security for costs of appeal.

The party in his counter affidavit stated clearly that he had some property, but in spite of this fact, he did not choose to pay the costs for which a decree was awarded to the opposite party by the lower Court, in spite of the fact that he was committed to the civil prison in execution of the decree:

Held: in the circumstances of the case the party should be directed to furnish security for the costs, which might be incurred by the opposite party in appeal before he is allowed to proceed with the appeal: 1931 *Cal* 40, *Rel. on*; *Harlock* v. *Ashberry*, (1882) 19 *Ch D* 84, *Ref.*

[P 434 C 1]

(b) Civil P. C. (1908), O. 41, R. 10—Security for costs—Power is discretionary—Ordinarily poverty of appellant is no ground for demanding security—But in certain cases, it may be ground for so demanding.

Order 41, R. 10 gives an absolute discretion to the appellate Court to decide in what cases security is to be demanded. But no Bench of Judges can lay down rules which purport to fetter the discretion of other judges in any similar application which may be made thereafter. Even though it is quite true that as a general rule a Court is loath to prevent an appellant from pursuing the remedy allowed to him by law merely on the ground of poverty, yet each case must stand on its own facts and there might be cases in which a party, because he is poor, should be directed to give security at any rate for the costs of the appeal, before he is allowed to proceed further: 1923 *Bom* 264, *Foll.*

[P 433 C 2]

S. A. Khan and *Bajrang Sahay*—for Appellant.

B. P. Sinha and *S. B. Prasad*—for Respondents.

Order.—This is an application by the respondents in which they ask this Court to direct the appellant under O. 41, R. 10 to furnish security for the costs of appeal and of the Courts below. The allegations made in the petition are that the appellant has no property from which the decree for costs passed by the lower appellate Court or which may be passed by this Court may be realised; that he is a mere tool in the hands of one Ramlakhan Mahto, and that the respondents executed the decree for costs amounting to Rs. 675 obtained by them in the lower Court and the defendant was sent to civil prison, but he did not pay any part of the decretal amount. The matter came up before the Registrar who relying upon the decision of this Court in 1 P L T 114 (1), rejected the application of the respondents. The Registrar interpreted that decision to mean that security is not to be demanded from an appellant, unless it is proved that he is merely a puppet in the hands of others and that he is merely a nominal party acting on behalf of others who are keeping themselves behind the scene. Now at the first sight it might seem that this is what was laid down by this Court in the case quoted by the Registrar, but upon a careful reading of the judgment delivered there, it would appear that it was based on the special facts of the case which rested on the definite allegation that the appellant was a puppet in the hands of another person and that allegation was distinctly found to be false. There was, it is true, an observation made in that case that mere poverty of the appellant is no ground for demanding security, but I think that this observation was made chiefly to guard against the danger of laying down a uniform rule of practice which might deter a poor litigant from bringing up his grievance before the superior Court. It is to be remembered that O. 41, R. 10 gives an absolute discretion to the appellate Court to decide in what class of cases security is to be demanded and as was pointed out by Macleod, C. J., in 1923 Bom 264 (2):

> Where the Court has been given absolute discretion to make an order for security for costs, no Bench of Judges can lay down rules which purport to fetter the discretion of other Judges in any similar application which may be made thereafter.

We also respectfully agree with the view expressed by Macleod, C. J., in the same case, that even though it is quite true that as a general rule a Court is loath to prevent an appellant from pursuing the remedy allowed to him by law merely on the ground of poverty, yet each case must stand on its own facts and there might be cases in which a party, because he is poor, should be directed to give security at any rate for the costs of the appeal,

1. Mahanth Raghunath Dass v. Sheo Kumar Misser, 1921 Pat 233=55 I C 835=1 P L T 114.
2. Gulabrao Manyaba v. Vinayak Bapusaheb, 1923 Bom 264=72 I C 285=25 Bom L R 195.

before he is allowed to proceed further. We might usefully refer here to the judgment delivered by Rankin, C. J., in 58 Cal 117 (3) where while pointing out that there is a great distinction between an application for security for costs to be given by the plaintiff at the original trial in the first instance and such an application in connection with an appeal and that the Code of Civil Procedure treats the two things as entirely different, he has referred to a number of English decisions in which it is stated that the ordinary practice in that country is to require security for costs from the appellant who is unable through poverty to pay the costs of the appeal. This practice is referred to by Sir George Jessel, M. R., in (1882) 19 Ch D 84 (4) in the following words :

> For sometime past, it has been the settled practice, if the respondent asks for it, to require security for costs to be given by an appellant who would be unable through poverty to pay the respondent's costs of the appeal if it should be unsuccessful.

Now, even though it may be that there is no such uniform practice in this country, yet it may be pointed out that just as mere poverty may not in a particular case be a ground for demanding security, similarly in the special circumstances of this case, security may well be demanded from an appellant who through poverty is unable to pay the costs of the appeal. In this particular case what we cannot ignore is that the respondent made an attempt to realise the costs decreed by the lower Court from the appellant, but failed to do so, even though in the execution of the decree for costs the appellant was committed to civil prison. The appellant in his counter affidavit states in clear terms that he has some property, but in spite of this fact, he did not choose to pay the costs for which a decree was awarded to the respondent by the lower appellate Court. In the circumstances of the case we think that the appellant should be directed to furnish security for the costs which may be incurred by the respondents in this Court. We do not, however, consider it necessary to demand security for the costs of the Courts below for which a decree has already been granted by the lower appellate Court. It may be mentioned that the respondents are willing to accept security in landed property. There will be no order as to costs of this application.

V.B.B./R.K. *Order accordingly.*

3. Birendranath Mitra v. Mt. Begam Jan, 1931 Cal 40=127 I C 669=34 C W N 495=58 Cal 117.
4. Harlock v. Ashberry, (1882) 19 Ch D 84=51 L J Ch 96=45 L T 602=30 W R 112.

A. I. R. 1936 Patna 434

WORT, AG. C. J. AND DHAVLE, J.

Gauri Shanker Sahu and *others*—Defendants—Appellants.

v.

Sheotahal Gir—Plaintiff—Respondent.

Appeal No. 281 of 1933, Decided on 22nd April 1936, from appellate decree of Sub-Judge, Saran, D/- 30th November 1932.

Mortgage—Redemption—Tenant mortgaging his holding with possession — Holding purchased by landlord in execution of rent decree due to default by mortgagee in payment of rent—Landlord giving notice to mortgagee to annul encumbrance — Mortgagee suing for preservation of his mortgagee-rights— Rights affirmed by compromise decree though rent sale not set aside— Equity of redemption in the meantime passing to original mortgagee's separated brother — Mortgagee subsequently purchasing holding—Purchaser of equity of redemption suing to redeem—Purchaser held could not redeem.

A tenant mortgaged his property with possession. The mortgagee in possession made defaults in payment of rents in consequence of which the holding was brought to sale by landlord in execution of the rent decree and purchased in 1911 by the landlord. Landlord issued a notice to the mortgagee to annul his encumbrance upon which the mortgagee sued in 1913 for a declaration for preservation of his rights as a mortgagee which were affirmed by the Court in pursuance of a compromise decree between the mortgagee and his separated uncle to whom in the meantime the equity of redemption had passed. Subsequently in 1914 the holding was re-purchased by the original mortgagee. The mortgagor in 1929 sold his equity of redemption and the purchaser sued to redeem :

Held : that the rent sale which was not set aside by the mortgagee's suit in 1913 had extinguished the mortgagor's equity of redemption as the rent sale was not established to be fraudulent. The right to redeem which passed under the compromise was not the revival of the equity of redemption that was extinguished by the rent decree. The purchaser of the equity of redemption from the mortgagor-tenant could not redeem. [P 436 C 1, 2]

P. K. Sen and *R. S. Chattarji*—for Appellants.

Hareshwar Pd. Sinha and *Bankey Behari Sahi*—for Respondent.

Wort, Ag. C. J.—This case, in my judgment, which is an appeal by the de-

fendant in an action for redemption, depends entirely upon the circumstances surrounding and the effect of sale in execution of a rent decree of 1911. The case depends also upon whether Gauri Shanker was joint with one Ramji, who was defendant 2 in the action and was the son of the original mortgagee, Gauri Shanker in that sense being the mortgagee. The purchase by Gauri Shanker took place on 5th March 1914, and it was a purchase from the landlord who himself had purchased the holding in the rent sale in the action which he had brought and to which I have already referred. There is a finding by the Courts below that Kishun Sah who was the uncle of Ram Khelawan was benamidar of Gauri Shanker.

Now as the plaintiff, who sought to redeem in this suit, purchased from the original mortgagor, the tenant of the holding, on 3rd June 1929, the case, as will be seen depends upon whether the equity of redemption at the time that it was sold to the plaintiff in 1929 was still subsisting. We have listened to the elaborate arguments of the learned Advocate on behalf of the respondent as also of Dr. P. K. Sen, who appears for the appellant defendant; but, in my judgment, the case depends upon a very short point to which I referred in the commencement of my observations.

There were two authorities relied upon by the learned Advocate on behalf of the respondent: one was in the decision of their Lordships of the Judicial Committee of the Privy Council in 10 M I A 540 (1). That case was relied upon more particularly for an observation of their Lordships to the effect that a person could not benefit from his own wrong; but when the opinion of their Lordships of the Judicial Committee which was stated by Sir Edward V. Williams is examined, it will be seen that that case has no application to the facts of the case which is before us. In this connexion I should observe that the judgment of the learned Judge in the Court below depends, as I have already stated, upon the finding that Gauri Shanker was joint with defendant 2 who was the son of the original mortgagee, and in that sense and in that sense only, was he the mortgagee, a fact which is to be found in a statement made by the learned Judge towards the end of his judgment and it is this:

> I, therefore, hold that the zarpeshgidars having purchased the zarpeshgi property in execution of a rent sale brought about by their own default the sale did not deprive the mortgagor, defendant 5, of his equity of redemption. As defendant 5 has sold the same to the plaintiffs the plaintiffs have the right to redeem.

Shortly, I will repeat the facts so far as this execution arising out of the rent action is concerned. The decree was in 1911, the landlord purchased the holding in execution of that decree and it was in 1914, about two years after, that Gauri Shanker bought the holding from the landlord. It is contended on behalf of the respondent that the mere fact that there was default in payment of rent on the part of the mortgagee who is in possession and who was under obligation to pay rent under the mortgage, was in itself a fraud. That is how I understand the argument. But the learned Judge in the Court below, as will be seen from the statement which I have just read, bases his judgment on the bare fact that there was default by the mortgagee and that default in no way deprived the mortgagor of his equity of redemption. Now, shortly stated, the position is this. When the holding was put up for sale in execution of the rent decree and the landlord purchased it, the equity of redemption ceased to exist. For the contention to which I have just referred, on behalf of the respondent, reliance is placed upon a decision of the learned Judges of the Madras High Court in 26 Mad 385 (2). There the position was reversed. The question there was not the rights of the mortgagor but of the mortgagee and the facts were shortly these. In 1886 the first defendant in the action had given a simple mortgage to *X*. Two years afterwards the property, the subject matter of the mortgage, became the subject-matter of a revenue sale and was purchased by a third person.

In 1894 that third person sold the property to the mortgagor. The mortgagor then entered into another mortgage transaction mortgaging the property to the plaintiff. The original mortgagee of 1886 in the year 1895 sold the mortgage or assigned the mortgage to the father of defendant 2. This purchaser of the ori-

1. Nawab Sidhee Nuzur Ally Khan v. Rajah Ojooddhyaram Khan, (1863) 10 M I A 540= 1 Ind Jur N S 185=2 Sar 133 (P C).

2. Sanagapally Lakshmayya v. Intoory Bolia Reddy, (1903) 26 Mad 385.

ginal mortgage then brought an action on the mortgage. There was a second action by the mortgagor to set aside the decree which had been obtained by the purchaser of the property in the year 1895. The argument in the case there was that when the mortgagor of the first mortgage purchased privately from the purchaser in the revenue sale (it was purchased sometime after the revenue sale I should have added) the liability to the transferee of the security in the first mortgage was re-attached to the land. It is that argument which is relied upon by the respondent in this case. In my judgment having regard to the fact that the rent sale intervened between the mortgage and the purchase of the equity of redemption by the plaintiff in this action and the circumstances of that purchase are the facts upon which this case depends. Now referring again to the decision of their Lordships of the Privy Council reported in 10 M I A 540 (1), it is necessary to notice the observations of their Lordships. The first matter to which I would make reference is stated on p. 557 of the report:

> Assuming, as we must, the agreement to be proved, was this sale, as between Abbott and M'Arthur, really meant to be a sale under the revenue laws for arrears of revenue, or was it a device part of the machinery, as it were to effect a fraud?

Their Lordships had already stated the terms of the agreement between Abbott and M'Arthur which quite clearly was for the purpose of bringing about the fraudulent revenue sale. Later in the course of judgment their Lordships make this most significant observation:

> This decision proceeds entirely upon the ground that, as between these parties, the sale must now be considered as a private sale. The decision has no application to interests derived under a real auction sale.

In other words their Lordships of the Privy Council considered that on the existing facts of the case the decision was as if the revenue sale had not taken place. Now I do not think that it is necessary in this case to express any opinion as to what would have been the position had this been a purchase from the mortgagee by private treaty; but this much is clear, when once the sale in execution of the rent decree took place in the absence of fraud (which has not been established in this case) the right or interest which the tenant had in the property, that is to say his right to redeem was extinguished. If it was extinguished, then the plaintiff, who claims his right to redeem by reason of the purchase in 1929, has no such right. In the absence of any finding of fraud, and in my judgment we cannot infer fraud in this case from the mere fact that the mortgagee failed to pay, the rent sale stands and in my judgment, therefore, the plaintiff had no right to redeem.

For these reasons, in my opinion, the decision of the learned Judge in the Court below cannot be upheld, the appeal must be allowed and the suit dismissed with costs throughout.

Dhavle, J.—I agree. The learned Subordinate Judge is definitely in error when he says that the zarpeshgidars having purchased the zarpeshgi property in execution of a rent sale brought about by their own default, the sale would not deprive the mortgagor of his equity of redemption. It was not the zarpeshgidars but the landlords themselves that purchased the holding in execution of the rent sale, though it is true that it was the zarpeshgidars' default that had led to the rent suit and the rent sale. It is not necessary to consider what the position would have been if the zarpeshgidars had purchased the holding at the rent sale. The facts actually before us are that the landlord purchased the holding and took possession through the Court and served a notice upon the mortgagee under S. 167, Bengal Tenancy Act, to annul the encumbrance. Thereupon the mortgagee brought his suit of 1913 to have his mortgage right declared and for other reliefs. In this suit the mortgagor was joined as a party defendant. He did not put in an appearance, and the suit ended in a compromise between the landlord and the mortgagee, according to which the mortgagee's rights as such were preserved and the equity of redemption was passed to the mortgagor's uncle who was separate from him. The suit of 1913 was, it must be remembered, brought in order to undo the sale that had been held in execution of the landlord's rent decree. We are informed that the decree actually drawn up says nothing about the mortgagor but disposes of the suit in terms of the compromise in respect of the parties that had joined in the compromise. The result was that though the suit was brought to challenge the rent sale, this sale was not in fact set aside though the mortgagee's

rights were affirmed by the compromise which he obtained from the landlord.

The mortgagee's equity of redemption which had been extinguished by the rent-sale was not revived by the compromise, but the mortgagee's right which was recognised in that transaction imported a corresponding right to redeem which passed under the compromise from the landlord purchaser to the mortgagee's separated uncle. This was three or four years after the rent sale. During the interval the equity of redemption was neither in the mortgagor nor of course in the mortgagee. Later on the mortgagee's successors, or members of the joint family to which he belonged, obtained a ladavi deed from the wife of Kishuni, the person to whom the equity of redemption had been assigned under the compromise in the suit of 1913. It was thus some considerable time after the rent sale that the equity of redemption and the mortgagee's right became vested in one and the same person or body of persons. The contention on behalf of the respondent is that it was not competent to the mortgagee by any such contrivances to defeat the mortgagor's right to redeem, and in support of this contention great reliance was placed on the case in 26 Mad 385 (2). This decision proceeded on the view that the mortgagor who was in default in that case could not be allowed to take an advantage of his father's wrong and plead for his own benefit that by reason of such wrong there had been a statutory extinction of the second defendant's mortgage security. The learned Judges applied this principle by extending to the case before them the principle adopted by their Lordships of the Judicial Committee in 10 M I A 540 (1), but the decision last-mentioned was clearly expressed as a decision based on the view that in the circumstances of that case the Court sale must be considered as a private sale. It cannot be said that in the present case the rent sale can possibly be regarded as a private sale.

It is true that the mortgagee was under an obligation to pay the rent of the holding as it fell due; and it is also true that because the mortgagee defaulted in paying it, therefore the landlord sued for the rent and afterwards proceeded in execution, to put the holding up to sale. No collusion, however, has been established between the landlord and the mortgagee. The sale was therefore perfectly good and the time for setting it aside on any ground whatsoever is long past. The mortgagor had an opportunity of joining in the attack that was made on that sale by the mortgagee in the suit of 1913, but, as I have already stated, he did not put in an appearance in that suit at all. That in such cases a sale must be got rid of before a mortgagor can claim to enforce his equity of redemption is abundantly established by the Full Bench decision of the Calcutta High Court in a case cited by Dr P. K. Sen, 47 Cal 377 (3). This question was apparently not considered in 26 Mad 385 (2). It may be that no question of limitation arose in that case, but, as has already been remarked, in the decision in 10 M I A 540 (1), their Lordships of the Judicial Committee, after holding that the Court sale must be considered as a private sale in the circumstances of that case, remarked that their opinion upon this point disposes of the first bar of limitation by effluxion of time under Act 1 of 1845. Whether or not that bar of limitation arose in the Madras case, it is clear that it does arise in the present case. Unless the rent sale can be set aside, the mortgagor or his assignee cannot be heard to assert his right to redeem, and his right to get that rent sale set aside, so as to leave him free to assert his right to redeem, is clearly barred by time.

D.L./R.K. *Appeal allowed.*

3. Uttam Chandra Dow v. Rajkrishna Dalal, 1920 Cal 363=55 I C 157=24 C W N 229=47 Cal 377 (F B).

A. I. R. 1936 Patna 437

FAZL ALI, J.

(Firm) Ram Chandra-Faraya Lal—Petitioner.

v.

Bhaia Dharman Sahi—Opposite Party.

Civil Revn. No. 565 of 1935, Decided on 24th March 1936, from order of Munsif, Ranchi, D/- 27th July 1935.

Civil P. C. (1908), O. 9, R. 3—Suit for recovery of money— Defendant several times taking adjournment—Plaintiff ready to go on with case—On day of hearing, plaintiff filing hazri—Neither party responded to call when case called out—Case dismissed for default — Court held acted with material irregularity.

In a suit for the recovery of certain sum of money, defendant took more than one adjournment and also applied for time, though the plaintiff was prepared to go on with the case.

On the day of hearing, the plaintiff filed hazri, but the defendant filed a petition for time, and when the case was called out, neither party responded to the call, and the case was dismissed:

Held: that no doubt O. 9, R. 3 gave the Court a discretion to make an order in suitable circumstances that the suit be dismissed, but the Court acted with material irregularity under the circumstances. [P 438 C 1]

L. K. Choudhury—for Petitioner.

Judgment.—The suit in connexion with which this application has been made was instituted by the petitioner on 13th August 1934, for recovery of a certain sum of money from the defendant on the basis of a chitta said to have been executed by the latter. From the order-sheet it appears that the defendant took more than one adjournment in order to file a written statement and on several subsequent dates also he applied for time though the plaintiff was prepared to go on with the case. On 13th June 1935, the plaintiff filed hazri, but the defendant again filed a petition for time. Sometime later the case was called out, but as neither party responded to the call the case was dismissed for default. The plaintiff appeared before the Court soon after the order of dismissal had been passed and gave an explanation for his absence. On 15th June 1935 he filed a regular petition under O. 9, R. 4, asking the Court to restore the case, but the learned Munsif dismissed the application on 27th July 1935. The learned Munsif in the order by which he has disposed of the application does not find that the account given by the plaintiff was incorrect, but he simply states that the plaintiff should have informed him before he left the Court. On a reference to the written statement it appears that the defendant admitted the execution of the hat-chitta but pleaded that he had executed it under undue influence and pressure and asked the transaction to be re-opened. In such circumstances the onus was clearly on the defendant to prove that the chitta could not be given effect to. The learned Munsif has overlooked this fact and he has also overlooked the fact that O. 9, R. 3 is not obligatory but merely gives the Court a discretion to make an order in suitable circumstances that the suit be dismissed. In my opinion this is a case in which the Court below has exercised its jurisdiction with material irregularity and its order must, therefore, be set aside and the case restored. The learned Munsif will now proceed to dispose of the case according to law.

D.S./R K. *Order set aside.*

A. I. R. 1936 Patna 438

ROWLAND, J.

Sri Krishna Prasad Sinha — Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 574 of 1935, Decided on 12th November 1935, from order of Sess. Judge, Chapra, D/- 3rd August 1935.

Criminal P. C. (1898), Ss. 428, 423 and 342— Evidence improperly admitted—Examination not satisfactory—Proper procedure is to set aside conviction and send case back for re-trial by competent Court or direct further examination of accused and taking of additional evidence and proceed under S. 428.

Where an appellate Court finds that certain documents admitted in evidence have not been proved according to law, and that the examination of the accused under S. 342 is not satisfactory and that the accused should be examined afresh, he can either proceed under S. 428 and then dispose of the appeal under S. 423 (2), or under S. 423 set aside the conviction and order the accused to be retried by a Court of competent jurisdiction. In the former case in ordering additional evidence to be taken, it would be quite proper to direct a further examination of the accused at the same time. An order setting aside the conviction and sending the case back for further evidence but not for complete trial is illegal : 1916 *Pat* 219, *Ref.* [P 438 C 2; P 439 C 1]

Hareshwar Prasad and *P. Jha*—for Petitioner.

Manohar Lal and *Ganesh Sharma*—for the Crown.

Order.—The petitioner was convicted of cheating by a Deputy Magistrate with first class powers and was sentenced under S. 420, I. P. C., to imprisonment for four months and a fine of Rs. 300. On appeal to the Sessions Judge it was found that some documents which had been marked as exhibits had not in the opinion of the Sessions Judge been proved according to law although they had been admitted in evidence without objection. The Sessions Judge thought that two documents (Exs. 10 and 11) ought to be proved and he also thought that the examination of the accused under S. 342 had not been satisfactory and that the accused should be examined afresh. This being so there were two courses open to the learned Sessions Judge : one was to

proceed under S. 428, that is to say to keep the appeal pending on his own file while directing additional evidence to be taken by a Magistrate and duly certified to the appellate Court which would then dispose of the appeal under S. 428, Cl. (2). In ordering additional evidence to be taken it would be quite proper to direct a further examination of the accused at the same time. The other course was under S. 423 to set aside the conviction and order the accused to be re-tried by a Court of competent jurisdiction. Such a re-trial if ordered would be a de novo trial. The learned Sessions Judge has, however, done neither of these things but has passed an order setting aside the conviction and sending the case back for further evidence but not for complete re-trial. The illegality of such a proceeding has been pointed out in 1 Pat L J 99 (1), a decision followed in subsequent cases of this Court. I must therefore set aside the order passed by the learned Sessions Judge and direct that the appeal be restored to the file of his Court and disposed of by him in accordance with law. If he requires further evidence to enable him to dispose of the original appeal he should proceed in one or other of the two methods which the Code authorizes.

V.B./R.K. *Order set aside.*

1. Gajanand Thakur v. Emperor, 1916 Pat 219 =35 I C 508=17 Cr L J 332=1 Pat L J 99.

A. I. R. 1936 Patna 439

MOHAMMAD NOOR, J.

Jamna Das-Bisesar Lal—Plaintiff—Appellant.

v.

Mani Ram Halwai and *others*—Defendants—Respondents.

Appeal No. 874 of 1933, Decided on 28th February 1936, from appellate decree of Sub-Judge, Purulia, D/- 20-5-1933.

(a) Mortgage—All persons interested in mortgage to be parties to suit—They need not be arrayed on same side.

All the persons interested in a mortgage must be parties to the suit. It is not necessary that all of them should be arrayed on the same side. Where all the persons who can possibly be interested in the mortgage are before the Court, the Court should not refuse to pass decree in plaintiff's favour merely because one of the mortgagees is a defendant. [P 441 C 1]

(b) Transfer of Property Act (1882), S. 68—Usufructuary mortgage—Suit for mortgage money under S. 68—Mortgagee does not lose right to proceed against security.

Section 68 enumerates cases in which a usufructuary mortgagee is entitled to sue for the mortgage money, but there is nothing in this section to show that the mortgagee can only get a simple money decree and not a mortgage decree. By instituting a suit for mortgage money under S. 68, a mortgagee does not lose his right to proceed against the security: 1919 *Mad* 1164 (*F B*), *Rel. on.* [P 441 C 2]

A. B. Mukherjee and *S. C. Mazumdar*—for Appellant.

A. K. Ray and *N. N. Ray*—for Respondents.

Judgment.—This second appeal arises out of a mortgage suit. The facts necessary for its determination are these: There were two firms each consisting of members of a joint Hindu family. One of them was styled as Jamnadas Bisesar Lal, which consisted of Jamnadas and his three sons Bisesar Lal, Purusottam and Madan; and the other was styled as Lalchand Nopechand which consisted of Lalchand, his son Nopechand and his five sons, one of them being Bhagwandas defendant 3. These two firms formed a third partnership firm which was styled as Jamnadas Bhagwandas. According to the finding of the lower appellate Court this partnership of the two firms continued in the years 1911 to 1919. In 1915 defendants 1 and 2 created a usufructuary mortgage of a certain house in Katras in the name of Bhagwandas. There is a concurrent finding by both the Courts below that the mortgage was in fact in favour of the firm Jamnadas Bhagwandas, though it stood in the name of Bhagwandas alone. This mortgage is the subject-matter of the present suit. The firm of Jamnadas Bisesar Lal are the plaintiffs and claim to be the sole mortgagees.

The plaintiff's case is that the firm Lalchand Nopechand, one of the two partners of the firm Jamnadas Bhagwandas, having withdrawn a large amount out of the assets of the firm, retired from it leaving the remainder of the assets including this usufructuary mortgage in question to the plaintiffs Jamnadas Bisesar Lal and thus the plaintiffs became the sole mortgagees. The firm Lalchand Nopechand was later on declared insolvent by the Calcutta High Court and its assets were vested in the Official Assignee of Bengal. The plaintiffs alleged that defendants 1 and 2 had undertaken to keep the mortgaged premises in good repairs but they did not do so, with the result that the value of the security deteriora-

ted. Defendants 1 and 2 were called upon to repair the house which they did not do and therefore the plaintiffs instituted the present suit for the mortgage money under S. 68, T. P. Act, making Bhagwandas, in whose name the mortgage stood, and the Official Assignee, parties to the suit. Defendant 5 is the purchaser of the equity of redemption in the house in execution of a certificate against defendants 1 and 2. The plaintiffs allege that they are the benamidars of defendants 1 and 2. The suit was resisted by defendants 1, 2 and 5. They raised various pleas such as legal necessity for the mortgage and of the passing of the consideration; but all of them having been decided by both the Courts below in favour of the plaintiffs, need not be considered. The main controversy between the parties, which is the only question to be decided in this second appeal, is as to the plaintiff's right to maintain the suit. The mortgagor defendants denied that the mortgage was in favour of the firm of Jamnadas Bhagwandas, and they further contended that even if it was so, the plaintiffs were not entitled to maintain the suit in the absence of a proper deed from the retiring partners, Lalchand Nopechand. The trial Court held that though the mortgage stood in the name of Bhagwandas alone it was the property of the firm of the Jamnadas Bhagwandas, of which the partners were the two firms Jamnadas Bisesar Lal and Lalchand Nopechand. It also held that Lalchand Nopechand retired from the business after having withdrawn a large amount of money and by adjustment of accounts the mortgage in suit became the exclusive property of the plaintiff firm Jamnadas Bisesar Lal and that under the circumstances no registered deed was necessary and even if the title of the plaintiffs was defective, it became good by twelve years' possession of the mortgaged property. It further held that at any rate the plaintiffs being the sharers in the mortgage to the extent of half, were entitled to maintain the suit. Having found other necessary issues in favour of the plaintiffs, it gave the plaintiffs a decree for the mortgage money, making it to be a charge upon the mortgaged property.

On appeal the learned Subordinate Judge, while agreeing with the trial Court on other issues and holding that the mortgage in fact belonged to the firm of Jamnadas Bhagwandas, though it stood in the name of Bhagwandas alone, has dismissed the suit on two grounds first, that a registered deed was necessary to convey the title of the firm of Lalchand Nopechand, of which Bhagwandas was a member to the firm of Jamnadas Bisesar Lal, and second, that there was no adjustment of accounts and that Bhagwandas did not withdraw from the partnership, leaving the mortgage in question to Jamnadas Bisesar Lal alone. It has also expressed the opinion that even if plaintiffs were entitled to a decree, no mortgage decree could be passed. The plaintiffs have appealed to this Court. I do not propose to enter into the question of law which has been discussed at an unnecessary length by the learned Subordinate Judge whether a registered deed is necessary in order to vest the interest of a retiring partner in an immoveable property in the remaining partner, or, in other words, whether a registered deed is necessary when the assets of a partnership owning immoveable properties are divided and on adjustment of accounts and immoveable property falls into the share of a partner. It is unnecessary to discuss this question, as according to the finding of fact by the learned Subordinate Judge, which is binding on me in second appeal, there has been no adjustment of accounts between the plaintiffs and the firm of Lalchand Nopechand and consequently the plaintiffs are not solely entitled to the benefit of the mortgage. On this finding the question of necessity of a registered document does not arise. Now the case is whether on this finding the plaintiffs are entitled to any decree whatsoever. The facts as found may be summarised thus:

(1). That there was a valid usufructuary mortgage in favour of a firm of which the plaintiffs' firm called Lalchand Nopechand was a partner which has become insolvent and its assets are now vested in the Official Assignee of Bengal, the mortgage being in the name of Bhagwandas, defendant 3.

(2). That there has been no adjustment of accounts as alleged by the plaintiffs and the plaintiffs are not exclusively entitled to the mortgage, though they have an interest in the mortgage. That interest according to the trial Court was half, but there is no clear indication of its extent in the judgment of the learned Subordinate Judge. I see nothing in law which disentitles the plaintiffs to get a

decree when all those persons who can possibly have any interest in the mortgage are before the Court. The plaintiffs have an interest in the mortgage as mortgagees whatever its extent may be. Bhagwandas in whose name the mortgage stood whether he gave up his interest or not—is a defendant in the suit. The Official Assignee, who represents the estate of the insolvent firm Lalchand Nopechand, is also on the record. Neither Bhagwandas nor the Official Assignee objected to the plaintiffs' title. What the law requires is that all the persons interested in a mortgage must be parties to the suit, but it does not lay down that all of them should be arrayed on the same side. In other words, the law does not require that all the mortgagees must be plaintiffs. If this were so, it would have been the easiest thing for a mortgagor to arrange matters with one of the mortgagees whose share may be very small and induce him not to join in the suit and thereby defeat the interest of the remaining mortgagees. In my opinion the plaintiffs are entitled to get a decree and the suit has been wrongly dismissed, of course the interest of the co-mortgagees, if any, has to be safe-guarded.

The next question is whether mortgage decree for sale can be passed. The learned Munsif passed a decree which was in a sense a mortgage decree, that is, a decree for money declaring it to be a charge upon the mortgaged property. The learned Subordinate Judge has expressed a view that the plaintiffs are entitled only to a money decree. I have not been able to understand the reasonings of the learned Subordinate Judge. He was referred by the plaintiffs to a Full Bench decision of the Madras High Court in 41 Mad 259 (1), which was to the effect that if a mortgagor fails to deliver possession to his mortgagee, the mortgage is not a usufructuary one and the mortgagee is entitled to bring a suit for sale. The learned Subordinate Judge seems to have been of opinion that this decision is no longer good law since the Act has been amended. But I do not find anything in the amended S. 67 T. P. Act, which in any way overrules the principle of that decision. S. 68, T. P. Act, enumerates cases in which a usufructuary mortgagee is entitled to sue for the mortgage money, but there is nothing in this section to show that the mortgagee can only get a simple money decree, and not a mortgage decree. Rather sub-s. (2) makes it clear that in case a suit is instituted under Cl. (a) or Cl. (b), of sub-s. (1), the Court may stay the suit for money till the mortgagee has exhausted all his remedies against the mortgaged property, or what remains of it, unless the mortgagee abandons his security and, if necessary, re-transfers the mortgaged property. This clearly shows that by instituting a suit for mortgage money under the circumstances enumerated in S. 68, T. P. Act, a mortgagee does not lose his right to proceed against the security. I cannot imagine that the legislature could have ever intended that if a mortgagor by his own default brings about deterioration of the mortgaged property and thereby forces the mortgagee to bring a suit for money, he can thereby deprive the mortgagee of what little security he has. The situation which this view will create will be apparent from the facts of this very case where the mortgagors' interest has been sold in a sale certificate and purchased by defendant 5. It is obvious that if the mortgagors had no property the mortgage money cannot be realised at all.

I therefore allow this appeal, reverse the decree of the learned Subordinate Judge and in lieu of the decree passed by the learned Munsif, give the plaintiffs the usual mortgage decree for sale. There will be a decree for the principal sum of Rs. 800 and interest at 24 per cent. per annum from August 1930, the date on which the plaintiffs gave notice to defendants 1 and 2 up till the date of the suit as decreed by the trial Court, together with costs in all the three Courts. If the decretal amount be not paid within three months from today the plaintiffs will get, on application, the usual final decree for sale. As there is a question whether the plaintiffs are the sole mortgagees, it will be clearly specified in the decree that the plaintiffs will not be able to withdraw any money which may be deposited in Court in pursuance of this decree or any sale proceeds of the mortgaged property, nor will they be able to enter satisfaction of the decree without giving to the satisfaction of the trial Court security for pro-

1. Marturu Subbamma v. Godda Narayya, 1919 Mad 1164=43 I C 4=41 Mad 259=33 M L J 623 (F B).

tecting the interest of the Official Assignee in the mortgage, if the reis any left in him.

R.W./R.K. *Appeal allowed.*

A. I. R. 1936 Patna 442

ROWLAND, J.

Bhaglu Mahto and *others*—Plaintiffs—Appellants.

v.

Ramautar Sah — Defendant—Respondent.

Appeal No. 1540 of 1932, Decided on 3rd December 1935, from appellate decree of Dist. Judge, Muzaffarpur, D/- 1st September 1932.

(a) Execution Sale—Property sold in execution—Owner not taking steps under Civil Procedure Code—He cannot after sale plead that, though party, proceedings are not binding on him—Court having jurisdiction over proceedings — No irregularity — Sale cannot be set aside and is binding on owner.

A person whose property is in danger of being wrongfully sold in execution of a decree by which he is not bound can resort to any of the remedies provided in the Civil Procedure Code. If he fails to do so he cannot after the sale plead that the proceedings, though he was a party to them, are not binding on him. If the Court has jurisdiction over the proceedings and they are not vitiated by any irregularity the sale cannot be set aside and the person cannot escape the effect of it : 25 *Bom* 337 (*PC*), *Rel. on.* [P 443 C 1]

(b) Practice—New case—Execution against minor — Minor impeaching proceedings on ground of guardian's fraud and collusion—Plea of guardian's negligence not taken—Allegations not established — Court held could not set up negligence as ground of attack.

A minor was represented by a guardian in a suit and in the execution proceedings arising thereout. The entire proceedings were however impeached by the minor on the ground of fraud and collusion on the part of the guardian. No plea of negligence was set up against the guardian. The allegations of fraud and collusion were not established :

Held : that the Court could not set up for the minor guardian's negligence as a ground of attack against the proceedings. [P 443 C 2]

B. P. Sinha and *Bramhadeo Narayan* —for Appellants.

Manohar Lal and *K. P. Sukul*—for Respondent.

Judgment. — The plaintiff-appellant was the purchaser at a rent execution sale of a holding of 7 bighas odd bearing survey khata No. 215 in village Gaibipur. In the Record of Rights the holding was entered in the names of Parayag Mahto and Pahlu Mahto. The heir of these recorded tenants was Dukhni, daughter of Pahlu. The village was in thika for a number of years to Gobind Sah. After his lease terminated the village was given in lease to Ramdeo Singh who was the tenure-holder and therefore the landlord of the holding in 1925. He sued for the rent impleading Mt. Dukhni and also impleading Ramautar Sah, the son and legal representative of Gobind, who was then dead, and alleging that the collection papers of the period of Gobind's thikadari were with Ramautar and that Ramdeo was unaware of any change in the holding as regards area or rental. The plaint contained a prayer that if Ramautar should disclose any such change the plaintiff might in due course be given permission to amend his plaint. Ramautar who was a minor entered appearance through his mother as guardian-ad-litem and her karpardaz Bhular Sah. The written statement denied that the collection papers were with him. No disclosure was made in this written statement as to any change in the area or rental of the holding in suit.

The suit was decreed and on execution the entire holding was sold on 10th May 1926 to Bhaglu Mahto who was not a party to the suit. Delivery of possession followed. In 1929 there were criminal proceedings: Bhaglu prosecuted Bhular Sah, alleging theft of the crop from plot No. 2282. The case ended on 4th April 1929, in acquittal of the accused. On 8th May 1930, the present suit was instituted by Bhaglu claiming recovery of possession of the land from which he had been dispossessed as a result of the removal of crop and criminal proceedings and for mesne profits. The defence was that Gobind had bought plots Nos. 2282 and 3306 having an area of 1 bigha 2 kathas by a sale-deed dated 1899 from Pahlu, one of the recorded tenants; that he had got mutation of his name; that the land was therefore not part of the holding and that no title passed to the plaintiff by his auction-sale. Regarding the rent suit decree and auction-sale it was said that these were fraudulent and collusive and the defendant was not bound by them. The Courts below agreed in holding that the rent suit decree and sale proceedings were neither fraudulent nor collusive, but have held that they were not binding on the defendants because defendant's father had purchased the plots in dispute and had been recognized by the landlord. The

defendant Ramautar had therefore a good defence to put forward in the rent suit. But this defence was not put forward through gross negligence of his guardian.

In second appeal it is contended that plaintiff by his auction-purchase got a perfect title which the defendant cannot impeach. The suit was by the sixteen annas landlord and the decree was a rent decree. In such a case S. 158-B, Bengal Tenancy Act, declares that the holding shall pass to the purchaser, and S. 65, Civil P. C., declares that where immoveable property is sold in execution of a decree, and such sale has become absolute, the property shall be deemed to be vested in the purchaser from the time when the property was sold. It would be flying in the face of these provisions to hold that the property did not vest in the purchaser Bhaglu. The Code itself provides remedies for a person whose property is in danger of being wrongfully sold on a decree by which he is not bound. He can prefer a claim under O. 41, R. 58. If his possession is disturbed he can apply under O. 21, R. 100; he can institute a suit to declare his title and obtain a temporary injunction under O. 39, R. 1, if his property is in danger of being wrongfully sold. Ramautar did none of these things.

If the decree was obtained against him by fraud or collusion he could bring a suit to set it aside; this also has not been done. The Courts below have proceeded on the view that, notwithstanding the failure of the defendant to take any of these steps, he can still as a defendant plead that the proceedings, though he was a party to them, are not binding on him. This view appears to me to be in direct contradiction of the decision of the Privy Council: 25 Bom 337 (1). A judicial sale, it was there held, cannot be treated as a nullity unless the Court lacked jurisdiction to make the sale. In the present case there is no doubt that the rent Court on the allegations before it had complete jurisdiction, nor have the Courts found that there was any irregularity in the proceedings; unless therefore the sale is set aside the defendant cannot escape its effect. The Courts below have proceeded on the view that the defendant being a minor is entitled to avoid the proceedings on the ground of gross negligence of his guardian.

It has been held that a suit lies to set aside a decree on the ground of gross negligence of the guardian of a minor and that proposition has been accepted in this Court in 16 P L T 484 (2), but as pointed out there (at p. 505): "There is an obvious difference between avoiding a decree and being entitled to ignore it." This difference has not been appreciated by the Courts below. But even if there were no difference there is another and fatal obstacle to the success of the defendant, that is, that negligence of any kind was not pleaded in the written statement of the present suit. The proceedings of the rent suit and execution were impeached on the ground of fraud and collusion. These not having been established the Courts could not set up for the defendant another ground of attack against the rent suit proceedings which was not pleaded by the party.

The result is that the appeal must be allowed and the suit decreed with costs throughout. The amount of mesne profits should be ascertained by the Court of first instance. Leave refused.

S.R./R.K. *Appeal allowed.*

1. Malkarjun v. Narhari, (1901) 25 Bom 337=27 I A 216=7 Sar 739 (P C).

2. Mathura Singh v. Rama Rudra Prasad Sinha, 1936 Pat 231=162 I C 235=14 Pat 824=16 P L T 484.

A. I. R. 1936 Patna 443

SAUNDERS, J.

Beni Singh—Petitioner.

v.

Ram Saran Singh—Opposite Party.

Civil Revn. Nos. 630 and 631 of 1935, Decided on 24th February 1936, from order of Munsif, Aurangabad, D/- 16th November 1935.

(a) Civil P. C. (1908), O. 41, R. 6 (2)—Application under—Executing Court cannot reject it summarily.

Where an order has been made for the sale of immoveable property in execution of a decree and an appeal is pending from such a decree, the sale shall, on the application of the judgment-debtor to the Court which made the order, be stayed on such terms as to giving security or otherwise as the Court thinks fit until the appeal is disposed of. The Court can impose terms and even require the judgment-debtor to deposit the whole amount of the decree in Court in cash but it cannot dismiss the application summarily. [P 444 C 1]

(b) Execution—Sale — Application under O. 21, R. 66, Civil P. C., made on same day after valuation fixed—Order of valuation held proper.

Where the application under O. 21, R. 66 was made on the same day after the Court fixed the valuation of the property and signed the order and the petitioner objected that the valuation was fixed before the date on which he was asked to show cause against the valuation :

Held : there was no substance in the objection. [P 444 C 1]

Raj Kishore Prasad—for Petitioner.

Order.—A suit was brought against the petitioner which was decreed and an appeal by the petitioner against the decree has been dismissed. The petitioner preferred a second appeal to this Court but in the meantime the decree-holder applied for execution of the decree in respect of the costs awarded to him. In execution of this decree some of the petitioner's property was attached and put up for sale and the petitioner's application under O. 41, R. 6 (2), Civil P. C., asking for stay of the sale was summarily rejected by the execution Court. One of the present applications is for revision of that order and the other application is directed against an order of the execution Court fixing the value of the judgment-debtor's property which was to be sold. The first application (C. R. No. 630) relating to the application of the petitioner under O. 41, R. 6, must be allowed. Sub-r. (2) provides that where an order has been made as in the present case for the sale of immoveable property in execution of a decree and an appeal is pending from such decree, the sale shall, on the application of the judgment-debtor to the Court which made the order, be stayed on such terms as to giving security or otherwise as the Court thinks fit until the appeal is disposed of.

The Court could have imposed terms and even have required the judgment-debtor to deposit the whole amount of the decree in Court in cash but it could not dismiss the application summarily. The order is accordingly set aside. The application will be heard by the lower Court and disposed of in accordance with law. There is no substance in the second application (C. R. No. 631). The objection of the petitioner is that the valuation was fixed before the date on which he was called upon to show cause against the valuation proposed to be made. It appears, however, that the property was valued by an order of the Munsif and the order was signed before the petitioner on the same day made an application under O. 21, R. 66 of the Code. The application is, therefore, dismissed but without costs, as there is no appearance on behalf of the opposite party. The petitioner will get his costs of the former application. The hearing fee is assessed at one gold mohur.

V.B.B./R.K. *Order accordingly.*

A. I. R. 1936 Patna 444

DHAVLE AND AGARWALA, JJ.

Benares Bank, Ltd.—Plaintiff—Appellant.

v.

Masudan Lal — Defendant — Respondent.

Appeal No. 1303 of 1932, Decided on 11th March 1936, from appellate decree of Addl. Sub-Judge, Bhagalpur, D/- 6th July 1932.

Accounts—Customer on application getting overdraft after furnishing surety—Surety undertaking to guarantee overdraft and also to hold himself liable for dues of customer, bank's charges, etc.—Statement of accounts signed by customer but not by surety—Held that there was account stated between customer and bank, and customer was liable to pay—Surety also held liable to pay under his own contract.

A customer of a bank applied for an overdraft. The bank allowed it on a suitable surety being provided. The surety undertook not only to guarantee the overdraft but he agreed to hold himself liable for the dues of the customer 'on any account whatsoever,' and interest and Bank's commission in respect thereof. The statement of accounts was sent to both the customer and the surety. The former signed but the latter declined to sign. In a suit against both it was contended by the surety that he was not liable for advances made prior to three years of the institution of suit as such claims were barred:

Held: that there was an account stated as between the customer and the bank which implied a liability on the part of the former to pay the amount ascertained to be due to the bank. The surety was also liable to the bank since he undertook to do so and the starting point of limitation was the date of accounts stated.

[P 445 C 2]

S. M. Mullick, R. K. Nandkeolyar and *D. L. Nandkeolyar*—for Appellant.

S. Naqui Imam and *N. C. Roy*—for Respondent.

Agarwala, J.—Defendants 1st party were merchants carrying on business in the town of Bhagalpur. The appellant Bank agreed to allow them an overdraft if a suitable surety was provided. Defendant 2nd party stood surety to the extent of Rs. 1,000. This was effected by an agreement dated 27th February 1925. The agreement was as follows:

In consideration of your allowing from time to time an overdraft in current account up to a maximum of Rs. 1,000 only to Babu Jugal Kishore and Babu Nawal Kishore, proprietors of the firm of Messrs. Agarwala Brothers of Nayabazar, Bhagalpur, I hereby agree to hold myself, my executors and administrators responsible for the due re-payment of the same or any unpaid portion thereof together with interest at the rate of 12 per cent. per annum, and I undertake to pay you the amount which may become due to you under this guarantee upon your demand. I further undertake to pay on demand any money for which he may become liable alone or jointly with any other person or persons to you on any account whatsoever and for interest, commission or other Bank's charges to the extent mentioned above exclusive of interest.

In June 1926 the overdraft amounted to Rs. 1,000. The Bank continued to make advances to defendants 1st party from time to time, and in June 1929 the amount due was Rs. 1,867-4-0. For the advances in cash of over Rs. 1,000 the defendants 1st party provided a security. The suit was instituted on 24th July 1930. It is admitted that with the exception of Rs. 100, which the Bank advanced on 27th July 1927, there were no advances from the Bank to defendants 1st party within three years of the institution of the suit. On 30th January 1929, however, the Bank sent a statement of account to defendants 1st party showing the amount then due from them. Defendants 1st party signed the statement and returned it. A copy of the account was also sent to defendant 2nd party who, however, declined to sign it. On 20th January 1930, the Bank again sent a statement of the account to defendants 1st party. A copy was again sent to defendant 2nd party who again declined to sign it. On these facts the first Court, purporting to follow the decision in 44 Cal 978 (1), held that the claim was barred against defendant 2nd party except to the extent of Rs. 100. He, therefore, passed a decree against defendant 2nd party to this extent and decreed the suit in full as against defendants 1st party. On appeal by the plaintiff this decree was modified by the Additional Subordinate Judge of Bhagalpur to this extent: that the decree for Rs. 100 which was passed against the surety was set aside.

In second appeal it has been contended that the surety is liable to the extent of Rs. 1,000 and interest on that sum. The plaintiff's claim is laid at Rs. 1,125-4-1. On behalf of the respondents reference has been made to that class of cases in which it has been held that payment of interest by a principal debtor does not extend the period of limitation as against the surety, and to the case in 50 All 211 (2), in which it was held that when a suit for recovery of debt is barred as against the principal defendant, the creditor has no remedy against the surety. The learned Advocates who appeared for the appellant and respondents, respectively, were not agreed as to the particular Article of the Limitation Act applicable to a suit against a surety. Reference was made to Arts. 57, 64, 73 and 115. In my opinion, however, the matter is not one which is of any consequence in the present case. On the face of the letter of guarantee itself defendant 2nd party undertook not only to guarantee the overdraft to the extent of Rs. 1,000 but by para. 2 he agreed to hold himself liable for the dues of defendants 1st party "on any account whatsoever" to the extent of Rs. 1,000 and interest thereon and commission or the Bank's charges in respect thereof. It is clear that there was an account stated as between plaintiff and defendants 1st party which implied a liability on the part of the latter to pay the plaintiff the amount ascertained to be due to him. The second part of the letter of guarantee covers this liability and the defendant 2nd party is, therefore, liable to the plaintiff to the extent of Rs. 1,000 of the sum so ascertained, together with interest and commission or the Bank's charges in respect of it. The starting point of limitation for a suit to enforce this liability is not earlier than the date on which the account was stated under Art. 64. The present suit was, therefore, in time, and the appellant is entitled to a decree for Rs. 1,000, with interest from the date of the account stated. The plaintiff has laid his claim at Rs. 1,125-4-1 and is entitled to a decree for this sum against both sets of defendants. As the rate of interest agreed to be paid by defendants 1st party has not been specified, interest pendente lite and until payment will be at the rate of six per cent. Defendant 2nd party will pay

1. Brajendra Kishore v. Hindustan Co-operative Insurance Society, Ltd., 1918 Cal 707=39 I C 705=44 Cal 978=21 C W N 482.

2. Salig Ram Misir v. Lachman Das, 1928 All 46=107 I C 42=50 All 211=25 A L J 937.

the costs of this appeal and of the Court below.

Dhavle, J.—I agree.

R.W./R.K. *Order accordingly.*

A. I. R. 1936 Patna 446

DHAVLE, J.

Kameshwar Singh Bahadur—Plaintiff—Appellant.

v.

Bacha Koiri and *another*—Defendants—Respondents.

Appeal No. 866 of 1933, Decided on 11th March 1936, from appellate decree of Addl. Dist. Judge, Bhagalpur, D/- 12th April 1933.

(a) Bengal Tenancy Act (1885), Ss. 50 (2), 103-B (3), 104 H and 115 — Suit under S. 104-H—Entry in favour of tenant in Record of Rights challenged—Tenant can avail of presumption under Ss. 50 (2) and 103-B (3).

In a suit under S. 104-H, when the entry in the Record of Rights in favour of the tenants is challenged, it is open to them to support its correctness by proof including the presumption laid down in Ss. 50 (2) and 103-B (3), and there is nothing to preclude this being done in S. 115: 1923 *Cal* 365, *Foll.* [P 446 C 2]

(b) Bengal Tenancy Act (1885), S. 115—"Thereafter" meaning.

Word "thereafter" in S. 115 clearly signifies "after the particulars have been finally recorded after recourse to all the provisions contained in Chap. 10 for the attainment of finality in this respect": 1922 *Cal* 146, *Foll.* [P 446 C 2]

R. Misra and *S. P. Srivastav* — for Appellant.

B. P. Sinha—for Respondents.

Judgment.—This appeal arises out of a suit apparently brought under S. 104-H, Ben. Ten. Act, for a declaration in favour of the plaintiff landlord that the tenants who have been entered in the recent Record of Rights as sharah muayyan tenants have no more than occupancy rights. Both the lower Courts have concurrently found that the entry in the Record of Rights in favour of the tenants has not been rebutted.

The learned advocate for the appellant has referred to S. 115, Ben. Ten. Act and contended that after the final publication of the Record of Rights, it was not open to the lower Courts to act as they have done on the presumption under S. 50, Ben. Ten. Act that the defendants, because they and their predecessors in interest have held at a rent or rate of rent which has not been changed during the twenty years immediately before the institution of the suit, have held at that rent or rate from the time of the Permanent Settlement. S. 115 does in terms provide that the presumption under S. 50 shall not apply to a tenancy after the particulars mentioned in S. 102 (b) relating to it have been recorded under Chap. 10. But it is obvious that in such a case it would not be necessary for the tenant to go back to S. 50 of the Act so long as the rent entry in the Record of Rights stands and carries the statutory presumption of correctness. It was pointed out in 27 C W N 936 (1), a case referred to by the learned Advocate for the respondents, that when the entry in the Record of Rights in favour of the tenant is challenged, it ought to be open to them—if S. 115 is properly understood—to support its correctness by proof including the presumption laid down in sub-s. 2, S. 50. It is obviously impossible to leave the tenants without both the presumption under S. 50 (2) and the presumption under S. 103-B (3) of the Act in a suit like the present. As was moreover observed in 49 Cal 919 (2), the word "thereafter" in S. 115, Ben. Ten. Act clearly signifies

> after the particulars have been finally recorded after recourse to all the provisions contained in Chap. 10 for the attainment of finality in this respect.

Mr. Rameshwar Misra has drawn attention to several decisions of this Court and of the Calcutta High Court, but it is not necessary to refer to them in detail because they relate to cases where the tenant-defendant endeavoured to support his case by the presumption under S. 50, sub-s. 2 of the Act contrary to the Record of Rights which was not in his favour. The position in the present case is materially different, and no authority of this or any other High Court has been brought to my notice in support of the appellant's contention that the entry in the Record of Rights which is in the tenant's favour but is assailed by the landlord, cannot, by reason of S. 115, be supported by the tenant by proving facts on which the presumption laid down in S. 50 (2) will arise. It is moreover to be noted that the question has arisen in a very special suit under Chap. 10 of the Act. Mr. Rameshar Misra has also urged that on the facts before the lower Courts

---

1. Dwarka Nath Bandopadhya v. Rash Behari Guha, 1923 Cal 365=76 I C 401=27 C W N 936.
2. Prasanna Kumar v. Durga Charan, 1922 Cal 146=70 I C 537=49 Cal 919=26 C W N 947.

the holding in suit should not have been found to be a holding of a sharah muayyan character. Three papers were produced on behalf of the appellant to show variations in the area and rent of the holding: a hastbood jamabandi of 1285 FS., another jamabandi of 1306 FS., and a wasilbaki of 1285 FS. These papers do show variations in the area and rent, but have not been believed by the final Court of fact. They must therefore be left out of account for the purpose of this second appeal, though this must not be taken to imply any disagreement with the observations of the learned Additional District Judge below regarding the failure of the appellant to support such "unilateral" papers by the production of his counterfoil receipt books and siahas.

The counterfoil receipt books in particular might have displaced the case of the tenants who only had the rent receipts to rely upon. The inference from these rent receipts regarding the identity of the holding is not erroneous as a matter of law. For along time very much in excess of 20 years, the area appears from the receipts to have been 18 bighas 6 cottas and the rent Rs. 13-1-1½ without cess. An area of over three bighas was diluviated by the river, and the holding was thus reduced to 15 bighas 13 dhurs as found at the survey and settlement; and it was in accordance with this reduced area that a fresh settlement was made. Mr. Rameshwar Misra has suggested that in view of the statement in para. 6 of the written statement of the defendants that the area that was diluviated at one time is recorded in the recent survey papers as gairmazrua, it ought to have been held that the identity of the old holding is lost. I am unable to accept this contention. The diluvion did not affect the rights of the tenants-defendants in respect of such portion of the old holding as still remained available. The identity of the holding, its old area and present area, and the rent are, moreover, all questions of fact; and it does not seem to me that in pronouncing upon them the lower appellate Court has committed any error of law so as to warrant any interference by this Court. The appeal fails and is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1936 Patna 447

ROWLAND, J.

Jagarnath Lal—Petitioner.

v.

Lal Babu—Opposite Party.

Civil Revn. No. 106 of 1936, Decided on 6th May 1936, from order of Addl. Dist. Judge, Patna, D/- 31st January 1936.

(a) Guardians and Wards Act (1890), S. 39—Locus standi of petitioner—Court can act in the matter of removal of guardian on application of any person interested.

Where objections were taken to accounts filed by a guardian of a minor by his maternal uncle who presented a petition for the removal of the guardian and an inquiry of accounts was held:

Held: that inquiry could be held at the instance of such person as S. 39 permitted a Court to act in the matter of removal of a guardian on the application of any person interested. [P 449 C 1]

(b) Guardians and Wards Act (1890), S. 34 (d)—Court can record any definite finding as to exact amount due from guardian.

Where a petition against a guardian states that a certain amount is due from the guardian and the Court finds that the exact amount due is something different:

Held: that Court can record any definite finding as to exact amount due from guardian: 1934 *Cal* 520 and 1924 *All* 593, *Foll.*; *Case law discussed.* [P 449 C 1, 2]

(c) Civil P. C. (1908), S. 11—Question once decided—Same Judge giving contrary decision on same question in same proceeding—Re-opening of question is barred.

Where a question is already decided by a Judge and the same Judge subsequently arrives at a contrary decision on the same question in the same proceeding, the re-opening of the question is barred by res judicata: 1921 *P C* 11 and 6 *All* 269 (*P C*), *Rel. on.* [P 449 C 2]

T. N. Sahai and *K. N. Varma*—for Petitioner.

Mathura Prasad and *Mahabir Prasad*—for Opposite Party.

Order.—This is an application against an order of the District Judge of Patna dated 31st January 1936, directing the petitioner to pay into Court the sum of Rs. 5,992-3-0 only. The proceeding arose in guardianship case No. 295 of 1926 which relates to the person and property of a minor named Dayanand. The minor was born on 22nd March 1917, and it is stated that for a time his mother was appointed his guardian under the Guardians and Wards Act, but she was removed for incompetence. Thereafter one

Raj Bahadur was appointed guardian on 27th September 1924. He died on 15th July 1926, and the petitioner Jagarnath Lal was appointed guardian of the person and property of the minor on 11th January 1927. He submitted accounts to the District Judge in February 1928. He submitted accounts again in January 1929. The correctness of the latter account was challenged by the husband of the sister of the minor who presented a petition to the District Judge objecting to the accounts and praying for the removal of the petitioner from guardianship. The accounts were checked by a Commissioner and were passed by the District Judge, who on 22nd May 1929, rejected the prayer for the removal of the guardian. Thereafter the petitioner filed accounts covering the period from December 1929 to April 1933. Objection was taken to these accounts by Lal Babu the maternal uncle of the minor who presented a petition to the District Judge praying for the removal of the guardian. The petitioner showed cause declaring that his accounts were correct, but stating that he was not willing to continue any longer as guardian and asking for his discharge. The District Judge made an enquiry into the allegations against the petitioner.

The principal items in dispute were payments amounting to Rs. 3,200 said to have been made to the mother of the minor for the maintenance of the minor and an amount of Rs. 1,575 which was a part of the consideration money of a sale-deed in respect of a certain property of the minor which the District Judge had given the guardian permission to sell for Rs. 5,075. Of this, Rs. 1,575 was payable to one Mewa Lal who held a zar-peshgi in his own name though actually on behalf of the Bhola Kuer, the real beneficiary. A question was raised whether this money had been paid. The District Judge passed an order on 23rd August 1934, removing the guardian, expressing an opinion unfavourable to the correctness of the accounts in respect of these items and some others and directing that a more complete check of the accounts be made by a pleader commissioner. Lal Babu's application to be appointed guardian was disposed of on 18th February 1935. The application was refused on the ground that the ward would attain the age of 18 years within a few weeks. The District Judge feeling somewhat uncertain whether there being no present guardian the minor would attain majority at the age or at the age of 21 was inclined to proceed on the assumption that the minor would attain his majority at the age of 18 years. Apparently no one was able to show the District Judge S. 3, Majority Act of 1875 (Act 9 of 1875) which has been only to be read to make it absolutely clear that the ward cannot attain majority till he reaches the age of 21. I mention this because in the circumstances of this case there may be a possibility of the institution of some litigation on behalf of Dayanand and it may avoid trouble if I said clearly that a suit instituted by him in his own name now will be incompetent on the ground of his minority. Lal Babu, though his application to be appointed a guardian was refused, was however permitted to continue the proceedings on the petition which he had presented objecting to the accounts of the petitioner. Those proceedings resulted in an Order No. 111, being passed by the Additional District Judge on 5th December 1935.

The learned Judge after examining the Commissioner's report found that it was not of much help. He then considered the question whether it was open to him to record any definite finding as to the exact amount due from the ex-guardian or not or whether such finding would be ultra vires or without jurisdiction. He appears to have thought that a Court has power to hold an investigation or scrutiny not for the purpose of ascertaining the present liability of the guardian but for considering whether the accounts are satisfactory enough to entitle a guardian to a discharge or so unsatisfactory as to warrant a sanction to legal action being taken against him. He concluded that the Court has no power to record any definite finding as to the exact amount due from the ex-guardian for which a regular suit against him under the general provisions of the law will have to be brought. Accordingly he ordered "let this proceeding against the ex-guardian be therefore dropped." On 10th December 1935, Lal Babu presented a petition referring to the District Judge's previous order dated 23rd August 1934 and asking the Judge to direct the petitioner to pay into Court or to Lal Babu himself the amount of Rs. 5,517-3-0 in respect of which the District Judge had expressed

an opinion unfavourable to the correctness of the petitioner's accounts.

The District Judge heard parties, but took no further evidence, and on 31st January 1936 passed the order under revision. The amount of Rs. 5,992-3-0 does not agree with the amount which Lal Babu had mentioned in his petition and I do not understand how the District Judge has arrived at it. Three objections are taken to the order of the District Judge. First that the Court should not have taken up this enquiry at the instance of Lal Babu who was not a guardian of the minor or a party to any proceeding pending in the Court at the time; secondly that the Court was functus officio after the removal of the guardian and after the refusal of his discharge and that there was no power to pass an order on the guardian for the deposit in Court of a stated sum; and thirdly that in view of the order dated 5th December 1935, it was not open to the District Judge to allow the matter to be re-agitated and to pass a different order. First as regards the locus standi of Lal Babu, S. 39, Guardians and Wards Act, permits the Court to act in the matter of removal of a guardian on the application of any person interested or of its own motion. The enquiry at least until 5th December 1935 was in continuation of a proceeding which Lal Babu was competent to institute for removal of the guardian and as a subsidiary matter for investigation of his account. I do not find any defect in the proceedings on this ground. The second point raises a question of some difficulty regarding which different opinions have been expressed not only by the District Judge himself in the two successive orders which I have set forth, but also by several High Courts in this country.

In 21 C W N 688 (1) it was held that a guardian cannot be compelled to pay into Court a larger sum than is found due on the accounts which he has exhibited under S. 34 (c) of the Act. In 1926 Mad 478 (2) it was held on examining Ss. 34, 35, 36, 41 and 45 that under those sections a guardian can be directed to pay into Court the amount admitted by him; but if it is sought to make him liable for a larger amount than is admitted, the question can be decided only in a regular suit. The Judges in that case sought to justify an order of this nature by extending the principle of S. 43 which empowers the Court to make an order regulating the conduct of proceedings of any guardian appointed or declared by the Court. But it is questionable whether such a construction of S. 43 can safely be relied on failing a power under Ss. 34 and 41. In 1936 A L J 36 (3) it was held that there is no such power in Ss. 34 and 41. On the other hand orders similar in nature to that under revision have been passed and approved in 38 C W N 438 (4) and in 7 Pat 144 (5). So also in 46 All 458 (6), but that decision was dissented from in 1936 A L J 36 (3) which presumably represents the present view taken in the Allahabad High Court. This being the state of authorities I would certainly not be justified in interfering with the order of the District Judge on the ground that he has taken a wrong view of the law in the final order which was passed by him. Whether the final order passed had been in favour of the guardian or against him, I should have had to recognize that the District Judge has taken a course which was supported by at least some judicial authority. But the third objection against the order complained of is, I am afraid, fatal.

The question which the District Judge decided by his order of 31st January 1936, was a question which the same Court had already decided in the same proceeding in a contrary sense. The reopening of it thereafter was barred by the principle of res judicata. The leading cases on the application of this principle to miscellaneous proceedings in the same manner as it applies to the suits are 48 Cal 499 (7) and 6 All 269 (8). It was not

1. Jagannath Panja v. Mahesh Chandra, 1916 Cal 459=36 I C 286=21 C W N 688.
2. Hari Krishna Chettiar v. Govindarajulu Naicker, 1926 Mad 478=98 I C 332 = 50 M L J 273.
3. Ragnath Misra v. Murari Lal Misra, 1936 All 179=161 I C 493=1936 A L J 36.
4. Heeralal Chakraburtty v. Sreemutty Manashamoyee Devi, 1934 Cal 520=152 I C 1073 =38 C W N 438.
5. Mahomed Fariduddin Ahmad v. Abdul Wahab, 1928 Pat 255 = 107 I C 152=9 P L T 383=7 Pat 144.
6. Sita Ram v. Mt. Govindi, 1924 All 593=80 I C 592=46 All 458=22 A L J 585.
7. Hook v. Administrator General of Bengal, 1921 P C 11=60 I C 631 = 48 I A 187 = 48 Cal 499 (P C).
8. Ram Kirpal v. Rup Kuari, (1884) 6 All 269= 11 I A 37 (P C).

open to the District Judge after having passed a final order on the matter on 5th December 1935, and this order having not been set aside by any other Court, to entertain a further application in the same matter and to pass a different order. On this view the application succeeds, and the order dated 31st January 1936, is set aside. The petitioner will get his costs. Hearing fee two gold mohurs.

D.S./R.K. *Order set aside.*

---

* A. I. R. 1936 Patna 450

DHAVLE AND AGARWALA, JJ.

Pancham Singh and *others*—Defendants—Appellants.

v.

Rai Promotha Nath Mitra and *others*—Plaintiffs and *others*—Pro forma defendants—Respondents.

Appeal No. 239 of 1930, Decided on 7th May 1936, from original decree of Sub-Judge, Gaya, D/- 18th September 1930.

*** (a) Lease—Construction — No rule that forfeiture clause should be strictly construed against lessor—Intention of parties should be ascertained from several clauses looked at as a whole.**

There is no essential difference between the rules for construing the various clauses of a lease and it cannot be said that a forfeiture clause should be strictly construed against lessors. The agreement between the parties is contained in the several clauses and the object of the Court is to ascertain the intention of the parties. The ordinary rules of construction are that the document must be looked at as a whole and the intention of the parties is to be gathered, not by speculating, but by reference to the language used and the object of the agreement. When it is claimed that a lessor is entitled to re-enter by reason of the lessees' breach of a covenant, it is first necessary to ascertain what it was that the lessee covenanted to do, or not to do, then to see, first whether the agreement provides for re-entry on breach of such covenant, and, finally, whether there has been a breach of the covenant by the lessee: *Case law referred.* [P 451 C 2]

(b) Deed — Construction — Documents in vernacular.

In construing documents in the vernacular it is not safe to rely upon English precedents: 38 *Cal* 468 (*P C*), *Foll.* [P 453 C 1]

*** (c) Lease — Forfeiture — Joint lessees—Share of each mentioned—Covenant not to transfer whole or even portion of property—Transfer of portion by one of them—Lessor is entitled to re-enter only on portion of such lessee but not in those of others.**

Where a lease is in favour of several persons jointly and the share of each is specified and there is a covenant for re-entry on transfer of the entire property or even a portion of it and one of the lessees transfers his share, the landlord is entitled only to re-enter on such lessee's share but not on the whole property in the absence of an express clause in the lease deed empowering him to do so: *Case law Referred.* [P 455 C 2]

(d) Deed—Lease—Construction.

Each lease or kabuliat must be construed on its own language and with reference to its own circumstances. [P 456 C 1]

P. C. Manuk, A. N. Lal, N. K. Prasad 2 and *Rameshwar Prasad*—for Appellants.

P. R. Das, S. M. Mullick, S. K. Mitra, J. Ghosh, Ishwari N. Prasad, Dhyan Chandra, R. C. Prasad and *A. C. Sinha*—for Respondents.

Agarwala, J.—The plaintiffs-respondents are the owners of an eight annas proprietary interest in Mauzas Labrikhud Parsauna, Raghubar and Neura. In 1865 their predecessors granted a permanent mukarrari of 7½ annas in these villages to a number of persons on an annual rent of Rs. 560. The lessees covenanted not to transfer the mukarrari property without the consent of the lessors, and the lease contained a clause entitling the lessors to re-enter on breach of the covenant. In the present suit the plaintiffs-respondents claim to re-enter by reason of the transfer of a 1 pie share on 9th March 1927, and the transfer of a 15 karants share on 27th August 1927. It has been found by the Court below that previous to these transfers there had been frequent transfers by the lessees inter se and this finding was not challenged in this appeal. The transfers of 1927, however, were to strangers. The Court below decreed the suit and the defendants appealed. The material portions of the kabuliat, which was in Persian, evidencing the grant of the mukarrari are as follows:

We have obtained the whole and entire 7½ annas . . . . . together with all boundaries . . . . at a uniform jama of Rs. 560 of the present currency with effect from 1276 F, on depositing Rs. 1,400 of the present currency. We have paid up the entire nazarana money and entered on possession of the mukarrari property. We shall continue to pay up rent thereof year after year . . . . . The expenses relating to the village and Court affairs, ... boundary disputes in the civil and criminal Courts and the collectorate concern us the mukarraridars. We shall continue to execute the orders of the Government and the landlords.

Here followed a number of other undertakings by the lessees, which are not material and then followed the following:

In the event of default in payment of instalment we shall continue to pay interest thereon at 1 per cent per mensem. If three consecutive instalments are defaulted, or if we, without the permission of the landlords, give this mukarrari property (shai mukarrari) in darmukarrari or transfer it by sale, conditional sale, gift, rehan or otherwise, or allow a single bigha or biswa of the land (zamin) of the said mauzas to go into the possession (ilaka) of others, or commit atrocities of any sort upon the tenants of the villages, then when these (ye manihae: lit: these matters) are brought to light the landlord or their heirs are and shall be competent to bring the said mauzas into their sir possession and settle them with others. In this case we, the executants, and our heirs, neither have nor shall have any claim to the mukarrari and refund of the said nazarana money.

Subsequent clauses stated that the annual rent was Rs. 560, that the mukarrari property was $7\frac{1}{2}$ annas out of 16 annas asli mai dakhli, and that the interests of the several lessees was as follows: Fatteh Singh $1\frac{3}{4}$ annas, Mahabal Singh $1\frac{3}{4}$ annas, Harakh Singh $1\frac{3}{4}$ annas, Sheobarat Singh $1\frac{3}{4}$ annas and Thakur Prasad $\frac{1}{2}$ anna. In the suit Fateh Singh's interest was represented by defendants 1-4a, Mahabal Singh's by defendants 5-19, Harakh Singh's by defendants 20-37 and Thakur Prasad's by defendants 38-44. The entire interest of Sheobarat Singh has passed into the ownership of the representatives of these four lessees. The transfers of the 1 pie share and the 15 karants share, which the plaintiffs claim bring the forfeiture clause into operation, were made by Harihar Prasad and Bhairo Prasad, respectively, both of whom were interested in the share of Thakur Prasad. Defendants 45 to 52 represent the transferee of the 1 pie share and defendants 53-58 the transferee of the 15 karants share. The question for decision is whether these transfers entitle the lessors to re-enter on the whole or any part of the demised property.

Mr. Manuk, for the appellants, contends that a forfeiture clause in a lease must be construed strictly against the lessors and that, so construed, the relevant clause in the present kabuliyat does not entitle the plaintiffs to re-enter. He referred to the cases in 15 Ves 258 (1), 4 M & Sel 265 (2), (1924) 1 K B 525 (3), 16 East 87 (4) at p. 95, 1 Ex D 124 (5), 15 M & W 465 (6), 6 H L C 672 (7), 5 Bom L R 1016 (8) and 54 Cal 948 (9), in which there are observations to the effect that the Court leans against a forfeiture and, consequently, construes strictly a clause under which a right to re-enter is claimed. Mr. Das, for the respondents, referred to a passage in the judgment of Jessel, M. R., in 6 Ch D 264 (10) at p. 270, relating to the construction of a deed of grant :

> I think the true rule of construction is to construe the language of the instrument according to its ordinary meaning, giving to technical terms their technical meaning, unless we find a context such as to convince the mind that the ordinary rules of construction which would be applied to the original expressions standing alone ought not to be applied.

In effect however it does not appear that there is any essential difference between the rules for construing the various clauses of a lease. The agreement between the parties is contained in the several clauses and the object of the Court is to ascertain the intention of the parties. The ordinary rules of construction are that the document must be looked at as a whole and the intention of the parties is to be gathered not by speculating but by reference to the language used and the object of the agreement. When it is claimed that a lessor is entitled to re-enter by reasons of the lessees' breach of a covenant it is first necessary to ascertain what it was that the lessee covenanted to do, or not to do ; then to see, first, whether the agreement provides for re-entry on breach of such covenant; and, finally, whether that has been a breach of the covenant by the lessee. So far as I have been able to ascertain there is no difference in the rules to be applied in ascertaining the nature of the covenant and the nature of any other term of the

1. Church y. Brown, (1908) 15 Ves 258=33 E R 752.
2. Spencer v. Goodwin, (1815) 4 M & Sel 265=105 E R 833.
3. Russel v. Beecham, (1924) 1 K B 525=93 L J K B 441=130 L T 570=40 T L R 66.
4. Good Title v. Saville, (1812) 16 East 87=104 E R 1022.
5. Wooler v. Knott, (1876) 45 L J Ex 313=1 Ex D 124=34 L T 362=24 W R 615.
6. Doe v. Ingleby, (1846) 15 M & W 465=153 E R 933.
7. Croft v. Lumley, (1858) 6 H L C 672=27 L J Q B 321=4 Jur N S 903=6 W R 523=10 E R 1459.
8. Chhabildas Lallubhoy v. Krishnarai Ramchandra, (1903) 5 Bom L R 1016.
9. Bejoy Lal Seal v. Benarasidas Khandelwal, 1928 Cal 99=110 I C 296=54 Cal 948.
10. Taylor v. Corporation of St. Helens, (1877) 6 Ch D 264=46 L J Ch 857=37 L T 253=25 W R 885.

agreement. In 16 East 87 (4), Lord Ellenborough said :

> In the construction of covenants of this sort, they are neither entitled to favour or disfavour, whether they are to create a forfeiture or to continue an estate ; but we are to put a fair construction upon them, according to the intention of the contracting parties.

In (1879) 12 Ch D 461 (11), where the construction of a lease with a provision for re-entry was in question, Jessel, M. R., said :

> In my opinion we must, in the first place, construe the covenant without regard to the proviso for re-entry, for its construction must be the same in an action for damages for breach of the covenant as in an action for the recovery of the land on the ground that the proviso for re-entry has come into operation by reason of such breach.

He went on to point out that such covenants in a lease are often inartistically drawn and are often meaningless, but that having regard to the nature of the property leased it is generally possible to construe them so as to effectuate the intention of the parties. In the same case Cotton, L. J., observed :

> I agree that, although it is a question of forfeiture, we must construe the covenant fairly, ascertain its meaning without regard to forfeiture, and then see whether upon that ascertained meaning, a forfeiture has been incurred.

The kabuliat under consideration is an illustration of the inartistic draftsmanship referred to by Jessel, M. R. There is, in the first place, no express covenant by the lessees not to transfer. The material clause may be rendered :

> In the event of default in payment of instalments we shall continue to pay interest thereon at 1 per cent per mensem.
>
> 1. If three consecutive instalments are defaulted, or
>
> 2. If we, without the permission of the landlords, (a) give this mukarrari property in darmukarrari, or (b) transfer it by sale, conditional sale, etc., or (c) allow a single bigha or biswa of the land of the said mauzas to go into the possession of others or (d) commit atrocities of any sort upon the tenants of the village, etc.
>
> Then when these are brought to light, the landlords and their heirs shall be entitled to re-enter.

It is to be observed, in the first place, that although there is an express covenant to pay interest on arrears of rent there is no express covenant by the lessees not to transfer. That it was the intention of the parties that the lessees should not transfer the demised property without the consent of the lessors is plain, and it is not disputed that the lessees impliedly covenanted not to do so. Secondly, the right of re-entry is expressed to depend on "these matters" (i. e. breach of all the implied covenants) being brought to light. It was indeed contended by Mr. Manuk that it was only on proof of breaches of all the implied covenants that the forfeiture clause comes into operation. When I ask myself whether that was the intention of the parties, as ascertainable from the language used, and with regard to the object of the agreement between the parties, I have no difficulty in rejecting this construction. On a reasonable and fair construction of the document the intention of the parties was that the right to re-enter should come into existence on breach of any of the implied covenants.

It was next contended by Mr. Manuk that a transfer of a part of the property by one of the lessees is not a breach of the covenant by all the lessees not to transfer the demised property, and reliance was placed in the observations of Lord Eldon in 15 Ves 258 (1) and on 1 Ch 727 (12), 1923 A C 578 (13), 9 Cal 526 (14), 50 Mad 331 (15) and 36 C W N 819 (16). In the first of these cases the question to be decided was whether a covenant not to assign was a usual covenant. While discussing this question Lord Eldon indicated that a covenant not to sub-let the demised premises did not include a covenant not to sub-let a part of the premises. In 1 Ch 727 (12) the lessee of the fishing rights in a portion of a river covenanted not to under-let, assign, transfer or set over or otherwise by any act or deed procure, the said premises to be assigned, transferred, or set over without the consent in writing of the lessor. The lessee granted a license entitling the licensee to fish in the whole of the portion of the river covered by the lease. Joyce, J. said:

> I must say, looking at the particular nature of the property demised in this case—the subject of the demise—that I doubt whether the

11. Corporation of Bristol v. Westcott, (1879) 12 Ch D 461=41 L T 117=27 W R 841.

12. Grove v. Portal, (1902) 1 Ch 727=71 L J Ch 299=86 L T 350=18 T L R 319.
13. Chatterton v. Terrel, (1923) A C 578=92 L J Ch 605=129 L T 769=39 T L R 589.
14. Dassorathy Huri Chunder v. Rama Krishna Jana, (1883) 9 Cal 526=13 C L R 114.
15. David Cutinha v. Salvadora Minazes, 1926 Mad 1202=98 I C 1070=51 M L J 552=50 Mad 331.
16. Sm. Swarnamoyee Debya v. Aferaddi, 1932 Cal 787=139 I C 239=36 C W N 819=60 Cal 47.

granting of the license to Mr. Bryant is a transfer of any part of the demised premises; but I do not decide the case upon that. I decide it upon the dictum of Lord Eldon and I hold that by reason of the omission from the covenant of the words 'any part of the premises' an assignment of a part of the premises was not forbidden.

In 1923 A C 578 (13) the lessee had first under-let a part of the premises with the consent of the lessor and had then under-let the remainder without the lessor's consent. It was held that the lessee had in fact under-let the whole of the premises without the consent of the landlord to the under-letting of the whole. The case is, therefore, distinguishable from the present one, but Lord Wrenbury there observed:

It is said, and said with truth, that if there be a covenant not to assign or under-let the premises, it is not a breach to assign or sublet part of the premises. It was not so stipulated if those be the words, for the words "or any part thereof" are not found in the covenant.

9 Cal 526 (14), was not decided upon the terms of a contract but upon custom. It was however there held that, where by custom a tenure is inalienable, the landlord is not entitled to re-enter on sale of a portion of the tenure. Odgers, J., in 50 Mad 331 (15), held that a restraint on alienation of the demised premises is not a restraint on an alienation of a portion. To the same effect is the decision of Guha and Ghose, JJ., in 36 C W N 819 (16) and of Krishnan, J., in 81 I C 1006 (17). Mr. Das contends that the object of a restraint upon alienation is to prevent the lessee from introducing on to the landlord's property tenants in whom the landlord has no confidence and of whom he does not approve and that a forfeiture clause operates as soon as the lessee parts with the whole of his interest in either the whole or a portion of the leased property. He therefore seeks to distinguish those cases in which the transferor retained an interest in the property transferred or in a portion of it. No authority was cited in support of this proposition and it cannot be inferred from 1 Ch 727 (12), in view of the emphatic statement of Joyce, J., that he decided that case on the dictum of Lord Eldon in 15 Ves 258 (1), and not the view that a license is not a transfer. A consideration of the English decisions referred to above leaves no doubt that in England a covenant not to transfer the demised premises is not a restraint on the transfer of a part, and that a transfer of a part only does not confer upon the lessor the right to re-enter. This I think is explainable. Even since the dictum of Lord Eldon in 15 Ves 258 (1), English conveyancers have been held to intend to restrain an alienation of part of the demised property only when the lease expressly says so. If the parties do not expressly include a covenant to restrain alienation of a part of the premises it is judicially recognized that that was not their intention. The Indian decisions referred to above apply the English rule in respect as if it were an established rule of Indian conveyancing. It may be that the leases which were under consideration in those cases disclosed that, reading the document in each case as a whole, the intention of the parties was to restrain not only an alienation of the entire demised property but also an alienation of any part of it. We have to ascertain in the present case whether that was the intention of the parties to the lease now under consideration, and I do not think that English conveyancing precedents will assist that object. In construing documents in the vernacular it is not safe to rely upon English precedents. As long ago as 1886 Wilson, J. observed:

It is no new doctrine that rules established in English Courts for construing English documents are not as such applicable to transactions between natives of this country. Rules of construction are rules designed to assist in ascertaining intention, and the applicability of many such rules depends upon the habits of thought and modes of expression prevalent amongst those to whose language they are applied.

This dictum received the approval of the Judicial Committee of the Privy Council in 38 Cal 468 (18) at p. 474. In the lease now under consideration there is not only the implied covenant not to transfer the mukarrari property but also an implied covenant not to allow a "single bigha or biswa" to go into the possession of others. This in my view, indicates that it was the intention of the parties to restrain not only a transfer of the entire mukarrari property but also a transfer of any portion of it. Mr. Manuk however contends that it is only a transfer by the

17. Venkataramana Bhatta v. Krishna Bhatta, 1925 Mad 57=81 I C 1006=47 M L J 307.

18. Bhagabati Barmanya v. Kalicharan Singh, (1911) 38 Cal 468=10 I C 641=38 I A 54 (P C).

entire body of lessees which entitled the lessors to re-enter, for the covenants, he argues, are by all the lessees jointly and not by "the lessees or any of them." This view is not consistent with the view taken of a similar lease by Devadoss, J., in 52 M L J 8 (19). That was a lease to three persons and contained a covenant by the lessees not to alienate the demised property. One of the lessees sold his interest to his daughter. This sale was held to be a breach of the covenant and to entitle the lessor to re-enter. The report of that case does not show that the interest of the several lessees was specified in the lease. Devadoss, J., however, based his decision on 42 Mad 654 (20), the facts of which were clearly distinguishable. That was a case in which there was only one lessee and he had, with the consent of the lessor, transferred his interest to another who, without the consent of the lessor, transferred the property to a third person. The latter also transferred his interest to a fourth person. In these circumstances the Court upheld the lessor's right to re-enter and held that it had no power to relieve against the forfeiture. The case is not an authority for the proposition that where there is a covenant by all the lessees not to alienate the demised property, the lessor is entitled to possession of the entire property on a transfer of a portion by one of the lessees. Nevertheless, when a lease in the vernacular is in favour of several persons, and the share of each is specified, it would, I think, be unreasonable to construe a proviso for re-entry on breach of a covenant in restraint of alienation as operating on the interests of all the lessees in consequence of a transfer of his own interest by one of them, unless the language of the document as a whole clearly showed that to be the intention of the parties.

I would, accordingly, set aside the decree of the Court below and, in place of it, pass a decree that the plaintiffs be placed in possession of the interests of Harihar Prasad, defendant 39, and Bhairo Prasad, defendant 38, and would also award them mesne profits thereon. The parties will pay the costs of this litigation in proportion to their success.

19. Koragalva v. Jakri Beary, 1927 Mad 261=99 I C 700=52 M L J 8.
20. Krishna Shetti v. Gilbert Pinto, 1919 Mad 12=50 I C 898=36 M L J 367=42 Mad 654.

Dhavle, J.—I agree.

If the Courts in England have always held a strict hand over covenants which, if broken, entail a forfeiture, they have never done so without endeavouring to put a fair construction on the words of the covenants according to the apparent intent of the contracting parties; and in construing such covenants they have been guided by previous decisions in view of their influence upon the language employed by conveyancers. Thus in 4 M & S 265 (2), one of the earliest cases cited for the appellants, the Court declined to read the words "hereinafter contained" as referring to the covenants that had gone before or to omit them, because it was not clear which of these alternatives was intended by the parties; and Dampier, J. added that by giving to the proviso a literal construction, the whole would not be rendered nugatory for it would still be operative for non-payment of rent. In (1923) A C 578 (13), it was contended for the appellant on the authority of (1771) 2 W Bl 766 (21), 15 Ves 258 (1), at p. 265 and 1 Ch 727 (12), at p. 731 that having assented to the subletting of a part of the premises the lessor could no longer enforce as to the remainder the covenant not to assign, underlet or part with the possession of the demised premises without the lessor's consent. The contention was overruled on the ground that the consent required was consent to sublet or part with possession of the whole. The covenant was thus construed according to the intent and not on the principle that forfeitures are to be looked upon with disfavour, a principle which would have led to a decision on the footing that what had been sublet without consent was only a part of the premises. In (1924) 1 K B 525 (3) it was pointed out that the covenant not to assign or part with the lease or the premises or any part thereof must be construed "with reference to the decisions of the Courts, for in reliance upon the meaning attributed to them (sic. the words) by those decisions, they are inserted in documents which have for years regulated the relation of landlord and tenant."

A kabuliat in Persian executed in the district of Gaya away from the Presidency Town of Calcutta as long ago as 1865 is on the face of it not a document of which

21. Crusoe v. Bugby, (1771) 2 W Bl 766=3 Wils 234.

the language could have been moulded upon English decisions and conveyancing practice. Our Transfer of Property Act, which was passed in 1882, makes some definite departures from the English law, see 57 Cal 1176 (22), and even now documents in the mufassil are usually drawn up by scribes without a training in law and conveyancing.

Lean as we may against forfeitures, it is impossible to accept the construction contended for on behalf of the appellants as within the apparent intent of the parties. For, this construction is that the lessor is to be at liberty to re-enter only on the coming to light of all the matters mentioned in the clause (ba-zahur-i-manihae), viz. (1) three successive defaults in paymentt of rent, (2) transferring the property in dar-mukarrari or by sale, bai-bil-wafa, gift, rehan or in any manner, (3) letting a bigha or biswa of land go into the possession or control of others, and (4) committing any atrocity upon the tenants. The conjunctions "wo" and "a" used in the clause as we find it in the document that was admitted in evidence are by no means fully differentiated from each other; but neither party has laid any stress on this circumstance. It is however one of the appellants' contentions that the third item above relates not to partial transfers but to suffering encroachments by neighbouring owners. Assuming that that is so, it becomes quite inconceivable that the parties intended to confine re-entry to the discovery of all the four items cumulatively, the result for all practical purposes would be that forfeiture was really not intended at all. It seems to me that we must not read the language so unreasonably in order to avoid a forfeiture, but must put a fair, rational construction on the kabuliat according to the apparent intent of the parties, and only taking care not to go beyond it.

The lease specifies the unequal interest of the five lessees, a feature not found in any of the numerous cases cited before us. It is true that they combined to take the lease and were jointly liable for the entire rent. But the express mention of their several interests must, I think, be taken along with such a provision as that about committing any atrocity upon the tenants as a fair indication that an alienation of his share by any of the lessees, without the consent of the landlords, was to entail a forfeiture of that share only. It could surely not have been intended that the atrocities must be committed by all the lessees together. If, again, such a partial alienation was not intended to work any forfeiture at all, and this is what the appellants contend, for it is difficult to conceive why the shares were carefully specified towards the end of the kabuliat. Upon this, the respondents contend that the transfer of his entire share by one of the lessees was meant to work a forfeiture of the entire lease. It is impossible to accept this in the absence of anything in the language of the document or in the circumstances of the transaction to establish such intention beyond doubt ; and we must not overlook the consideration that it was open to the party entitled to a forfeiture to have its right expressed in clear language. Nor is it easy to conceive of the lessees intending and agreeing to make themselves all jointly liable for a breach of covenant by any one of them. The lease was, moreover, permanent, and the parties could hardly have proceeded on the footing that the number of the lessees would not go up as it has in fact done. For the respondents reliance has been placed on 99 I C 700 (19), a case in which the plaintiff's claim for recovery of possession, apparently of the entire leased property, was allowed when one of the three lessees had conveyed his right to his daughter notwithstanding the provision in the kabuliat executed by the lessees that they were not entitled to alienate the land demised to any one else.

But it does not appear and plainly we cannot assume that that kabuliat contained any indication that each lessee was to take the consequences of his own defaults and no more. In 24 I C 79 (23), referred to in the judgment under appeal, we have an instance where it was held that one of the three lessees had incurred a forfeiture by transferring his interest in breach of a covenant but that this did not affect the other two lessees who did not join in the breach. The terms of the lease in that case are not reported, but it is rather surprising to find the learned Subordinate Judge saying that that case can-

22. Hunsraj v. Bijaylal Seal, 1930 P C 59=122 I C 20=57 I A 110=57 Cal 1176 (P C).

23. Kundun Lal v. Kallu, 1914 All 305=24 I C 79=12 A L J 650.

not be held to be good law "in view of the majority of case law to which I have directed my attention." None of the other cases referred to by him raise the precise point under consideration; and each lease or kabuliat must be construed on its own language and with reference to its own circumstances. On a fair reading of the kabuliat before us I cannot doubt that the default of each lessee was to be visited upon him alone (barring, of course, the liability for rent which was joint), and that while the respondents are right in contending that the defaults need not be cumulative for a forfeiture to be incurred, the appellants are entitled to succeed in part to the extent that an alienation by one lessee does not effect a forfeiture of the shares of the other lessees.

R.W./R.K. *Order accordingly.*

A. I. R. 1936 Patna 456

WORT, AG. C. J.

Kirtyanand Sinha—Plaintiff.

v.

Ramanand Sinha and *others*—Defendants.

Title Suit No. 2 of 1936, Decided on 17th April 1936.

(a) Contract—Consideration — Parties not managing their estates in severalty but agreeing for common management — Such giving up of their rights is sufficient consideration

Where the parties, though entitled, do not manage their estate or their respective interests in sevaralty but give up that right and agree to a common management, such giving of rights is sufficient consideration. [P 459 C 1]

(b) Principal and Agent—Several persons appointing common agent—One of them cannot revoke under all circumstances.

Where several persons have together appointed an agent, it cannot be said that under all the circumstances one of them is entitled to revoke the authority of the agent : *Bristow and Porter* v. *Taylor*, 2 *Stark R* 47, *Expl.* [P 459 C 2]

(c) Specific Relief Act (1877), S. 57—Persons having right to manage their shares separately agreeing to have common management—Agreement held in substance to be negative and S. 57 is applicable—Injunction from breaking agreement held could be granted.

The parties came to an agreement that their property should be managed by a common manager. There was also a negative covenant that there should be no partition of the estate jointly owned for a certain period. But in the meanwhile the defendants tried to break this contract on which the plaintiffs applied in the Courts for an injunction:

Held : that the effect of the agreement was that the parties had agreed not to do that which they ordinarily had right to do. The agreement although affirmative in form was negative in substance and hence S. 57 applied and injunction could be granted against some of them trying to break it : *English cases referred.* [P 461 C 2]

Sultan Ahmed, *S. M. Mullick* and *D. L. Nandkeolyar*—for Plaintiff.

P. R. Das, *R. K. Jha*, *R. Chowdhury* and *Ratikanta Jha*—for Defendants.

Judgment.—This is an action for an injunction to restrain the defendants from interfering with the common management of the property known as the Banaili Raj. The case was commenced in the Court of the Subordinate Judge of Bhagalpur and by an order of this Court transferred to this Court, the parties agreeing to waive the formal proof of all documents and to confine their arguments to questions of law.

The plaintiff is Raja Kirtyanand Sinha Bahadur who was the second son of the late Raja Leelanand Sinha. Defendant 1 is Kumar Ramanand Sinha, who was the son of the brother of the plaintiff, and defendant 2 is Kumar Krishnanand Sinha who was the second son of the brother of the plaintiff. They are described as defendants first party. The other defendant is Rani Chandrabati, widow of Kumar Chandranand Sinha who was the son of Raia Padmanand Sinha and was a brother of the plaintiff, is described as defendant second party. This defendant is no longer in the case. She died during the course of the action and the plaintiff has taken no steps to obtain substitution. For a very long time (it is certainly since the year 1880) the members of this family have been separate, and for an almost equally long time their property the Banaili Raj has been managed by a common manager appointed by them all. Their shares originally were as between the plaintiff and the defendants first party 9 annas and Raja Padmanand Sinha Bahadur 7 annas.

The present state of the shares in the Raj now enjoyed by the parties is that the plaintiff and the defendant first party are proprietors of 6 annas each and lessees of another 2 annas each were brought about by the following circumstances. In an action of 1888 a compromise was entered into between the parties under which the share of Raja Leelanand Sinha, father of the plaintiff and

the defendant first party was defined as 9 annas and of Raja Padmanand Sinha Bahadur father-in-law of the defendant second party as 7 annas. Another action was compromised in 1903 in which Padmanand Sinha's share was defined as 3½ annas and his sons as the same. Under these compromises it was agreed to continue the joint collection of the shares. In 1904 a further agreement was reached the important items of which were joint management, and a lease of the 7 annas interest to Leelanand Sinha. During this lease Padmanand Sinha sold his 3½ annas share to his son under an indenture of 26th September 1905. The son declared himself a disqualified proprietor and the 7 annas was placed under the management of the Court of Wards. The son then died and the widow who is defendant second party succeeded. Her estate of 7 annas was managed by the Court of Wards. The Court of Wards granted a fresh lease on expiry of the earlier one of the 7 annas to the father of the plaintiff and defendant first party, and during this lease of 1916 the father of the plaintiff and defendant first party died. The sons came into the share of the father and then separated in estate being the proprietors of 4½ annas each. By the indenture of sale by which the defendant second party sold 3 annas interest to the plaintiff and the defendant first party their respective shares are 6 annas, 6 annas and 4 annas. During all this time by agreement there was joint management of the 16 annas interest.

We now come to the material date of September 1928 when the agreement, which is the basis of this action, was entered into. It is an agreement between the plaintiff, the defendant first party and the defendant second party. It was recited as follows :

> That although the estate is not divided and partitioned by metes and bounds the said three (sic) shares are all holding and enjoying their respective shares in severalty. And whereas in view of the fact the joint debts of the estate have not been fully liquidated and that as separate management of their respective interests would cause an additional burden and expenditure on their respective shares and a joint management would be to the benefit of the estate in every respect and in every way and would remove all difficulties in the administration of the estate and in view of the further fact that the parties hereto have agreed to refer all disputes and differences that may arise between any two of them or among all three of them to the Commissioner of the Bhagalpur Division for the time being in a manner hereinafter appearing and whereas the parties aforesaid consider it desirable and advantageous to themselves that the integrity of the estate should be maintained and that the management of their estate should be carried on by a joint manager so that the benefits of common management be secured, now this Indenture witnesseth &c.

The first covenant is

> that there shall be no partition of the estate jointly owned by the parties hereto for the period commencing from 1st Assin 1336 to 30th Bhado 1347, except that with the approval of the Commissioner of the Bhagalpur Division for the time being.

There is then a covenant not to tranfer in any manner their respective shares in the property to any person or persons. The third covenant is that Mr. Godbole a member of the Indian Civil Service should be the common manager for a period of 12 years or for such portion of that time for which his services may be available, and then the 9th covenant is to the effect that differences of opinion between any two of the parties with regard to any matter concerning the management of the estate or expenditure from the joint common funds or the several budget or in any way affecting their interests in the estate shall be referred to the Commissioner of the Bhagalpur division.

One of the recitals was to the effect that the Court of Wards had agreed to convey and transfer 3 annas out of the 7 annas of the estate of the defendant second party, and this lease was entered into on 12th October of the same year, just about one month after the agreement of September the covenants of which I have just read. It is obvious, and it is in fact the case of the parties, that one of the reasons for taking the lease of 12th October 1928 was for carrying out the purposes of the agreement, namely paying off these joint debts. Under the said lease one of the covenants between the lessees on the one hand, that is to say, the plaintiff and defendant 1st party (by defendant 1st party I mean of course Kumar Ramanand Sinha and Kumar Krishnanand Sinha) of the first part and the lessor who was the Court of Wards of the second part, was that the estate should remain under common management. Apart from that covenant, it is perhaps unnecessary to make any mention of the provisions of that lease. The covenant to which I have referred runs in this way :

That during the term of the lease the lessees shall keep intact the common management of the 16 annas collection of the Banaili Raj.

It will be seen from what I have stated that the lease was the final transaction under which the plaintiff and the defendants 1st party came in possession of the whole 16 annas of the Banaili Raj. Now the next transaction was an agreement dated 23rd March 1930, but this does not appear to have been acted upon and is not a part of the case of either party. I have already stated that under the agreement of September 1928, the parties agreed to appoint Mr. Godbole as common manager for a period of 12 years or for such term as he should be available. Government withdrew his services after a period of two or three years and on 15th November 1933, the plaintiff and the defendant 1st party entered into an agreement employing Mr. E. W. Daunt the common manager for a period of three years. In pursuance of that agreement and on the same day a power of attorney was executed in favour of Mr. Daunt. I now come to the events which have given rise to this action. There is stated in the plaintiff's plaint in para. 18 that for sometime past the defendants 1st party wanted separate management to be made with respect to their proprietary and leasehold interest from that of the plaintiff and that with that end in view they, one after another, dispensed with the services of Mr. E. W. Daunt. (After referring to several letters, the judgment proceeded.) It will be seen from these letters of April 1935, that there was an attempt on the part of the defendants 1st party, that is, Kumar Ramanand Sinha and Kumar Krishnanand Sinha, to dissolve the common management.

In those circumstances the plaintiff brought this action, claiming as his cause of action the attempt on the part of the defendants 1st party to which I have just referred. In answer to that the defendant Kumar Ramanand Sinha pleads that the allegations contained in para. 18 of the plaint are substantially correct and that this defendant had dispensed with the services of the said Mr. Daunt as he found him a very undesirable person and deserving of no confidence whatsoever. I read that paragraph merely to show that on the one hand it is alleged that an attempt was made and on the other it is not denied but admitted. No question arises as to the conduct of Mr. Daunt and as Mr. Das on behalf of the defendant Kumar Ramanand says and agrees, he, Ramanand, makes no allegation as regards the conduct of Mr. Danut whatsoever. The question therefore is purely a legal one and in answer to the plaintiff's case, three points are raised on behalf of the defendants, one of which is partly a question of mixed fact and law. The first point is that no agreement to have the properties managed by a common manager was entered into between the plaintiff and the defendants 1st party. A subsidiary point is that if such an agreement between them was entered into, it is not a binding contract as there was no consideration.

The second point is that if there was such an agreement at any time for a common management, that common management has now been brought to an end by the action of the defendants. The third point is that, even assuming that there was an agreement, the relief which the plaintiff claims is not relief to which in law he is entitled : if he is entitled to any form of relief at all it is by way of damages which in this case is not claimed. It will be seen that the second and the third points are substantially one. The first question is whether any agreement was entered into as between the plaintiff and the defendant for the common management of their interests in the Banaili Raj, I find it quite impossible to come to any conclusion other than that there was such an agreement between the parties. It would be impossible, in my judgment, to read the indenture of 1st September 1928 otherwise, The first recital which has any reference to this matter is this :

Whereas the parties aforesaid consider it desirable and advantageous to themselves that the integrity of the estate should be maintained and that the management of their estate should be carried on by joint manager so that the benefits of common management be secured ;

and then the first clause is

that there shall be no partition of the estate jointly owned by the parties hereto for the period commencing from 1st Assin 1336 to 30th Bhado 1347 F.

This covenant not to partition might not be inconsistent with the collection of the shares separately. They were already separate in interest and estate although their shares have not been partitioned by metes and bounds. That a recital may be construed as an agree-

ment between the parties is I think clear and that the agreement must be collected from the entire instrument is equally clear. That being so I have little hesitation, taking the instrument as a whole and particularly the clauses just referred to, in holding that the parties to this indenture of 1928 agreed to have the property managed by a manager common to them all for the period up to Bhado 1347, that is, up to 1940.

There is the subsidiary point as to consideration. In the ordinary course of events the parties would be entitled to manage their estate or their respective interests in severalty. By this agreement they gave up that right and that in itself, in my opinion, would be sufficient consideration. There was forbearance on the part of the plaintiff to insist upon his rights of managing his own interests and there was forbearance on the part of the defendants also to manage their interests separately ; but there was this further fact : it was recited that the parties agreed and that agreement was carried out, that the parties should take a lease from defendant 3 of her 4 annas interest. Under that lease the plaintiff and defendant 1st party jointly became liable for a rental of Rs. 2,30,000. The lease may have been advantageous to the parties but that is immaterial. It is clear that they entered into obligations to which I have already referred and that this agreement of 12th October 1928 was part of the consideration of the agreement of September of the same year.

The second question is whether the common management was brought to an end. The agreement, as I understood it, was very largely based on the assumption (a wrong assumption) that the question depended upon the rights as between the owners of the Banaili Raj on the one hand and Mr. Daunt, the common manager, on the other; but that was not the question. The parties as a body may or may not have had a right to dispense with the services of Mr. Daunt but whether they had such a right or not is besides the question. I should in this connexion mention one of the covenants of the agreement of September 1928 as it has some bearing on this matter. That covenant is the third covenant by which Mr. Godbole should be the common manager for a period of 12 years or for such portion of that term for which his services may be available ; and it was one of the branches of Mr. Das's argument, and an argument which was not strenuously put forward, that when Mr. Godbole ceased to be the common manager by reason of his services being withdrawn by Government, the common management came to an end ; in other words the covenant was simply this that the common management would continue so long as Mr. Godbole should be the common manager. That again, in my opinion, is an impossible construction if we take the document as a whole. It is also falsified by the acts of the parties who, when Mr. Godbole ceased to be the common manager, forthwith proceeded to appoint another manager in his place.

I now go back to the substantial part of the second point as to whether in these circumstances the common management was brought to an end by the defendants dispensing with the services of Mr. Daunt. Mr. Das has relied upon the English law on this point and has contended on the authority of the case in 2 Stark R 47 (1), that either of the joint proprietors who had jointly entered into this agreement with Mr. Daunt might at any time discharge him. That was the case in which after the dissolution of partnership the partners had agreed that a certain person should collect the debts of the partnership. Having collected the debts one of the employers countermanded his authority and demanded payment from the agent. It was held there that in the circumstances the authority of Bristow (that was the agent) was revocable. Lord Ellenborough expressed himself in these words :

> If Bristow had, in consequence of the authority given him, done any act, it might not have been revocable ; but the authority to him was counter-mandable and had in fact been countermanded ; each partner had a right to countermand before any act intervened which in point of law would preclude a revocation.

It will be seen from the words which I have read that, even if the case cited is relevant or in point, it does not bear out the proposition that under all the circumstances one of the joint proprietors would be entitled to revoke the authority of the agent. But I am assuming for the moment, however, that it does bear out the proposition advanced. There is a

1. Bristow and Porter v. Taylor, (1817) 2 Stark R 47.

very considerable difference in the facts in the case relied upon and the facts of this case. The first difference is this that in the case in 2 Stark R 47 (1) the agreement between the sometime parties was for no definite period and, therefore, there would be no question of any breach of agreement as between themselves. In this case Mr. Daunt had been engaged by the proprietors for a period of three years. Can it be said, therefore, in those circumstances, that the common management had rightly been brought to an end?

It is contended by Mr. Das that the action of the defendants effectively brought the common management to an end and that the only right which the plaintiff had in the circumstances was to claim damages for breach of his agreement. But in my judgment, that does not in any way dispose of the question whether the common management was brought to an end or not. In my opinion that in no way depends upon whether one or another of these parties was entitled to dispense with the services of Mr. Daunt. I should rather lean to the opinion, if that qnestion had to be decided, that it would have to be decided against the defendants having regard to the fact that under the agreement all matters or any differences of opinion between any of the parties with regard to any matters concerning the management of the estate had to be referred to the Commissioner of Bhagalpur. Let me for the moment summarise the position in this way. The parties to this action by agreement would have been entitled as between themselves to dispense with the services of Mr. Daunt. Whether Mr. Daunt would have any right of action against either would depend upon the circumstances under which his services were dispensed with, but that is irrelevant. If there had been any disagreement as to whether Mr. Daunt's services should be dispensed with or not, it seems to me clear that matters of that kind would have to be referred to the Commissioner of Bhagalpur. But it is quite clear that whether the defendant could rightly dispense with the services of Mr. Daunt is in no way relevant to the question of whether he could break the agreement between himself and the plaintiff and it is that agreement with which we are concerned in this case. It seems to me that the final determination of the second point cannot be made until the disposal of the third point, namely, whether, if the agreement was made, the plaintiff was entitled to the form of relief which he has claimed in this action.

Now shortly the point is stated in this way. If the agreement was affirmative in form, it was an agreement to appoint a common manager and an agreement which could not be specifically enforced and that, if it could not be specifically enforced under S. 56 Special Relief Act, the plaintiff would not be entitled to an injunction. S. 56, Cl. (f) provides that an injunction cannot be granted to prevent breach of a contract, the performance of which would not be specifically enforced. The parties refusing to carry out the agreement to employ a common manager is a question of some difficulty but does not strictly arise here as a manager has been appointed and has acted, and the question is therefore the more limited one which arises by reason of S. 57 Specific Relief Act. That section provides:

> Notwithstanding S. 56, Cl. (f), where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstance that the Court is unable to compel specific performance of affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement.

As regards one part of that section it is substantially the English law. In some respects it may not reproduce the English law but we are not really concerned with that matter as, so far as this question is relevant, we are governed by the sections which I have just read. Now Mr. Das contends that first of all this is an affirmative covenant to place the Raj property under common management and that on the proper construction of S. 57 Specific Relief Act the mere negative or the affirmative covenant which every affirmative naturally implies is not one which is contemplated by the expression "where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied." In connection with this argument a number of authorities have been relied upon but I only propose to refer to one or two. In 3 Ch D 654 (2), which related to the employment of a manager, the following clause was in the agreement:

2. Davis v. Foreman, (1894) 3 Ch D 654=64 L J Ch 187=43 W R 168.

> The employer hereby agrees with the manager that he will not, except in the case of misconduct or a breach of this agreement, require the manager to leave his employ and determine this agreement during such period that he shall draw from the said business £15 each and every month.

As pointed out by the learned Judge in that case that covenant was negative in form but was in substance affirmative and that in those circumstances an injunction could not be granted: in other words, if an injunction could be granted it would in effect be for specific performance of a contract of service. Now the matter in my judgment is best stated in 2 Ch D 799 (3), where Buckley, J. referred to the judgment of Lord Selborne in 16 Eq 433 (4), at p. 440. The principle to which reference was made by Lord Selborne is this:

> I can only say that I should think that it was the safer and the better rule, if it should eventually be adopted by this Court, to look in all such cases to the substance and not to the form.

Lord Selborne had referred to this authority: 1 D M & G 604 (5) and made this observation:

> With regard to the case in 1 D M & G 604 (5), to which reference was made, really when it comes to be examined it is not a case which tends in any way to limit the ordinary jurisdiction of this Court to do justice between parties by way of injunction. It was sought in that case to enlarge the jurisdiction on a highly artificial and technical ground, and to extend it to any ordinary case of hiring and service, which is not properly a case of specific performance; the technical distinction being made, that if you find the word 'not' in an agreement 'I will not do a thing'—as well as the words 'I will,' even although the negative term might have been implied from the positive, yet the Court, refusing to act on an implication of the negative, will act on the expression of it.

I refer to the decision in 2 Ch D 799 (3) in support of the principle that what is to be looked at is the substance of the agreement and not its form. If we take this agreement as a whole we find that it is an agreement to have the property of the Banaili Raj managed by a common manager and there is the definite negative covenant that there shall be no partition of the estate jointly owned for a certain period. Even taking the covenant as one under which the parties agreed that there should be a common management of the estate, although the covenant might be held to be affirmative in form, in my opinion it quite clearly is negative in substance. I have already said and repeat that ordinarily the proprietors of this estate would, as they are holding their shares in severalty, be entitled to manage their respective shares separately. This would involve the collection of their respective rents and profits by an arrangement with the tenants. What is the effect of the agreement? In my judgment, the effect of the agreement is that the parties have agreed not to do that which they ordinarily have a right to do: in other words although affirmative in form the agreement in substance is negative.

A number of cases were quoted in the course of the arguments but in my opinion they give me very little assistance in coming to a conclusion with regard to this matter. After all I have to construe the section and I have to apply the principle which I gather from that section to the facts of this case and I arrive at the conclusion with very little hesitation that this agreement entered into in September 1928 complies with S. 57, Specific Relief Act, in that the covenants if taken individually might be held to be affirmative in form (excepting perhaps that which refers to partition) yet the agreement taken as a whole is negative in substence. Having arrived at that conclusion, the only point that remains is whether the plaintiff is entitled to the relief he claims. The prayer in the plaint is that a perpetual injunction be granted to restrain the defendants from breaking up the common management till the joint debts of the estate were paid under the agreement dated 1st September 1928. Mr. P. R. Das argues, as I understand his argument, that the relief in the form in which it is claimed is in substance a claim against the defendants to continue the common management. From one point of view that is correct but I think the substance of the prayer which the plaintiff makes is that the defendants should be restrained .from committing any act in breach of this undertaking: in other words that they should be restrained from doing any act in execution of their purpose to manage their share of the property separately. On the whole I come to the conclusion that the plaintiff is entitled to succeed; he is entitled to a decla-

3. Metropolitan Electric Supply Co., Ltd. v. Ginder, (1901) 2 Ch D 799=70 L J Ch 862=84 L T 818=49 W R 508=17 T L R 435.
4. Wolverhampton and Walsall Ry. Co. v. London and North Western Ry. Co., (1874) 16 Eq 433=43 L J Ch 131.
5. Lumley v. Wagner, (1852) 1 D M & G 604=21 L J Ch 898=16 Jur 871.

ration in the form claimed by him in para. 1 of the reliefs claimed. He is also entitled to an injunction restraining the defendants from interfering with the common management and that he is entitled in the circumstances to the costs of his action.

I do not propose to make a declaration as claimed in sub-para. 3 of para. 31 of the plaint as it, in the form in which it is claimed, does not strictly arise; it is only incidental to the main question, the subject matter of the declaration given in sub-para. 1, namely, whether the defendants are entitled to break up the agreement of 1st September 1928. The action succeeds with costs. I fix the hearing fee in this case at 50 gold mohurs.

R.W./R.K. *Appeal allowed.*

A. I. R. 1936 Patna 462

WORT, AG. C. J. AND FAZL ALI, J.

Rajendra Narayan Singh Deo and *others*—Defendants—Appellants.,

v.

Lalmohan Tribeni, Plaintiff and *another*, Defendant—Respondents.

Appeal No. 153 of 1932, Decided on 1st May 1936, from decision of Sub-Judge, Manbhum, D/- 24th June 1932.

(a) Evidence Act (1872), Ss. 32 (2), 13—Register and maps regarding land in dispute prepared by people dead or whose whereabouts not traceable are admissible.

Where the people who have prepared certain registers and maps regarding the land in dispute are dead or whose whereabouts cannot be traced, those documents are admissible under S. 32 (2) together with S. 13. [P 464 C 1]

(b) Limitation Act (1908), Arts. 116, 65, 97—Grant of lease under registered document on consideration of certain premium—Subsequent finding as to lessors' incapacity to make such grant—Lease is void and lessee is entitled to refund of money—Suit for refund is governed by Art. 116.

Where the lease of a certain piece of land is given under a registered document, to the lessees on consideration of a certain premium, but afterwards it is found that the lessors have no right to make such a grant, the lease is void and the lessee is entitled to the return of the money paid to the lessors under S. 65, Contract Act, and the suit for refund of money is governed not by Art. 65 or Art. 97 but Art. 116, Limitation Act: 1927 *Pat* 248 and 1916 *P C* 182, *Rel. on*; 1918 *P C* 151, *Ref.* [P 465 C 1]

S. M. Mullick and *R. S. Chatterjee*—for Appellants.

Manohar Lal and *S. C. Mazumdar*—for Respondents.

Wort, Ag. C. J.—The subject-matter of this appeal is a triangular piece of land in or adjoining the town of Purulia, at one time the village of Purulia, which is owned by the Raja of Panchete. The land is approximately 15 acres in area. The defendants are the appellants in this appeal which arises out of an action by the plaintiff for a declaration of his title to and a claim for possession of the land in suit in the following circumstances:

The Raja of Panchete granted a lease of some land to the Crown, defendant 1, in this case, (so it is alleged) in or about the year 1835, and at some later date—the exact date has not been established in this case and is immaterial—granted a patni lease of mauza Purulia to the predecessor in interest of defendants 2 to 5. On 3rd September 1926, these patnidars, defendants 2 to 5, granted a lease of the land in dispute to the plaintiff at an annual rent of Rs. 118-2-0 and in consideration of a preminm or salami of Rs. 15,000. It is alleged by the plaintiff that in seeking to take possession of the land he was resisted by one Jimat Bahan Sen who claimed an interest in a part of the land, the particulars of which are set out in Sch. 2 of the plaint, under a lease. It has been suggested in this case that a part of the land in dispute was in the adjoining village of Naudiha, but this point has not been developed by either party in this case. Proceedings under S. 145, Criminal P. C., were started and the Crown, intervening and represented by the police, was joined as a party. The claim of the Crown in those proceedings was that the land in dispute was a part of the Government lands and used by the police as a parade ground; and that this land was included in the lease granted by the Raja of Panchete in 1835 or thereabouts, the lease to which I have just referred. The Magistrate deciding the proceedings came to the conclusion that the Crown was in possession of the land, and that it was used for the purpose I have mentioned. The plaintiff thus being ousted, or being held not to be in possession, commenced this action against the defendants, their lessors. The claim was for a declaration of his title, possession and alternatively the return of the premiun paid, and other expenses.

The trial Judge has held that defendant 1, the Crown, was entitled to the land under the lease of 1835 and that the

Crown is in possession, the lease including the land in dispute, and that consequently defendants 2 to 5 had no right to grant the land to the plaintiff in 1926. There is no dispute that the patni lease was subject to the lease to the Crown whatever may have been included in the latter. The Court below in those circumstances has given judgment for the plaintiff for the return of the salami or premium. Defendants 2 to 5 have appealed to this Court making the Crown and the plaintiff-respondents. The case of the appellants is that the disputed land was not comprised in the grant to the Crown by the Raja, and that therefore they were entitled as patnidars to grant the lease to the plaintiff, and, in those circumstances, the plaintiff is not entitled to the return of the premium. As an alternative plea the defendant-appellants contend that this claim for the return of the premium is barred by limitation. Defendant 1, the Crown, supports the finding of the Judge in the Court below as to its title, and the plaintiff-respondent naturally supports the judgment of the learned Judge in the Court below as to the return of the premium or salami.

In the circumstances the question to be decided is a very limited one. It is whether in the grant to the Crown in 1835 this triangular piece of land was included, and, as it will be seen, it becomes a question in the result of identification. A number of facts were not disputed in the trial Court, nor are they disputed in this Court. First it is not disputed that the Crown had two leases of land in Purulia, one with a rental of Rs. 11-7-0 relating to some land adjoining the land in dispute with which we are not concerned, and another a lease relating to 35 acres 25 poles of land with an annual rental of Rs. 40-11-6. Included in that second lease was some land known as the parade ground. Secondly it is not disputed that subject to the grant to the Crown defendants 2 to 5 became patnidars of the then village of Purulia. Lastly the rent reserved under the second lease to the Crown has admittedly been and is being paid to the patnidars, defendants 2 to 5. As I have stated, the matter in the result becomes a question of identification.

The learned Judge in the Court below has pointed out that the plaintiff admits that the Crown is entitled to some land which used to be described as a parade ground, and I do not think there can be any very serious dispute that at the present time, at any rate, the land in dispute is known locally as the parade ground. The matter would have been very simple had it not been for the fact again a fact which is not disputed that the original patta to the Crown of 1835 was destroyed when the record room of Purulia was burnt down in the Mutiny. It was in those circumstances that the Crown in this case in establishing its title was forced to rely upon what is said to be secondary evidence of the patta and a number of other documents including maps which, if admissible, would go to show that a piece of land known as the parade ground, which admittedly the Crown was entitled to, was this very piece of land which is in dispute in this action.

It has been stated that the area to which the Crown is entitled under this lease is 35 acres 25 poles and Mr. Sushil Madhab Mullick for the appellants in arguing this case has advanced an argument which was not addressed to the Court below. By a reference to certain documents he would have this Court hold that if the triangular piece of ground known as the parade ground is included in the parcel of land to which the Crown is entitled to possession under the lease of 1835, then the Crown will be shown to be in possession of an area considerably in excess of 35 acres 25 poles and therefore the disputed land cannot have been included in the lease. It is unfortunate that this point has been raised in this Court for the first time. A Commissioner was appointed by the learned Judge in the Court below to take certain measurements which he has done by relaying maps, but no actual measurement of all the parcels of land now in possession of Government (including the triangular piece of land) was taken, and the result is that we are entirely without any materials, apart from references to maps, which will enable us to compare the admitted area of 35 acres with the area of the land actually in possession of Government. It would be most unsafe, if not improper, for us now to decide this case in the absence of those materials and we can only imagine that the reason why those materials were not forthcoming in the Court below was that they would not necessarily support the case of the party

now advancing that particular line of argument.

The arguments on both sides were mainly concerned with the documents and oral evidence relied upon by the Crown in support of its title. As already indicated in the absence of the original lease to the Crown of 1835, it has sought to establish its right by showing that it has in fact been in possession of the land certainly since about 1862, if not before and by relying upon this possession as I have said, as evidence of its title and also failing proof of that to establish a title by adverse possession. (After giving the history of the disputed land, His Lordship proceeded:) Having regard to the fact that the only question in dispute is the identification of a parade ground admittedly in possession of Government with the land in dispute, it seems to me quite clear that the only inference that can be drawn from these documents is that the identification has been established. It was faintly argued that these maps and registers were not admissible. The learned Judge in the Court below has admitted them under S. 13, Evidence Act, but as these documents many of which were prepared by people who must now be dead and certainly whose whereabouts cannot be traced, they would be admissible under sub-s. 2, S. 32 together with S. 13, Evidence Act as being statements asserting possession over the land in dispute.

There was a further fact upon which the appellants relied. That was a letter by Mr. Toplis, Deputy Commissioner of Manbhum, addressed to the present plaintiff immediately after he had acquired the lease which was the subject-matter of this dispute. The letter states that the writer understood from the Inspector-General of Police that the Government desired to acquire the land where the police at present hold their parades so that there would be no difficulty about the police parading there. This letter was answered on 15th December 1926. To this is a further note made by Mr. Toplis on 10th January 1927 in which he states that there was some uncertainty as to the title to this ground which had been purchased recently, the area of which is 22 bighas. These documents are taken to be admissions by the Crown that it had no title to the property, but having regard to the last note of 10th January 1927 the most that can be said that there was some doubt with regard to the matter. If it be a fact that the Government had title as I have now held it had, the statements by the Deputy Commissioner in the circumstances would be of little avail to the appellants. The circumstances under which these letters were written were that the plaintiff having acquired his lease appears to have gone to Mr. Toplis and discussed the question of the Government acquiring the land with him, with the result now disclosed in the letters. No further action was taken in the matter as shortly afterwards proceedings out of which this case arose were started.

So far as has been necessary for the Crown to establish its title, after the admissions which have been made by showing itself in possession of this particular piece of land, I think the Crown has succeeded. The appeal in so far as it relates to the rights of the Crown fails. There comes next the question of the appeal by defendants 2 to 5 against the alternative claim of the plaintiffs for the return of the salami. Two questions have been argued, one that the plaintiffs were not entitled to recover the salami under any circumstances by reason of the agreement between the parties and secondly that the claim is barred by limitation. Mr. Sushil Madhao Mullick relies strongly upon the provision in the patta Ex. 1 to the effect that "on no account you, your heirs or successors will ever get back the said amount of premium or will be competent to claim a refund thereof." The premium referred to is the one now claimed of Rs. 15,000. The passage relied upon is only one part of a clause which is to the effect:

> Be it known that on payment of the amount of rent you as well as your heirs and successors in interest shall possess and enjoy the leased out land from son to grandson in succession with power to transfer the same by sale or gift etc.

and then comes the provision relied upon. The clause must be taken as a whole and it seems to me quite clear that the clause referring to the return of the premium admits of only one construction and that is that the premium is not returnable if the lease is effective. It can have no possible relation to circumstances in which the consideration has wholly failed.

The result of this judgment is that the lease must be held to be void inasmuch as

the defendant-appellants had no right to make such a grant and under those circumstances under S. 65, Contract Act the plaintiff is entitled to the return of the money paid by him to defendants 2 to 5. The next question is whether this claim is barred by limitation. Two points are argued, first that the relevant Article of the Limitation Act is 65 or 97 ; secondly that limitation runs from the date of the payment and that the action is therefore barred as the payment was made in September 1926 ; this action having been commenced in September 1931. It is argued however by the respondent plaintiff that neither of the articles referred to applies but Art. 116 which gives a period of limitation of six years in the case of a claim for "compensation for breach of a contract in writing registered." Reliance is placed upon 44 I A 65 (1). In that case a claim was made for royalties under a mining lease and it was argued that the claim was virtually one for rent as such governed by Art. 110, Limitation Act which provided a period of three years for such actions. Lord Sumner delivering the opinion of their Lordships discussed the history of the Limitation Acts in India and the almost unanimous decisions of the Indian High Courts in favour of Art. 116 and stated that the omission from the Article, in the Act of 1877, of the words "not herein specially provided for" which in his Lordship's opinion was critical. Lord Sumner also stated that these Acts as the Act of 1859 had drawn a broad distinction between unregistered and registered instruments much to the advantage of the latter. The view that this Court has taken of their Lordships' decision in a case in which a similar claim to that made in the present action, is that Art. 116 applies in all cases of claims under registered contracts of which the present lease is one. The case referred to is 6 Pat 606 (2), which settles the matter so far as this Court is concerned. In the case in 46 I A 52 (3), their Lordships of the judicial Committee of the Privy Council applied Art. 97 but there was no argument addressed on this point and it is not known whether the contract there involved was registered or not. From the other point of view that is to say that the period of limitation was three years it is said that the action is not barred as time does not run until the contract is pronounced to be void judicially and reliance is placed upon the decision in 50 I A 69 (4). But in the view I take that Art. 116 applies it is unnecessary to deal with this point. By the appellant it was faintly argued that the plaintiff did not pay the premium but having regard to the fact that there was no denial in the written statement or evidence that Rs. 15,000 had not been paid this contention is not tenable. Nor was there any serious argument addressed to us by the plaintiff-respondent that he was entitled to recover more than has been allowed him, nor any argument by the appellant that the plaintiff was not entitled to the costs of the execution of the lease contrary to the decision of the trial Judge on these points. The appeal fails and is dismissed with costs.

Fazl Ali, J.—I agree.

R.W./R.K. *Appeal dismissed.*

1. Tricomdas Cooverji v. Gopinath Jiu Thakur, 1916 P C 182=39 I C 156=44 I A 65=44 Cal 759 (P C).
2. Nabin Chandra Ganguli v. Munshi Mandar, 1927 Pat 248=101 I C 707=6 Pat 606=8 P L T 590.
3. Juscurn Boid v. Pirthichand, 1918 P C 151=50 I C 444=46 I A 52=46 Cal 670 (P C).
4. Harnath Kuar v. Indar Bahadur Singh, 1922 P C 403=71 I C 629=50 I A 69=26 O C 223=45 All 179 (P C).

A. I. R. 1936 Patna 465

WORT, AG. C. J. AND DHAVLE, J.

Krishna Chandra Deb—Appellant.

v.

Rajendra Narayan Bhanj Deo and *another*—Respondents.

Privy Council Appeal, No. 9 of 1936, Decided on 5th May 1936, in Civil Revn. No. 88 of 1934, D/- 10th January 1934.

(a) Civil P. C. (1908), S. 109 (c)—Application under O. 21, R. 100, Civil P. C. in anticipation of delivery of possession—Court deciding it under Rr. 99 and 101 of O. 21, Civil P. C.—Case not fit for appeal to Privy Council under S. 109 (c).

Where, in anticipation of delivery of possession to decree-holder, an application under O. 21, R. 100, Civil P. C. was made by the person in possession and was decided in his favour by the Court under principles laid down in Rr. 99 and 101 of O. 21, Civil P. C., the case, though it did not strictly come under O. 21, R. 100, did not raise any question of great public or private importance to which it is impossible to give a money value and hence leave to appeal to the Privy Council could not be granted under Cl. (c) of S. 109. [P 468 C 2]

(b) Civil P. C. (1908), S. 109 (a)—Order made in revision under S. 115, Civil P. C. is not order made on appeal—No leave for appeal under S. 109 (a).

An order made in revision under S. 115, Civil P. C. is not an order made on appeal though it might have been made on the appellate side of the Court and hence High Court has no jurisdiction to give leave to appeal to His Majesty in Privy Council under S. 109 (a): 32 *Bom* 108 and 1926 *All* 202, *Rel. on.* [P 468 C 1, 2]

(c) Appeal—Difference between judgment on appellate side and final order on appeal—Former may include latter but latter is not same as former.

There is a vast difference between an order made or a judgment passed on the appellate side of a Court and the final order passed on appeal. The latter may be included in the former but the former is necessarily not the same as the latter: 1914 *Cal* 388, *Dissent.*; 1926 *All* 202, *Ref.* [P 467 C 2]

P. R. Das & G. P. Das—for Appellant.

K. P. Jayaswal & S. K. Mitra—for Respdts.

Wort, Ag. C. J.—This is an application for leave to appeal to His Majesty in Council from an order made by this Court on 7th January 1936, in an application in revision against the order of the Subordinate Judge of Cuttack made on 10th January 1934. It is unnecessary to state elaborately the facts of the case; it is sufficient to say that the respondent (the Raja of Kanika) in this application purchased a certain property in the year 1931, that is during the pendency of a suit brought by the petitioner on 29th March 1930, in which suit a decree was pronounced in his favour in December 1933.

Now there appears to have been an application for execution, that is to say for delivery of possession to the petitioner and this was anticipated by an application by the respondent under O. 21, R. 100, Civil P. C. This application, however, it appears was dismissed but on what grounds it is immaterial to state; the fact is that the petitioner had no notice of the application. A subsequent application was made by the respondent, the Raja, after an application had been made and a writ of delivery of possession issued to the petitioner. The learned Subordinate Judge dealt with the matter under O. 21. He expressed himself in these terms:

I think the case should be decided according to the principles laid down in R. 99 or R. 101 of O. 21, Civil P. C., although the present miscellaneous case does not strictly fall under either of these rules.

I understand him to have meant by those words that the case did not strictly come under O. 21, R. 100 by reason of the fact that possession had not actually been delivered to the petitioner: at any rate that is the meaning attached to it by the parties to this application. Now the learned Judge disposed of the application of the respondent in the respondent's favour, hence the application to this Court in revision. Saunders, J. who delivered the judgment of this Court made this statement:

It is argued that the Raja ought to have waited until an attempt was made to deliver possession to the petitioner and then to have resisted the delivery of possession, leaving it to the petitioner to make an application under O. 21, R. 97. The Court, however, merely anticipated a situation which would afterwards arise on the application that presumably would be made by the petitioner under R. 97.

The learned Judge then stated that there was no ground for interference by way of revision unless the order was without jurisdiction or it was the case of a failure of justice. The learned Judge in his judgment, in which the learned Chief Justice concurred, came to the conclusion that there was no cause of any failure of justice, and as I understand the judgment, he came also to the conclusion that the learned Subordinate Judge did not act without jurisdiction.

Now the application to this Court is made under S. 109, Civil P. C., and it is suggested that it comes either under sub-cl. (a), S. 109 or sub-cl. (c). Dealing with the latter clause first, I am quite clearly of the opinion that it is not a case in which we should give a certificate of fitness to appeal to His Majesty in Council under Cl. (c), that is to say the most that can be said with regard to the order of the learned Subordinate Judge is that he did in fact anticipate a state of affairs which would have obtained had the writ of delivery of possession been given effect to on behalf of the petitioner. Strictly as the learned Subordinate Judge points out, the matter did not come under O. 21, R. 100, Civil P. C., but that, in my judgment, would not entitle us to hold that the case was of such importance that we should give leave to appeal under Cl. (c), S. 109. But it remains to be considered whether the order of this Court is a final order passed on appeal by the High Court under Cl. (a). Mr. P. R. Das, appearing on behalf of the petitioner, has relied upon a decision of the Calcutta High Court in 13 C L J 681 (1). There Mookerjee, J. discussed the question of

1. Srinivasa Prasad Singh v. Kesho Prasad Singh, (1911) 13 C L J 681=10 I C 444.

whether the order there being considered was a final order. As I have already indicated two questions arise: first whether it was a final order and secondly whether it was order passed on appeal. Mookerjee, J. in the course of his judgment appears to take this view that the question is to be determined upon a consideration of the question of whether the order was made in the appellate jurisdiction of the Court. Before dealing with that matter, reference should be made to a decision of their Lordships of the Judicial Committee of the Privy Council in 47 I A 124 (2). Their Lordships in that case were considering the question of what was a final order, and Lord Cave, who delivered the opinion of their Lordships of the Judicial Committee of the Privy Council expressed himself in these terms:

> The question as to what is a final order was considered by the Court of appeal in (1891) 1 Q B 734 (3), (1903) 1 K B 547 (4) and (1916) 2 K B 139 (5). The effect of those and other judgments is that an order is final if it finally disposes of the rights of the parties.

Mr. Das in this case contends that this order would in effect give delivery of possession to the respondent and thus finally dispose of the rights of the parties. But assuming that to be so for the moment, we have, as I have already stated, to consider the question of whether this order was passed on appeal. I come back to the judgment of Mookerjee, J., in the case reported in 13 C L J 681 (1). There the learned Judge, as I have already stated, appears to have decided the question on the footing of whether the order was made in the appellate jurisdiction of the Court or on its original side, having stated that Letters Patent nowhere spoke of any revisional jurisdiction in contradistinction to appellate jurisdiction. But with great respect to that very distinguished Judge, it seems to me that the test which the learned Judge was there applying is not a final test in the matter. An order may be made on the appellate side of the Court without its being a final order passed on appeal. In this connexion I propose to refer to a decision of the Bombay High Court in 32 Bom 108 (6). There the matter under consideration was an application to admit an appeal after the period of limitation prescribed by the Limitation Act; and it was there decided that an order made on such an application was not an order or decree passed on appeal. Sir Lawrence Jenkins, C. J. in the course of his judgment made this observation:

> The meaning of the expression 'passed on appeal' has been settled by a line of authorities, which it is right that we should follow: see 30 Cal 679 (7) and the cases there cited. And applying that interpretation to the circumstances of this case, it cannot (in my opinion) be said that there is here a decree passed on appeal by a High Court.

The case to which Sir Lawrence Jenkins referred is the case reported in 30 Cal 679 (7). Now reference was made to the case in 10 W R 1 (8). This case was referred by Jackson, J. to a Full Bench and the reference was made in these words:

> It was held that an order made by the High Court on an application to review its judgment in a case of appeal to the Privy Council previously heard is not an order made on appeal within the terms of Cl. 39 of the Court's Charter, so as to enable the Court to admit an appeal against such order to Her Majesty in Council.

In that case Sir Barnes Peacock, C. J. drew attention to the language used in the Charter "which is practically identical with that in S. 595 of the Code" and to the difference between words "made or passed on appeal" and "made in exercise of its appellate jurisdiction." In S. 595 of the Code the language used is "passed on appeal" and not "passed in the exercise of its appellate jurisdiction." In my judgment there is a vast difference between an order made or a judgment passed on the appellate side of a Court and the final order passed on apppeal. The latter may be included in the former but the former is necessarily not the same as the latter. Mr. Das in this connexion has referred to a decision of the Calcutta High Court in 41 Cal 323 (9). The matter there before the learned Judges was whether

2. Ramchand v. Goverdhan, 1920 P C 86=47 I A 124=47 Cal 918=14 S L R 191 (P C).
3. Salaman v. Warner, (1891) 1 Q B 734=60 L J Q B 624=39 W R 547.
4. Bozson v. Altrincham Urban District Council, (1903) 1 K B 547=72 L J K B 271.
5. Isaacs & Sons v. Salbstein, (1916) 2 K B 139=85 L J K B 1433=114 L T 924.
6. Karsondas Dharamsay v. Gangabai, (1908) 32 Bom 108=9 Bom L R 566.
7. Sunder Koer v. Chandreshwar Prasad Singh, (1903) 30 Cal 679.
8. Rajah Enaet Hossein v. Ranee Rowshun Jahan, (1868) 10 W R 1=1 Beng L R 1 (F B).
9. Shew Prasad Bhungshidhur v. Ram Chunder Haribux, 1914 Cal 388=23 I C 977=41 Cal 323.

the order which was under discussion was a judgment within the meaning of Cl. 15, Letters Patent. They decided it was, but in the course of the judgment reference was made to a matter which is under discussion in this case and there the learned Judge stated that it had been decided in the Calcutta High Court that an appeal lay from an order made under S. 115, Civil P. C. With very great respect to that most distinguished Judge the point there was not necessary for the decision but perhaps the value of it is none the less having regard to the fact that the learned Judge there stated that it had been decided in the Calcutta High Court that an order made under S. 115 of the Code was appealable to His Majesty in Council. There is one decision however, a decision of the Allahabad High Court in 48 All 226 (10), which is directly in point in this matter. There the effect of the judgment of the learned Judges was this, that an order passed in revision is entirely distinct in its nature from an order passed on appeal and does not come within the purview of S. 109, Civil P. C. The learned Judges in deciding that case made this observation:

> We are not prepared to take the view that an order passed by this Court in the exercise of its revisional jurisdiction is an order passed 'on appeal.' There is a substantial difference between the powers of this Court when exercised in appeal and when exercised in revisional jurisdiction. As was properly pointed out, the jurisdiction of this Court under S. 115 is a discretional jurisdiction and the Court is not bound to interfere even if it is satisfied that an error of law has been committed by the Court below.

In this connexion I would make reference to S. 115 itself. In my opinion with great respect to the decision upon which reliance is placed I hold the view that S. 115 is conclusive of the matter and that an order made under this section can be made only when there is no appeal and it necessarily implies that an order made under the section is not an order made on appeal. S. 115 in my judgment quite clearly distinguishes between an order made under the revisional powers of the Court and an order made on appeal. It is true, as I have already stated and repeat, that an order made under S. 115, Civil P. C. may well be an order made on the appellate side of the Court but it by no means follows that it is an order on appeal. In my judgment that it is not. I come clearly to the conclusion that although it may be a final order, it was not a final order passed on appeal and therefore we have no jurisdiction to give leave to appeal to His Majesty in Council under S. 109 (c). For the reasons which I have already stated, I think also it is not a fit case for appeal to His Majesty in Council. Saunders, J., in delivering the judgment of this Court referred to the fact that there was right of action in the plaintiff under S. 103, Civil P. C., although I do not hold that that finally decided the matter or that it is a matter which ought to be taken into consideration in coming to a conclusion in the case. For the reasons I have given this case should be rejected. The application for leave to appeal is dismissed with costs; hearing fee ten gold mohurs.

Dhavle, J.—I agree. The course of decision in Calcutta is by no means uniform, and it is impossible to distinguish the case before us from that of 48 All 226 (10). My Lord the Chief Justice has pointed out a further reason for holding that the order under consideration was not an order passed on appeal within the meaning of Cl. (a), S. 109, Civil P. C. in that the revisional jurisdiction of this Court is only invoked, as S. 115 of the Code expressly provides, in cases where no appeal lies to this Court. As regards Cl. (c), S. 109, it is clear that the case does not raise any question of wide public importance nor any question of great private importance to which it is impossible to give a money value. The contest between the parties seems ultimately to have reduced to the question whether the applicant is to get the better of the other side by reason of the tactical move he adopted in dropping the mortgagee and the objector from his suit.

D.S./R.K. *Application dismissed.*

10. Suraj Singh v. Phul Kumari, 1926 All 202=90 I C 904=48 All 226=23 A L J 997.

A. I. R. 1936 Patna 468

WORT, J.

Kameshwarsingh Bahadur, Darbhanga and *another*—Petitioners.

v.

Ambler Slate and Stone Co., Ltd. and *another*—Opposite Parties.

Companies Act Case No. 74 of 1935, Decided on 28th February 1936.

(a) Companies Act (1913), S. 215 (2)—Voluntary winding up—Creditors have no power under S. 215 to say that winding up

is irregular or void—S. 215 is limited to assistance to winding up.

A person has no right under S. 215 of the Act to come and say that there is no such thing as winding up in particular case, that is to say the winding up is irregular or void for another reason. The powers of a Court under that section are strictly limited to assistance to the winding up and there is no power under the Companies Act for the creditors to come and say that the winding up resolution is bad. [P 470 C 2]

(b) Company — Voluntary Liquidation — Creditors applying for appointment of official liquidator — Application not complying with provisions of Act does not lie — Court has no power to waive irregularities.

Where a certain company wound up its business voluntarily and the creditor of the company applied for the appointment of an official liquidator with the liquidator appointed by the company:

Held: that an official liquidator could only be appointed, when a compulsory winding up order was made. The application could not be treated as an application for the compulsory winding up of the company, because the rules to be strictly observed had not been observed, and the Court had no power to waive any irregularity as regards strict compliance with law. [P 470 C 2]

(c) Company — Voluntary Liquidation — Creditor challenging it—He cannot apply for supervision order.

A supervision order can be made only where there is a valid winding up. Hence where a creditor challenges the voluntary winding up proceedings as being void, he cannot apply for a supervision order: *Re Caloric Engine and Siren Fog Signals Co., Ltd.*, (1885) 52 *L T* 846, *Rel. on.* [P 471 C 1]

(d) Companies Act (1913), S. 209 (2)—Meeting of creditors is condition precedent for getting liquidator removed.

A condition precedent to moving the Court for the removal of the liquidator is a meeting of the creditors held in pursuance of sub-s. (1), S. 209 in which the creditors should determine whether an application would be made to the Court for the appointment of any person as liquidator in the place of or jointly with the liquidator appointed by the company. [P 471 C 1]

Murari Prasad, *Manohar Lal*, *S. P. Srivastava* and *K. N. Lal* — for Petitioners.

K. N. Moitra—for Opposite Parties.

Order.—The two applications are made by two creditors of the Ambler Slate and Stone Co. Ltd., the principal one of which at any rate was a decree-holder for a sum of approximately Rs. 20,000. The application in the first instance was that an official liquidator be appointed with Mr. Barnard who was the liquidator under a voluntary winding up: other claims also were made and an order was asked restraining the liquidator from parting with the property of the company. It was also prayed that Mr. Barnard might file in Court the register of shareholders and creditors, the register of assets and articles and goods of the company, the register of minutes and resolutions of meetings of the company, etc. Certain matters were pointed out at the first hearing and the case was adjourned. An additional petition was filed asking for a declaration that the voluntary liquidation was illegal, ultra vires and void. I do not know what the draftsman of the petition had thought when he had added to the petition by using all this surplusage of expression, but apparently it appears to have been in the mind of the petitioner that there was some sort of merit in the use of language of this kind. But it is perfectly clear that if he had any sort of case, a mere declaration that the winding up was void would have been quite sufficient. I think I better say at once that the application is wholly misconceived. It is a little difficult to understand why the petitioners took the action they did having regard to what might have been their rights under the Companies Act if proper proceedings had been brought. But this Court is not in any way concerned with that. I have to consider solely the petition which is before me.

The principal point by Mr. Moitra on behalf of the respondent company at the second hearing of the case was that the petitioners had no locus standi. There are authorities relating to that; but the only case which is directly in point having regard to the differences in the Companies Act in England before and after 1900 is a case reported in the King's Bench Division Reports, a decision of a Divisional Court of that Division, being an appeal from the decision of a County Court Judge. But having regard to the judgments therein pronounced, it gives me very little assistance in the case, Lush, J. having decided the case on the merits and the decision of Greer, J., the other Judge of the Divisional Court, resting as it did upon the fact that the shareholders had waived any irregularity: (1921) 3 K B 32 (1).

So far as the point is concerned, I am thrown back on first principles. I do not think it was ever suggested, or ever could

1. In re Oxted Motor Co., Ltd., (1921) 3 K B 32 =90 L J K B 1145=126 L T 56=37 T L R 737.

be suggested, that a creditor had any right to interfere with the internal management of a company. The principle is stated, although the authority is not directly in point on other matters, in 73 L T 374 (2). The case is not directly in point, as the decision of Lindley, L. J., and the other Lords Justices in that case very largely depended upon the fact in that case that the irregularity complained of could at any moment be set right. I am not quite sure whether that could be said in this case, but I would leave that for the moment. But in this connexion it is necessary for me to state that the reason why the creditors (the petitioners before me) complained that the voluntary winding up was void was that the resolution to wind up the company was passed at a meeting at which Mr. G. H. Barnard, the sole remaining Director and no other person was present. I need not, at the moment, refer to a number of other alleged irregularities in the case. I have to deal, as I have said, with the point, whether the creditor has any locus standi. Now, the only possible section under which the creditors could come would be S. 215, Companies Act, which provides:

> Where a company is being wound up voluntarily, the liquidator or any contributory or creditor may apply to the Court to determine any question arising in the winding up, or to exercise. . . .

and then certain powers are mentioned. Sub-section (2) of that section is of great importance and it says:

> The Court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as the Court thinks fit.

Now that section, as we find it in the Companies Act, was the section as it appeared in the subject (?) Companies Act of 1908 before the Act of 1929. That section has always been understood to mean that the Court was empowered under that section, on the petition of persons named in the first sub-section, to exercise certain powers for the "assistance" if I may so use the expression, of the winding up. It is to be noticed that the first sub-section is very limited. It speaks of determining any question arising in the winding up, and, under the second sub-section, the Court has to be satisfied that the determination of the question or the required exercise of power will be just and beneficial. Thus it is quite clearly indicated in my opinion that a person has no right under S. 215 of the Act to come and say that there is no such thing as winding up in a particular case, that is to say, the winding up is irregular or void for another reason. The powers of a Court under that section are strictly limited to what I have described as assistance to the winding up. My greatest difficulty in this case, however, was to understand exactly what the nature of the petitioners' application was. I have pointed out that in the first instance it was for the appointment of an Official Liquidator; and, secondly, in the amended or additional petition the prayer was that the winding up should be declared void. If it is necessary to determine the point advanced by the learned advocate for the respondent, I have very little hesitation in coming to the conclusion that there is no power under the Companies Act for the creditors to come and say that the winding up resolution is bad. But I have got to look at the substance of this application.

In the first instance it was for the appointment of an Official Liquidator. It is a little difficult to understand what that means because an Official Liquidator can only be appointed when a compulsory winding up order is made. It might be possible to treat the application (although not expressed, as it might have been clearly) as an application for an order for supervision. The application might also have been treated as an application for the removal of the liquidator. The application cannot be treated by me as an application for the compulsory winding up of the Company, because on the face of it the rules to be strictly observed have not been observed in this case. I am not concerned merely with the litigants or the parties before me in the jurisdiction conferred upon the Court under the Companies Act but I am concerned with the creditors or contributories and the public generally, and indeed I have no power to waive any irregularity as regards the strict compliance with the law laid down in the Act and the rules made thereunder. It is obvious that I cannot treat the application as an application for compulsorily winding up the Company. Also R. 24 of the Rules of this Court apply equally to an application for the winding

2. Southern Counties Deposit Bank, Ltd., v. Rider and Kirkwood, (1896) 73 L T 374.

up of a Company by the Court and an order for the winding up under the supervision of the Court. That rule has not been complied with. In other words, the petition does not pretend to be a petition for the winding up of the Company. The only other contention put forward is to treat the application as an application for the removal of the liquidator who has been described as a self-appointed liquidator of the Company.

Now before dealing with that point, however, I would like to make another observation. The application is wholly misconceived for this very reason. If it is treated as a petition for supervision or some such order as the Court might be empowered to make in the case of a compulsory winding up, it is obvious that in order to make such an order the Court would have to be satisfied that the winding up had taken place; and the whole case of the petitioners here is that the whole proceedings were ultra vires and void. I need say no more about that matter than to quote a decision of the English Court on this point in 52 L T 846 (3), where the petition was to wind up the Company compulsorily. The Company suggested that a supervision order should be made. Kay, J. pointed out that as there were certain irregularities, and as the supervision order contemplated a valid winding up, the only order that could be made was a compulsory winding up. In other words, to put it shortly, a supervision order can be made only where there is a valid winding up. As I have pointed out, the whole case of the petitioners here is that there is no such winding up. The powers of the Court in the case of voluntary winding up, which this is, are given under S. 209 of the Act, and the only right, which the petitioner has to move the Court is under sub-s. (2) of that section. The condition precedent to moving the Court for the removal of the liquidator is a meeting of the creditors held in pursuance of sub-s. (1) of S. 209 in which the creditors shall determine whether an application shall be made to the Court for the appointment of any person as liquidator in the place of or jointly with the liquidator appointed by the Company.

Now the petitioners in this case seem to have taken one part of the section and forgotten the remainder. In other words, as I have already pointed out, no application of that kind can be made unless the condition precedent exists, namely, a meeting of the creditors resolving that the liquidator of the Company should be removed and certain person be appointed as liquidator in place of, or jointly with him, and no such meeting or resolution has taken place or been passed. Whichever way one looks at this application, it is impossible to say that the application either on merits or for any other reason complies with the provisions of the Act. The application is misconceived and does not lie. It is impossible in my judgment, quite apart from the technical objection that the creditors have no locus standi, for me to exercise any powers under S. 215 of the Act for the simple reason that exercise of such powers must be in cases which are just and beneficial, not only just and beneficial to the petitioner but just and beneficial to all parties. In other words, the powers are strictly limited (if I may use the expression which I have already used in connection with this matter), to the assistance in the winding up. It would be impossible for me to hold that I should be exercising such powers if I accepted the applications before me. There are obvious irregularities in the procedure as regards the winding up, and I express no view with regard to that because in certain circumstances it has been held in a very large number of cases, that the winding up is valid in spite of the irregularities. I do not say that this case is similar to those; I do not, on the other hand, say that it is not.

Both these petitions are dismissed and as I cannot say that in the circumstances these are proper applications and raise questions which should have been brought to the notice of the Court, I cannot say that the costs should come out of the assets in the winding up. The petitioners will, therefore, pay to the respondent Company five gold mohurs, the principal petitioner paying of that sum three gold mohurs and the other petitioner two gold mohurs. The costs will be paid into the Court and the respondent Company will be entitled to withdraw them.

V.B.B./R.K. *Petitions dismissed.*

3. Re the Caloric Engine and Siren Fog Signals Co., Ltd., (1885) 52 L T 846.

A. I. R. 1936 Patna 472
FULL BENCH

COURTNEY TERRELL, C. J., MACPHERSON AND FAZL ALI, JJ.

Brajnandan Singh—Petitioner.

v.

Ramnath Mali—Opposite Party.

Civil Revn. Appln. No. 624 of 1935, Decided on 3rd March 1936, from order of Munsif, Hazaribagh, D/- 19th August 1935.

(a) Practice—Procedure—Duty of Court—Suit by creditor for his loan—Debtor's objection to claim as fraudulent—C. I. D. Officer appointed to investigate fraud — Date fixed for hearing adjourned and another date fixed—C. I. D. Officer requesting postponement of case for two months — Postponement granted without any intimation to creditor's pleader—Procedure held not according to law.

A creditor sued his debtor for principal and interest on his loan. The debtor denied taking such a loan and alleged that the claim was fraudulent. C. I. D. department was entrusted with the inquiry of the fraud. A day was fixed for hearing but had to be adjourned as a result of absence of debtor. Afterwards a letter from the C. I. D. officer was received requesting Judge to postpone the case for two months. The postponement was allowed without previous intimation to the pleader of the creditor:

Held: that the presiding Judge ought not to have taken any judicial notice of the letter and in any event ought not to have passed any orders except in the presence of the pleader of the creditor, and preferably not until the date fixed. Hence the procedure was not according to law. [P 473 C 1]

(b) Practice—Procedure—Intervention by third party in suit is contrary to judicial principle—Communications from third parties being improper, however laudable motive may be, should not form part of record—Action should always be taken upon such communication only on intimation to the party who might be adversely affected and after having such party heard in open Court.

Intervention by a third party in a suit, however excellent the motive may be, is contrary to judicial principle; the contest is restricted to the parties or persons put forward under the usual procedure by the parties to represent them therein. Government or any authority designated by Government which is satisfied that intervention is required, cannot intervene at all except on formal authorization by the defendant of the Government Pleader or other Pleader in that regard. Thus if a postponement of the trial is required to enable investigation to be made, Government or the authority designated by Government must seek it through the defendant, and to that end may have to assist the defendant to enter appearance at a date before the investigating department is able to report definitely that the suit is in fact fraudulent; such action may perhaps be regarded as incidental to the policy approved. Again the grant of postponement to the defendant is in the discretion of the Court and will be exercised upon consideration of the materials placed before the Court by the Pleader empowered by the defendant to appear and act on his behalf. Communications to the Court by letter or otherwise from third parties being improper, however laudable the motive may be, should not form part of the record. It goes without saying that under no circumstances should action be taken upon such a communication unless and until the Court has drawn to them the attention of the party who might be adversely affected and has heard such party ordinarily in open Court. [P 474 C 1, 2]

Baldeo Sahay—for Petitioner.

Govt. Advocate—for Opposite Party.

Order.—This is an application under S. 25, Small Cause Courts Act. The petitioner, who is an inhabitant of Sheopurdiar in the District of Balia in the United Provinces, at present residing at Hazaribagh in this Province, sued the defendant, a Mali, also of Sheopurdiar, in the Small Cause Court at Hazaribagh on 7th December 1934, for a sum of Rs. 39-12-6, being principal and interest on a loan of Rs. 19, alleged to have been advanced at Hazaribagh on 5th January 1932. The defendant denied taking the loan from the plaintiff or even visiting Hazaribagh in January 1932, and contended that the suit had been instituted out of ill-feeling with a view to harass him. The Judge in an elaborate judgment found that the alleged transaction was not true and that the suit was groundless and fraudulent and dismissed it. This Court has called for the record of the case for the purpose of satisfying itself that the decree passed is according to law. On behalf of the petitioner it is urged that the decision ought not to stand in view of certain happenings in the Court which have or may have influenced the presiding Judge.

It appears that on receipt of the summons the defendant approached the District Magistrate of Balia with the allegation that the claim was fraudulent. In reliance upon instructions to District Officers in connection with inquiries into fraudulent claims against defendants in districts distant from their home where defence is difficult, the District Magistrate requested the Criminal Investigation Department of the Province, Bihar and Orissa, in which the suit was brought to make inquiry. The first date in the suit was 21st January 1935; but as the defendant did not appear the Judge adjourned the hearing to 25th February. The adjournment was in the usual course and

was particularly proper in a case where the defendant lived at a great distance in another province. But on 14th February the Judge having received from the Deputy Inspector-General of Police, Criminal Investigation Department, a letter requesting the Court to adjourn the suit for two months and to keep the record in safe custody, adjourned the hearing till 8th April, and sent an intimation of the fact to the Deputy Inspector-General of Police. Here the action of the Judge was unsound. The record shows that the postponement was allowed without previous intimation to the Pleader of the plaintiff, the order merely being shown to him immediately after it had been passed. The presiding Judge ought not to have taken any judicial notice of the letter and in any event ought not to have passed any orders except in the presence of the plaintiff or his Pleader and preferably not until 25th February, which was the date fixed.

Subsequently adjournments were granted upon similar applications by letter by the Deputy Inspector-General and the defendant eventually appeared on 22nd July. Manifestly the plaintiff adduced proof more elaborate than is usual in such suits because of the intervention of the Criminal Investigation Department and in particular he applied on 27th April for summons on one Sheodutta Singh of Sheopurdiar. The suit came to trial on 19th August, and the plaintiff examined himself and four other witnesses to prove the transaction, two witnesses being Sheodutta Singh, who deposed that he came with the defendant to Hazaribagh, and Sant Singh, also of Sheopurdiar, who deposed that he had lent five rupees to the defendant to enable him to reach Hazaribagh in search of service, while the other evidence is to the effect that the defendant and his son did come to Hazaribagh and borrowed the sum of Rs. 19, though the entry in the plaintiff's book does not contain the signature or thumb-impression of defendant by way of acknowledgment. The defendant and a witness deposed that the defendant never visited Hazaribagh on the occasion mentioned and the Judge on a consideration of the evidence and the circumstances held that the transaction of loan alleged by the plaintiff had never taken place. We are informed that the Judge has been moved to make a complaint against the plaintiff of an offence under S. 209, Penal Code. From a consideration of the facts set out and particularly of the action of the Court on 14th February and succeeding dates and of the judgment, elaborate though it is, it is not possible to be satisfied that the proceedings were according to law. The procedure in his Court was incorrect, and though the decree might not be vitiated for that reason only, there is at least some reason to believe that his judgment was, doubtless unconsciously, affected by the peculiar course which the proceedings took in his Court. We accordingly make the rule absolute, set aside the decree and direct that the suit be re-tried ab initio. There is no other Small Cause Court at Hazaribagh and at the suggestion of the learned advocate for the plaintiff, with which the learned Government advocate concurs on behalf of the defendant, we direct that the suit be transferred to the Court of Babu Umakanta Prasad Sinha, Munsif at Patna vested with the powers of a Small Cause Court Judge. The costs in this Court will abide the result.

The first letter of the Deputy Inspector-General set out that the suit was alleged to be fraudulent and that the District Magistrate was making enquiries and taking such action as was contemplated by letter No. 6 of 1906 and letter No. 995 of 1914 from the High Court and requested an adjournment. A similar procedure is said to have been followed in other cases in which enquiry was made by the Criminal Investigation Department. It is clear that the letters mentioned are no warrant for a correspondence between the Court and any third party to the litigation and the procedure must be designated as improper. The letter of 1906 merely contemplated that a Judge who had come to the conclusion or perhaps who suspected that a claim was fraudulent, might avail himself of the services of the new Criminal Investigation Department to be set up in every province to which the Government of India would entrust the investigation and prosecution of offences in connection with the institution of groundless civil suits in Courts situated at such a distance from the place of residence of the defendants that it was practically impossible for the latter to contest the claims satisfactorily. The letter of 1914 merely forwarded certain circulars of the Government of Bihar and

Orissa to Commissioners of Divisions in connection with the same matter. The most important of these dated 24th November 1913, prescribes the procedure for the guidance of District Officers. A District Officer having reasonable grounds to believe that such a fraudulent suit has been instituted shall cause a preliminary inquiry to be made through the Criminal Investigation Department with the object of ascertaining whether sufficient grounds exist for the institution of a criminal prosecution; if the result of the inquiry establishes the sufficiency of the grounds, he is to communicate with the Magistrate of the district in which the false suit has been instituted asking for the services of the Government Pleader and to get a power-of-attorney from the defendant which will enable the Government Pleader at the place of suit to appear for the defendant. It is stated that the procedure prescribed is already in force in the United Provinces.

The prescribed procedure makes no provision for the period during which the inquiry by the Criminal Investigation Department is proceeding. That department has apparently filled in the lacuna by asking the Court for a postponement of the trial. But intervention by a third party in a suit, however excellent the motive may be, is contrary to judicial principle; the contest is restricted to the parties or persons put forward under the usual procedure by the parties to represent them therein. Government or any authority designated by Government which is satisfied that intervention is required, cannot intervene at all except on formal authorization by the defendant or the Government Pleader or other pleader in that regard. Thus if a postponement of the trial is required to enable investigation to be made, Government or the authority designated by Government must seek it through the defendant, and to that end, may have to assist the defendant to enter appearance at a date before the investigating department is able to report definitely that the suit is in fact fraudulent; such action may perhaps be regarded as incidental to the policy approved. Again the grant of postponement to the defendant is in the discretion of the Court and will be exercised upon consideration of the materials placed before the Court by the Pleader empowered by the defendant to appear and act on his behalf.

It falls to be added that communications to the Court by letter or otherwise from third parties being improper, however laudable the motive may be, should not form part of the record. It goes without saying that under no circumstances should action be taken upon such a communication unless and until the Court has drawn to them the attention of the party who might be adversely affected and has heard such party, ordinarily in open Court. Let the record be sent down forthwith so that the suit may be determined with the least possible delay.

R.W./R.K. *Order accordingly.*

A. I. R. 1936 Patna 474

COURTNEY TERRELL, C. J. AND DHAVLE, J.

Mt. Daiwati Kuer and *another*—Defendants—Appellants.

v.

Mt. Tunki Kuar — Plaintiff and *others* —Defendants—Respondents.

Appeal No. 110 of 1932, Decided on 24th January 1936, from original decree of Sub-Judge, Patna, D/- 21st December 1931.

Practice—Inconsistent pleas—Rule against joinder of inconsistent and alternative title is not absolute — Plaintiff in honest doubt as to nature of relief may make inconsistent or alternative claims.

The rule against the joinder of inconsistent and alternative title is not of an absolute character. Cases are conceivable where a plaintiff may from obscurity or from complexity of facts, be in honest doubt as to the nature of relief available to him, and inconsistent claims may therefore be entertained but not where there could be no reasonable excuse for them : 1925 *Pat* 674, *Disting.*; 1930 *All* 877 and *Owen* v. *Morgan*, (1887) 35 *Ch D* 492, *Rel. on.*

Where the plaintiff was a girl of 10 or so at the time of her father's death and had no personal knowledge of affairs at all, and the inference from the document (if proved) was a matter of law :

Held : that she had ample excuse for setting up alternative claims. [P 476 C 1]

Manohar Lal, *Syed Hasan* and *B. N. Rai*—for Appellants.

Baldeo Sahai, *Birijnandan Sahai* and *Nawal Kishore Sahai*—for Respondents.

Dhavle, J.—This is an appeal by defendants 1 and 4 in a title suit brought by Mt. Tunki Kuar as daughter and sole heir of one Umrao Singh. Her brothers Chamroo and Pitambar had predeceased their

father and left behind two widows, Mt. Sahago Kuar and Mt. Suraj Barto Kuar, defendants 2 and 3. Umrao himself had a brother Tengar with whom and whose son Mangar Singh he was joint. Tengar and Mangar died in the life-time of Umrao. Mangar's son Chandi Singh was the husband of Mt. Daiwati Kuar, defendant 1. Plaintiffs' case was that Chandi predeceased Umrao who died in Bhado 1326. Plaintiff thus became entitled to all the properties of the joint family, but as she was a young girl married elsewhere, the management of the properties was left in the hands of Ramkrishun Singh, defendant 4, brother of Daiwati and cousin of Sohago and Suraj Barto. Plaintiff was married to one Madan Singh who, on her attaining majority, started looking into her affairs, as a result of which Ramkrishun Singh was dismissed. There followed proceedings under Ss. 144 and 145, Criminal P. C. between the parties, and in these Madan Singh failed and Ramkrishun succeeded. Plaintiff therefore brought the suit for recovery of the property left by Umrao, viz. about 40 bighas of land. In para. 24 of her plaint she set up an alternative case, "in view of several pieces of documentary evidence which were filed by both the parties in the case under S. 145, Criminal P. C.," that if it should be found that Umrao and Chandi were separate, the properties may be partitioned and the plaintiff put in separate possession of a moiety. Defendants 2 and 3 were impleaded on the ground that Ramkrishun had their names entered in the zamindari laggits and had three saledeeds executed by them along with defendant 1, besides two ijaras, executed one by defendant 1 and the other by the other widows; there was also a will of Umrao leaving his property to Sohago (six annas) and Suraj Barto (ten annas), and a deed of relinquishment by Sohago in favour of the plaintiff.

The case of defendants 1, 3 and 4 was that Umrao had predeceased Chandi, who had thus become sole owner of the property of the joint family, and that accordingly the plaintiff had no title at all. Defendant 2 urged that Umrao and Chandi were separate, that she had taken six annas of Umrao's property under his will and that her ladavi deed in favour of the plaintiff had been obtained from her by misrepresentation. The substantial issue in the case was. "(3) Were Umrao Singh and Chandi Singh living separate? Did Chandi Singh predecease Umrao Singh?" The lower Court answered the first part of this issue in the affirmative and the second in the negative, and accordingly decreed the suit in part, giving the plaintiff possession of Umrao's half share "after partition." It has been contended on behalf of the appellants that the decree of the lower Court in favour of the plaintiff proceeds on a basis which was not the plaintiffs' case, and that as it has been found that Umrao predeceased Chandi, and as it was the common case of the plaintiff and the appellants that the family was joint, the suit should have been dismissed altogether because Chandi being the last and sole holder of the properties, the plaintiff could have no title at all.

The finding that Umrao predeceased Chandi is supported by Ex. F-1, a registered ijara of February 1920, executed by Chandi Singh for a loan for "defraying the expenses of the Sradh of my grandfather's brother Umrao Singh", and is unquestionably correct. On her own case that Umrao and Chandi were joint, the plaintiff would, therefore, have no title. There was, however, the alternative case in para. 24 of the plaint, to which I have already referred. It has been contended for the appellants that the plaintiff should not have been allowed to plead an alternative claim based on the separation of Umrao and Chandi, and that their jointness being common ground between the plaintiff and the appellants, the issue of separation raised by defendant 2, should not have been gone into in the case, as she only claimed under a will of which no probate has yet been taken. But the issue was actually raised and tried without any objection that defendant 2 had been wrongly imported into the suit; and the finding on the issue will be res judicata not merely between plaintiff and defendant 2 but also between defendant 2 and defendant 1. Defendant 2 was clearly a necessary party to the suit, and though it is true that she could make no title against the plaintiff or any other party on the basis of her father-in-law's will without taking out probate, her pleading could not have been struck out in limine on the ground of want of probate even if the appellants had moved the lower Court to do so because it was open to her to take out probate after the framing of the issues

and before the close of the trial of the case. Learned counsel for the appellants has cited a decision of this Court, 7 P L T 82 (1), as an authority against allowing a plaintiff to make inconsistent alternative claims.

But what was laid down in that case was that where the facts are presumably within plaintiff's knowledge he should not be allowed to plead inconsistent facts but should be required to elect so that the defendant may know what case he has to meet, and similarly, the defendant may not claim inconsistent facts unless he is a stranger to the transaction and the true state of facts is not within his personal knowledge. The rule against the joinder of inconsistent and alternative titles is thus not of an absolute character, and as was observed in 53 All 16 (2) cases are conceivable where a plaintiff may, from obscurity or from complexity of facts, be in honest doubt as to the nature of relief available to him, and inconsistent claims may, therefore, be entertained but not where there could be no reasonable excuse for them. See also 35 Ch D 492 (3), where the Court of appeal reversed North, J., and allowed a number of alternative defences to stand, subject to particulars being given. In the present case the plaintiff had ample excuse for setting up the alternative case made out in para. 24 of the plaint. She was a girl of 10 or so at the time of her father's death and had no personal knowledge of affairs at all, and the inference from the documents (if proved) was a matter of law. (The remaining portion of the judgment is not necessary for the purpose of this report).

Courtney Terrell, C. J.—I agree.

K.S./R K. *Appeal dismissed.*

1. Bhimnath Misra v. Jaggarnath Prasad, 1925 Pat 674=89 I C 814=7 P L T 82.
2. Dwarka v. Ram Jatan, 1930 All 877=128 I C 755=1930 A L J 1537=53 All 16.
3. Owen v. Morgan, (1887) 35 Ch D 492.

A. I. R. 1936 Patna 476

WORT, AG. C. J. AND DHAVLE, J.

Lachhiram Baldeodas—Petitioner.

v.

Commissioner of Income-tax—Opposite Party.

Misc. Judicial Case No. 3 of 1935, Decided on 7th May 1936, from Commissioner of Income-tax, Bihar and Orissa.

(a) Income-tax Act (1922), S. 26-A—Question whether partnership is real or fictitious is one of fact.

The question as to whether the partnership transaction is real or not is purely a question of fact. A mere application under S. 26-A and a decision by Income-tax Officer even in favour of assessee will not conclude the matter. [P 477 C 1]

(b) Income-tax Act (1922), Ss. 25-A, 26-A—Scope of inquiry under S. 25-A—Application under S. 26-A—Assessees not suggesting existence of joint family alongside that of partnership — Absence of evidence that family divided—Income-tax Officer held was right in not enquiring under S. 25-A and concluding that partnership was fictitious.

Under S. 25-A the Income-tax Officer does not inquire into a question of separation or disruption of the family, notional or otherwise; he has to inquire into the question of whether the joint family property has in fact been divided.

Where an application under S. 26-A for registration of a joint Hindu family as a firm was filed, and the assessees nowhere suggested that joint family existed alongside the new partnership, and there was no evidence that the family was divided :

Held : the Income-tax Officer was right in coming to the conclusion that the partnership transaction was not a genuine one : 1930 *Cal* 449 (*S B*), *Rel. on.* [P 478 C 1]

K. P. Jayaswal and *J. C. Sinha*—for Petitioner.

Manohar Lal—for Opposite Party.

Wort, Ag. C. J.—This is a case stated by the Commissioner of Income-tax under the direction of this Court and the question submitted for consideration was "Under the circumstances of this case is the family to be considered joint or separated in law?" There is no doubt that that question, that is to say whether the family can be considered joint or separate, is substantially a question of fact; but it is contended shortly by Mr. Jayaswal on behalf of the assessee that in the circumstances of the case there was no evidence upon which the Income-tax Officer, and ultimately the Assistant Commissioner and the Commissioner could decide against the application which was made by the assessee to be registered as a firm under S. 26-A, Income-tax Act. The case has been very elaborately argued; but in my judgment the matter is resolved by a very simple consideration. Shortly stated the family of Lachhiram had been assessed as a joint Hindu family up to 1931; the year of assessment in dispute is the year 1931-1932. Lachhiram's family was carrying on business as a joint Hindu family and in 1931 three members of that firm being the sons of Lachhiram, Baldeodas, Mulchand

and Mahabir Prasad, executed what purported to be a deed of partnership. This was on 1st June of that year and in the month of August following they made an application to the Income-tax Officer under S. 26-A, Income-tax Act to be registered as a firm. In the result the Income-tax Officer decided that the alleged partnership was fictitious, not being acted upon, and that the members of the family still remained a joint Hindu family.

Now Mr. Jayaswal contends in substance that the apparent state of facts should be taken as real in the absence of any evidence to the contrary and he contends that the inquiries which were made by the Income-tax Officer and upon which he appears to have decided that the family was still joint were not evidence upon which he was entitled to come to the conclusion that this partnership deed was an unreal transaction. The Income-tax Officer relied upon inquiries made from outsiders; he also found that the parties were messing together, and also a matter which in his opinion was of considerable importance was the fact that the father Lachhiram did not execute the partnership deed to which I have already made reference. I should be more accurate in saying that the Income-tax Officer stated that the father did not endorse the partnership deed. His statement to that effect was made for obvious reasons. It is nowhere contended that Lachhiram was a partner in the new firm and therefore it would be unnecessary to execute it; but the Income-tax Officer in making a reference to this fact stated that it was recited in the partnership deed that the members of the family had separated and it is in reference to this statement that the Income-tax Officer was of the opinion that the endorsement of Lachhiram might have been or was necessary and its absence raised a suspicion, which, added to the facts of the case, and made him come to the conclusion to which I have already referred.

As I have already stated, whether the partnership transaction was real or not is purely a question of fact. The matter seems to me to be concluded by what I have already described as one which was of considerable importance for consideration. Mr. Jayaswal would have this Court to hold that the effect of the Income-tax Officer's finding is a finding of fact against the assessee, and in order to come to that conclusion definite evidence is required which in this case it is contended is absent.

Now the points which seem to me to determine this question are very simple. The applicant applied under S. 26-A, as I have already stated, and it was for him to establish the fact that a partnership had come into existence and that partnership firm in the future was to be assessed in substitution for the Hindu joint family which heretofore had been assessed as such. Shortly stated, the Income-tax Officer was not satisfied with that transaction, and when the matter comes to be examined it seems to me that transaction is something more than a matter of suspicion. The mere application under S. 26-A and a decision even in favour of the assessee would not conclude the matter, and for this reason; Lachhiram had three sons, two of whom I have mentioned, the third was Hazarimul who is now represented in the partnership transaction by his son Mahabir Singh who was his adopted son. There was Debi Prasad who was the son of the second member of the alleged partnership, that is to say the son of Mulchand, and there were at least four sons of Baldeo Das. It will be seen that as Lachhiram and the sons of whom I have made mention were not partners under the partnership deed, that in one form or another either the joint family or several joint families remained and the mere decision of the Income-tax Officer under S.26-A that three persons had constituted themselves a partnership firm, would not settle the question of whether there was to be in future an assessment on a joint family or more than one joint family. It is important to notice this in connexion with a matter to which I am now about to refer. Mr. Jayaswal contends that it was unnecessary for him to make an application under S. 25-A, Income-tax Act. That section provides :

> Where at the time of making an assessment it appears that there has been a separation between the members of the family who have been assessed as such, and that the joint family property has been partitioned among the various members or groups of members in definite proportions, he shall record (that is to say the Income-tax Officer shall record) an order to that effect.

It was never the case of the assessee either before the Income-tax Officer or the Commissioner or before this Court,

although it was faintly suggested by Mr. Jayaswal, before this Court, that the partnership firm existed alongside the joint Hindu family, and as it was nowhere stated, as I have already stated in order to finally decide the question of assessment, it would have been necessary for an application to have been made and a decision to have been given under S. 25-A for the reasons which I have already indicated. In those circumstances as no application was made, and in order to test whether in future this partnership firm should be substituted for the joint Hindu family that had been heretofore assessed, it was not only possible, but it was the only course which the Income-tax Officer could take in the circumstances, to inquire whether in fact the joint Hindu family property had been divided. Under S. 25-A the Income-tax Officer does not inquire into a question of separation or disruption of the family, notional or otherwise; he has to inquire into the question of whether the joint family property has in fact been divided, and having regard to the fact to which I have already referred, that it is not suggested that the joint Hindu family firm existed alongside the new partnership firm, it is not surprising that the Income-tax Officer, in this case, in the absence of evidence that the property of the family had been divided, came to the conclusion that the partnership transaction was not a genuine one.

Now Mr. Jayaswal contends on the other hand that there are two items of evidence which do in fact prove that the joint family property was divided and that neither the joint family nor the joint family property hereafter existed. The evidence to which reference was made was first a deed of relinquishment entered into by Baldeo Das, Mulchand and Mahabir Prasad and various minor members of the family and Lachhiram, the father, that purported to relinquish the rights of the parties in the property in favour of their father Lachhiram. It is difficult to know exactly what effect in law this deed would have if the family were joint. It is perfectly obvious that they could not execute such a document, at any rate a document such as this could not take effect. In any event the deed of relinquishment is not a document of title, and thirdly it is to be noticed that the mention of the properties and the relinquishment of the rights of the parties in them in favour of the father indicate, taken in conjunction with the evidence of Baldeo Das taken on oath before the Income-tax Officer, that there were properties other than those mentioned in the deed. But apart from that the deed does not purport to be a partition deed; it may relinquish some properties in favour of the father, but, as I have already indicated, there are properties which are not the subject matter of this deed and in those circumstances in my judgment it is impossible to say that that evidence by itself was such that the Income-tax Officer was not entitled to come to any other conclusion than that the property had been divided as alleged.

The other piece of evidence is the account in the bahi dated 28th June 1930 in which the accumulated profits are shown to be divided between the three members of the firm and the father Lachhiram. In this account Lachhiram gets a share of approximately Rs. 24,000 less than the others which it is stated is made up by moveable property which had been released under the deed of relinquishment. It was some evidence possibly that the joint family property had been divided, although it is stated by the Income-tax Officer to be a division of the accumulated profits; but it is, in my judgment, impossible to say that it was such evidence that the Income-tax Officer was bound to come to the conclusion that the fact had been proved that the joint family property had been divided. Reference has been made by Mr. Jayaswal to declarations made on different dates as to the separation of the family. They are declarations, as I understand, of separation of the family in contradistinction to the division of the property. One was made in 1933 before the Agent of the Imperial Bank, but the fact that it was so late as 1933 is in itself significant. The partnership deed was entered into in June 1931; there was a gap therefore of a year or two before the declaration was made before the Imperial Bank. The weight of this evidence is not a matter for this Court.

The fact that the declaration was made is stated in the report made by the Income-tax Officer, but if any criticism were necessary it is to be found in the fact that this declaration was made in 1933 whereas the partnership was entered into in June 1931. We can assume (and

we must assume) that Baldeo Das who acted as the manager of the firm had up to that time operated on the account; and the necessary question which arises is what was happening between June 1931 and 1933 when the declaration was made? It rather indicates that at any rate during that period, although the partnership deed was in existence, the members of the partnership did not treat themselves as such. As I have already stated this is not a matter for this Court but was one of the questions which influenced the mind of the Income-tax, Officer and it is impossible therefore to hold that he was not entitled to be so influenced. Shortly stated, the matter comes to this: in the circumstances of the case the Income-tax Officer had to be satisfied that the joint family property had been divided. I say that by reason of the facts of the case which had been put forward by the assessee before him under the application under S. 26-A. That being so, although there was some evidence it was not evidence on which he was obliged to act and as he came to the conclusion that the property had not been so divided. That being so the only conclusion which he could have arrived at on the application made under S. 26-A was that the partnership transaction was not a real one. The case is not unlike that reported in 4 I T C 365 (1), in which a partnership deed alone had been adduced in evidence before the Income-tax Officer. Sir George Rankin pointed out that that was the only evidence before the Income-tax Officer upon which he was asked to act. It was for the applicant to establish the fact that the partnership existed and it was, to use the words of Sir George Rankin:

> Tolerably clear in the absence of some evidence to the contrary, that this piece of paper referring to the partnership deed which the parties had signed was expected to be magical talisman which would protect them from the imposition of super-tax and had no other reality at all.

It is contended as I have already stated that there was evidence in this case. It is true that there was evidence, but the weight of that evidence was for the Income-tax Officer as also the conclusion at which he should arrive. It is impossible to hold that in this case the Income-tax Officer was not entitled to come to the conclusion which he did. That in my judgment is sufficient and the answer to the case submitted by the Commissioner of Income-tax, is that in the circumstances of this case the family is to be considered joint. The application is dismissed with costs: hearing fee Rupees two hundred and fifty.

Dhavle, J.—I agree. When the assessee first came up to this Court his grievance substantially was that the refusal of the Income-tax authorities to register the firm was wrong and arbitrary; and he got this Court to direct the Commissioner to state a case on the point whether in the circumstances of this case the family was to be considered joint or separate in law. Partnerships are dealt with in S. 26-A of the Act, and the question which the Income-tax Commissioner was required to state is a question that is dealt with in S. 25-A of the Act. As regards the question under S. 26-A, no appeal lay at the time the assessee's application was disposed of by the Income-tax Officer, but there was an appeal provided by law at the time against orders under S. 25-A. It is obvious how in the circumstances of this case the two questions were connected together. Some of the argument before us has proceeded on the footing of what is called the notional separation of a Hindu joint family which sometimes gave rise to very difficult questions of law; and the legislature has got over the difficulty by enacting specially in S. 25-A of the Act that what the Income-tax authorities have to proceed upon is whether "the joint family property has been partitioned amongst the various members or groups of members in definite proportions." That is a concrete question of fact which it is fairly easy to investigate.

It has been contended on behalf of the assessee that in view of the deed of partnership and the ladavi deed and the accounts put forward on behalf of the assessee it was not open to the Income-tax authorities without any material whatsoever to treat these documents as bogus, but it is not a fact that the Income-tax authorities have proceeded without any material at all. They were entitled to take the circumstances into account, particularly the delay in the declarations of separation made by the members of the family to the Imperial Bank and elsewhere, and the statement I find made in the tenth ground of the

1. Bisseswarlal Brijlal v. Commissioner of Income-tax, 1930 Cal 449=126 I C 327=57 Cal 1336=34 C W N 363=4 I T C 365 (S B).

assessee's application to this Court that the petitioners never thought it necessary to make it known to the outside world that there had been a disruption in the family when their close friends and relatives knew about it. Whether in the circumstances of this case there had been what the Income-tax Commissioner calls an actual separation of the family, or as S. 25-A of the Act puts it, a partition of the joint family properties amongst the various members or groups of members in definite proportions, was clearly a question of fact. I do not think that on the materials produced before the Income-tax authorities by the assessee there could in law have been a decision one way only and this, as my Lord the Chief Justice has observed, is sufficient to dispose of the reference.

V.B.B./R.K. *Petition dismissed.*

A. I. R. 1936 Patna 480

AGARWALA AND ROWLAND, JJ.

Surpat Singh and *others*—Petitioners.

v.

Shital Singh—Opposite Party.

Civil Revn. No. 508 of 1935, Decided on 24th March 1936, against order of Munsif, Madhipura, D/- 12 August 1935.

(a) Bengal Tenancy Act (8 of 1885), S. 170 —S. 170 does not bar claims under O. 21, R. 58, Civil P. C., where decree obtained by landlord is not rent decree but money decree.

Section 170 does not bar a claim under O. 21, R. 58, Civil P. C., in a case where the decree obtained by the landlord is, not what is generally known as a rent decree, but a money decree. The remedy by a claim under O. 21, R. 58 is intended to be barred in all cases, in which the holding is put to sale for its own arrears of rent; the only way of preventing the sale from taking place is payment of the decretal amount: 28 *Cal* 382 (*F B*), *Foll.*; *Case law reviewed*; 36 *Cal* 765, *Expl.*

[P 481 C 1, 2]

(b) Bengal Tenancy Act (8 of 1885), S. 170 —S. 170 does not exclude claim under O. 21, R. 100, Civil P. C.—Person claiming land adversely to judgment-debtor can sue for declaration that decree is not binding on him.

Section 170 does not exclude a claim by any person interested in the land under O. 21, R. 100, Civil P. C. So also a person claiming the land adversely to the judgment-debtor can sue for a declaration that the decree is not binding on him or that his interest has not passed by sale. [P 481 C 2]

J. C. Sinha—for Petitioner.

Ganesh Sharma—for Opposite Party.

Agarwala J.—This application in revision arises out of proceedings taken by the petitioners who obtained a decree for arrears of rent against the tenants recorded in their sharista. The execution proceedings were opposed by the opposite party who claimed to be in possession under purchases from the tenants of the holding. A petition under O. 21, R. 58, preferred by the opposite party was upheld on the ground that in the Record of Rights other tenants besides the judgment-debtors are recorded in the landlord's sharista. The Court below held that in these circumstances the decree obtained by the petitioners must be held to be a money decree, and in that view of the matter decided that S. 170, Ben. Ten. Act, does not bar the application of O. 21, R. 58, Civil P. C. The question of law which arises for decision, therefore, is whether S. 170 bars the application of O. 21, R. 58, in a case where the decree obtained by a landlord is not what is generally known as a 'rent decree' but a money decree. In 28 Cal 382 (1), a Full Bench of the Calcutta High Court held that S. 170, Ben. Ten. Act bars a claim under the present O. 21, R. 58, in all cases where it is shown that the decree was one for arrears of rent.

The matter has been agitated in this Court in a number of cases, some of which are reported in 7 P L T 625 (2), Jwala Prasad, A. C. J., and Macpherson, J., held that R. 58, has no application to proceedings in execution of a rent decree and that the landlord is not bound to go beyond his own record when enforcing a claim for arrears of rent. This decision was followed by Sen, J. in 7 P L T 717 (3), and by Fazl Ali, J. in 10 P L T 118 (4). In the last mentioned case, Fazl Ali, J. cited an extract from the decision of Banerji, J. in the Full Bench case of the Calcutta High Court already referred to, namely, that a claim petition on behalf of the purchaser of a holding, who does not deny that the decree-holder is the landlord or that there were actually arrears due on the holding for the years in suit in respect of which the rent decree

---

1. Amrita Lal Bose v. Nemai Chand Mukhopadhya, (1901) 28 Cal 382=5 C W N 474 (F B).
2. Rameshwar Singh Bahadur v. Rajo Chowdhrain, 1926 Pat 210=95 I C 293=7 P L T 625.
3. Rameshwar Singh v. Puran Chander, 1926 Pat 213=95 I C 303=7 P L T 717.
4. Dwarka Singh v. Nema Singh, 1929 Pat 195 =117 I C 203=10 P L T 118.

was passed but who attacks the decree on the ground that it has been wrongly obtained against the original tenant who has sold the holding to the claimant, is barred under S. 170, Ben. Ten. Act. In 11 Pat 790 (5), Fazl Ali, J. referred the case then before him to a Division Bench. The leared Judge observed in his order of reference that the point raised on behalf of the opposite party in the petition before him was that it was always open to a claimant under R. 58 to show that the decree sought to be executed was not a rent decree. In that case the claimant contended that the decree had been obtained not against the recorded tenant but against the shikmidar or under-tenant. The Division Bench, before which the case was eventually laid, consisted of Khaja Mohammad Noor, J. and Dhavle, J. In the course of his judgment Dhavle, J. said:

> It has been contended that he (that is to say, the claimant) was entitled to show that the decree under execution was not a rent decree, but it is plain that he was not entitled to show this by establishing that the decree was obtained against a wrong party. That would really be establishing that the decree is a nullity, and establishing it under O. 21, R. 58, which is excluded by S. 170, Ben. Ten. Act.

The decision of the Full Bench of the Calcutta High Court already referred to was cited with approval. It appears therefore that from 1901 down to the decision last referred to, it has been held that in circumstances such as we have in the present case, a claimant is not entitled to prefer a claim under O. 21, R. 58. I would therefore set aside the order of the Court below and allow the decree-holder-petitioner his costs. Hearing fee two gold mohurs.

Rowland, J.—I agree and would like to add some observations with reference to the decision in 36 Cal 765 (6), a case in which a claim under the provisions of the old Code corresponding to O. 21, R. 58, was in fact allowed. The circumstances of that case were peculiar. The suit was for arrears of rent not of one holding only but of two, and it was in pursuance of this decree so obtained and for the rent of both the holdings that the attachment was made. It could not, therefore, be said strictly and within the meaning of the words of S. 170 that the holding had been attached in execution "for arrears due thereon," so as to bar a claim under O. 21, R. 58. The fact that the suit was for two holdings also had the effect that the decree was only a money decree and the decision is sometimes used in argument to support the contention that where the decree is only a money decree a claim under R. 58 is not barred. But I am quite clear in my opinion that it does not support that contention. Where the decree is only a money decree, it has been settled by several decisions that on a sale in execution only the right, title and interest of the judgment-debtor will pass, and it is to be noted that S. 170 does not exclude a claim by any person interested in the land under O. 21, R. 100. A person claiming the land adversely to the judgment-debtor can also sue for a declaration that the decree is not binding on him or that his interest has not passed by the sale. But the remedy by claim under R. 58 is intended to be barred in all cases where the holding is put to sale for its own arrears; the only way of preventing the sale from taking place is payment of the decretal amount.

R.M./R.K. *Petition allowed.*

5. Deonandan Prasad v. Pirthi Narayan, 1933 Pat 32=142 I C 40=11 Pat 790=13 P L T 643.
6. Bipra Das Dey v. Rajaram Banerji, (1909) 36 Cal 765=3 I C 306=13 C W N 650.

A. I. R. 1936 Patna 481

VARMA AND ROWLAND, JJ.

Bhagwat Singh and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 127 of 1935, Decided on 20th August 1935, from judgment of Sess. Judge, Saran, D/- 16th May 1935.

(a) Criminal Trial—Defence—Person claiming interest in land attacking persons who were cultivating that land without giving latter notice to quit that land—He inflicting more injuries than necessary on cultivating persons—No right of private defence arises.

Where a group of persons led by a man having some right in the land attack the persons that are cultivating that land without giving the latter any notice to leave that land and inflict injuries on them which are not necessary to make latter leave the field, no right of private defence for the former arises.

[P 483 C 2; P 484 C 1]

(b) Penal Code (1860), S. 149—Construction—Member of assembly whether liable of same offence as principal offender or of minor offence—Such member is to be convicted according to offence he must have known to be likely to be committed by assembly.

In construing S. 149, a question arises whether a member of the assembly is guilty necessarily of the same offence as the principal

offender or whether it is to be determined, with reference to the facts of the case, what offence the members must have known to be likely to be committed and whether, if such offence is a minor offence, they should be convicted accordingly. The latter construction appears to be more in accordance with the intention of Legislature on a reading of the words of the section. [P 484 C 2]

(c) Penal Code (1860), Ss. 149, 38 and 110 —Principle of Ss. 38 and 110 applies to S. 149—Liability of individual member under S. 149 depends upon his intention or knowledge.

The principle of Ss. 38 and 110 applies to offences under S. 149 and the liability of individual members of an unlawful assembly under the latter section depends on the intention or knowledge of the members. [P 485 C 1]

S. N. Sahay, *Nageshwar Prasad* and *P. N. Gour*—for Appellants.

Asst. Govt. Advocate—for the Crown.

Rowland, J.—The case before us arises out of a dispute regarding a 9 katha plot of land bearing revisional survey No. 142 in khata No. 22, tauzi No. 3120 in village Babhangawan. The plot was a part of the raiyati holding of Jhari Raut which had been given in usufructuary mortgage to Bhagwat, appellant 1, and members of his family by a deed Ex. B, dated 4th December 1913. The landlord Srikishun Panjiar sued for rent of the holding in 1918 and got a decree in execution of which he put the holding to sale and purchased it himself on 18th May 1920. It has been found by the Sessions Judge that he did not succeed in ejecting the zerpeshgidars. In 1928 the landlord gave a lease of this land to the original raiyat Jhari Raut who, according to the prosecution, has since then been in possession. The landlord sued Jhari for rent of succeeding years and got a decree in execution of which the holding was put to sale on 11th June 1934, and a petition Ex. A for annulment of Bhagwat's zerpeshgi under S. 167, Bengal Tenancy Act, was presented to the Collector on 10th August 1934. The defence case was that in spite of all these proceedings the zerpeshgidars retained possession of the land and it has been so found and quite rightly by the Sessions Judge.

The occurrence giving rise to this case took place on 19th October 1934. The prosecution case which the Sessions Judge has accepted, was that Jhari with Durga, Jamuna and Ganesh were ploughing and sowing when the accused with a mob of 30 or 40 men armed with spears came there and without any previous altercation made a violent attack on Jhari and those with him with the result that Durga was stabbed in the back and died immediately. Ganesh was stabbed in the back and also in the belly and died of his wounds in hospital on 21st October 1934, Jamuna received a spear wound on the front of the left thigh, Jhari escaped unhurt. Charges were framed against the five appellants under Ss. 148 149, read with Ss. 302, and 109 read with S. 302, and against Purander Singh under S. 324, with the result that all have been convicted under S. 148 and under S. 302 read with S. 149 and Purander has been also convicted under S. 324. Bhagwat has also been found guilty under S. 302 read with S. 109. The appellants have been sentenced to transportation for life under S. 302 read with S. 149, concurrent sentences being passed under other sections.

The points taken in appeal are that the finding of the Sessions Judge regarding the course of the occurrence is incorrect and that the conviction of rioting cannot be supported as the accused had a right of private defence. The defence version was that Ramlakhan Singh and Charitar Singh of the party of Rajputs were ploughing the fields when an armed mob of Goalas came and attacked them; whereupon other Rajputs came and there was a free fight. This version is supported by two witnesses Brahmdeo Singh and Durga Singh. The Sessions Judge finds their evidence vague and unsatisfactory for good reasons. The Rajputs have not been able to show a single injury on any member of their party in support of the allegation that there was a free fight; the presence of seeds and a basket is not accounted for; the defence version was propounded at a very late stage; and Ram Lakhan Singh has not been examined though available.

Prosecution witnesses (1) Jhari Raut, (2) Jamuna Raut, (4) Sital Raut, (5) Bira Raut, (6) Subran Raut, (9) Parma Raut, (10) Ramdeo Raut, (13) Basudeo Raut, (14) and Megha Mahto were put forward by the prosecution as witnesses of the occurrence. Of these none except Megha are members of any other caste but Ahirs. P. Ws. 4, Sital, 5 Bira, 6 Subran and 13 Basudeo were merely tendered for cross-examination; of the remainder some did not see the actual assault but have identified persons whom they saw in the mob going to or returning from the place, and the

Sessions Judge has eliminated these and acts on the evidence of Jhari Raut, Jamuna Raut and Parma Raut. Of these Jhari and Jamuna are directly interested and Parma is not altogether unconnected with them, so their evidence needs scrutiny to see whether their story is convincing and fits in with the state of things which the Sub-Inspector found on the spot. Part of the field was found ploughed and seeds had been sown broadcast. There were no marks of blood or signs of struggle on the disputed plot itself; but in an adjacent field to the east belonging to Uma Missir, there were blood marks beginning from a place 20 or 25 paces from the south-eastern corner of Jhari's field and leading to the place where the dead body of Durga was lying. The Sub-Inspector was also shown by Jhari a place 27 steps east of the south-eastern corner of Jhari's field as the place where Ganesh was assaulted and another place 43 steps south-east of the south-eastern corner of his field, where Jamuna was assaulted. In Court the eye-witnesses have represented that the assault was committed on the disputed field and that the persons assaulted ran to some distance after being struck and fell in the field of Uma Missir. Thus Parma says : "Jhari Lal and others did not run away on seeing the mob. The three injured went and fell and sat on Uma's land;" and Jamuna says : "None of us ran away before the assault" and describes the assault as having taken place in Jhari's field; the injured persons ran some distance after being wounded. Similar is the deposition of Jhari himself, but in cross-examination, when confronted with the fact that he had shown the Sub-Inspector the places of assault as being on Uma's land, he returned to his original story and said :

"We fled on leaving the plough and got filabbergasted on Uma's land and there the assault took place." The description of the actual assault as having taken place in the field of Jhari is therefore an artificial story. I have no doubt that the party of Jhari fled as the mob drew near and were pursued and run down except Jhari who escaped unhurt. It is suggested that Jhari was not an eyewitness at all, but as he was a principal man of the party claiming the field, it is unlikely that he was absent and both the defence witnesses have said that Jhari was present. It is argued that if the prosecution witnesses have distorted facts, their evidence should not be relied on at all as to particulars of the occurrence and as to persons who took part. It seems unfortunate that more of the eye-witnesses were not regularly examined at the hearing of the case, particularly Subran and Basudeo. However, it seems to me improbable that the wrong persons have been maliciously implicated as the principals in the riot.

The prosecution story seems to have been consistent throughout in maintaining that the leader was Bhagwat who gave the order to attack ; that it was Ekbal alias Kala who stabbed Durga and that Chander Singh accused struck at Durga but missed him. In this connexion it is significant that Ekbal alias Kala absconded directly after the occurrence and has not yet been found. The evidence has been consistent throughout that the assailants of Ganesh were Sobhit Singh and Charitar Singh. Ganesh made a dying statement before a Magistrate on the evening of the day of occurrence to the effect that on Bhagwat's order Charitar and Sobhit stabbed him. Charitar and Sobhit have both been absconding ever since the occurrence. The prosecution evidence has been consistent throughout that Jamuna was stabbed by accused Purander. I would accept this finding as correct. No overt act of violence is ascribed to Dhanukdhari and Sarup. The Sessions Judge has held all the accused alike liable under S. 302 read with S. 149 and this finding raises questions both of fact and law.

On the facts it appears from the deposition of Jhari that whereas the entire party of Rajputs who came armed numbered 30 or 40 persons, actually only about eight men came to the field and made the attack, whereas the remainder stood at a distance of 15 or 16 liggis and fled as soon as the assault was over saying that murder had been committed. The inference is that the common object of the entire assembly may have been to retain possession of the field for Bhagwat in face of possible resistance, not that all the members intended to attack the Ahirs' party even if they did not resist. But within this assembly there was a group of about eight persons who either had from before or formed on the instigation of Bhagwat the common intention of

beating the Ahirs to punish them. They did not preface their attack by any demand that the Ahirs should leave the field, therefore it cannot be said that the infliction of injuries on the Ahirs was necessary to make them leave the field. In this state of the facts I am of opinion that in the case of this group no right of private defence arises, that if there was a right to defend Bhagwat's property from criminal trespass, the assault was not done in exercise of any such right. Against those persons who, led by Bhagwat, ran at the Ahirs' party who were not resisting, the common object of voluntarily causing hurt to them is established. There were at least five such persons ; Bhagwat himself, the absconders Ekbal Sobhit and Charitar, the appellants Purander and Chander, and one Moti Lal Singh who was not on trial.

The question remains whether Dhanukdhari and Sarup were in this violent section of the mob. Neither of these two appellants has been identified by P. W. 14, Megha. Dhanukdhari is not identified by P. W. 10, Ramdeo. Parma who identified them as having been in the mob who came from the south does not speak of their going forward to take part in the assault. Sarup is mentioned by Subran but was apparently not named by him to the police and Jamuna does not ascribe any definite part to either of these appellants. I would therefore give them the benefit of doubt and acquit them. On these findings it is manifest that Bhagwat, Chander and Purander are guilty of rioting armed with deadly weapons. It is to be considered whether they are liable by virtue of S. 149 to conviction of the offence of murder or of any other serious offence. The Sessions Judge was of opinion that as murder was committed by some members of the unlawful assembly each of the appellants was liable for that offence. The judgment speaks of murder as being committed "in prosecution of the common object of the assembly," but it was not charged against the accused and it is no one's case that the common object was to commit murder. The common object charged was "voluntarily to cause hurt." If S. 149 applies it must be by virtue of the second party dealing with an offence such as the members of that assembly knew to be likely to be committed in prosecution of that object.

I am reading the section in the light of the observations in the Full Bench case in 20 W R 5 Cr (1), and I take the last five words quoted to mean in this context "in prosecuting that object," or "in the course of prosecuting that object." In construing the section a question arises whether a member of the assembly is guilty necessarily of the same offence as the principal offender or whether it is to be determined with reference to the facts of the case, what offence the members must have known to be likely to be committed, and whether if such offence is a minor offence they should be convicted accordingly. The latter construction appears to me to be more in accordance with the intention of the legislature on a reading of the words of the section. In the judgment of Phear, J. in the Full Bench decision in 20 W R 5 Cr (1), above cited, it is observed that the effect of S. 149 may be different in the case of different members of the same assembly. This view is consistent with the principles laid down in Ss. 35 and 38 of the Code : S. 35 runs :

> Whenever an act, which is criminal only by reason of its being done with a criminal knowledge or intention is done by several persons, each of such persons who joins in the act with such knowledge or intention is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention,

and S. 38 runs :

> Where several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act,

and again S. 110 lays down that :

> Whoever abets the commission of an offence shall if the person abetted does the act with a different intention or knowledge from that of the abettor be punished with the punishment provided for the offence which would have been committed if the act had been done with the intention or knowledge of the abettor and with no other.

This view of the law was acted on in 1924 All 670 (2) by the Allahabad High Court and by Judicial Commissioner's Courts in 60 I C 679 (3) and 99 I C 93 (4). In this Court, however, it has been held

1. Queen-Empress v. Sabid Ali, (1873) 20 W R 5 Cr=11 Beng L R 347 (F B).
2. Behari v. Emperor, 1924 All 670=83 I C 714 =26 Cr L J 154.
3. Barkan Singh v. Emperor, 1920 Oudh 152= 60 I C 679=22 Cr L J 279.
4. Ahmed v. Emperor, 1927 Sind 108=99 I C 93=28 Cr L J 61=21 S L R 159.

in 1 Pat 753 (5), that under S. 149 other members of the assembly should be convicted either of the same offence as the principal offender or of no offence at all. No authority is cited in support of this view and Ss. 38 and 110, I. P. C , are not referred to. With great respect, I think that the principle of Ss. 38 and 110 applies to offences under S. 149 and that the liability of individual members of an unlawful assembly under the latter section depends on the intention or knowledge of the members. In the case before us the principal offenders Charitar, Sobhit and Ekbal alias Kala are not on trial so that no question can arise in this case of convicting the principal offenders under one section and other members under another and the decision in 1 Pat 753 (5) is not applicable to the facts of this case. It does not, in fact, fall to be finally determined here and now whether the offence committed by Sobhit, Charitar and Ekbal amounted to murder or not. I do not however consider that the likelihood of murder being committed was in the contemplation of other members of the mob when they made the attack. It is certain at least that grievous hurt was voluntarily caused, and considering the weapons used, I think that all must have been well aware that grievous hurt was likely to be caused and therefore, in my opinion, the appellants Bhagwat Chander and Purander are liable by virtue of S. 149 to the punishment of voluntarily causing grievous hurt with deadly weapons, S. 326, I. P. C.

In the result I would acquit Dhanukdhari and Sarup. I would maintain the convictions and sentences of the other three appellants under S. 148 and of Purander under S. 324 and I would alter the conviction of all the appellants from S. 302 read with S. 149 to S. 326 read with S. 149 and that of Bhagwat from S. 302 read with S. 109 to S. 326 read with S. 109. I would sentence Bhagwat to undergo seven years' rigorous imprisonment and Chander and Purander each to undergo four years' rigorous imprisonment, to run concurrently with the sentences under other sections.

Varma, J.—I agree.

R.W./R.K. *Order accordingly.*

5. Ram Prasad Singh v. Emperor, 1923 Pat 50=71 I C 113=24 Cr L J 65=1 Pat 753=4 P L T 213.

A. I. R. 1936 Patna 485

COURTNEY-TERRELL, C. J.

Ghasiram Biseswar Lal Firm—Plaintiff—Appellant.

v.

Otla Gaurai Otla Basaraj Firm —Defendant—Respondent.

Appeal No. 68 of 1933, Decided on 17th January 1936, from appellate decree of Sub-Judge, Cuttack, D/- 5th December 1932.

(a) Hindu Law—Joint family—Business by member appropriate to his caste is part of joint family property.

Where a member of a Hindu joint family carries on a business which is appropriate to the caste to which he belongs, it may properly be inferred that that business is part of the joint family property. [P 486 C 1]

(b) Hindu Law—Joint family—Family business—Managing member contracting debts for such business—Share of minor also is liable—Purchase of goods must be presumed to be necessary for carrying on business.

When a Hindu joint family carries on a business of a kind appropriate to the caste of that family, the member, who manages, has an implied authority to contract debts for the purpose of that business and a creditor supplying goods to the business of the class and character dealt with by the purchaser is not bound to inquire into the necessity of the family, because the purchase of cloth of that kind and in that sort of quantity is necessary for the carrying on of a business of that character and the share of a minor who is a coparcener in such a joint family is liable for debts contracted by the managing co-parcener for the purpose of the joint family business: 34 *Bom* 72 and 1927 *P C* 121, *Foll.* [P 486 C 1]

S. K. De—for Appellant.

Subba Rao—for Respondent.

Judgment.—This second appeal is from a judgment of the Subordinate Judge reversing the decision of the Munsif who had decreed the suit of the plaintiff based on a bahikhata account for cloth supplied. The defendants are alleged in the plaint, and it is not denied by defendant 2, the sole contesting defendant, to be members of a caste known as *tilanga tanti* (weavers) and engaged in cloth business. The plaintiff supplied cloths to defendant 1 who is the elder step-brother of defendant 2. The defence taken by defendant 2 was that he was not joint with his elder brother, that he was a minor and had indeed no connexion with defendant 1. The finding of fact by the trial Court was that it was admitted that the defendants are weavers by caste and

maintained themselves by weaving cloths and selling them, that it was true that they had no shop or place of business, but they did purchase and sell cloths. The finding also by the trial Court was that they were joint, and indeed it is clear that neither trial Court nor the appellate Court believed the defence of defendant 2 that he was separate. The view of the lower appellate Court is that in the first place there was no firm by which (if the words of the Subordinate Judge are to be treated in their proper legal significance) I take it, he means that defendant 2 being a minor he could not be in a state of legal partnership with his elder brother because he was incapable of making a contract; that the business carried on, however, by the two brothers was a joint family business is not dissented from by the learned Subordinate Judge. His reason for dismissing the suit of the plaintiff was that the plaintiff had not proved that the goods were supplied to the joint family and the joint family business for any necessity of the joint family.

Now where a member of a Hindu joint family carries on a business which is appropriate to the caste to which he belongs, it may properly be inferred that that business is part of the joint family property. In this case it is admitted that the defendant family are of the weaver and cloth-seller caste and in those circumstances it may reasonably be presumed that the business which they carry on is a joint family business. In any case the learned Subordinate Judge does not dissent from the finding that there is in fact a joint family business. Now when a Hindu joint family carries on a business of a kind appropriate to the caste of that family, the member who manages, in this case defendant 1, has an implied authority to contract debts for the purpose of that business and a creditor supplying goods to the business of the class and character dealt with by the purchaser is not bound to inquire into the necessity of the family, because the purchase of cloth of that kind and in that sort of quantity is necessary for the carrying on of a business of that character and the share of a minor who is a co-parcener in such a joint family is liable for debts contracted by the managing coparcener for the purpose of the joint family business. This principle was well established by the case in 34 Bom 72 (1) and the law is made even more clear by the decision of the Privy Council in 8 P L T 647 (2).

To my mind the learned Subordinate Judge has approached this case from the wrong point of view. The caste of the family to which the two defendants belong being what it is, the business carried on by the defendants being of the nature that it is, it is properly inferred by a supplier of goods of the kind that the goods are required for the joint family business and the family business needs such goods for the purpose of trade. In these circumstances the learned Subordinate Judge should have supported the decision of the learned Munsif. His finding that it could not be inferred that the goods supplied to defendant 1 were for family business is necessarily erroneous. In any case the defence of defendant 2, which is probably entered into with the collaboration of defendant 1 is thoroughly dishonest. The appeal will be allowed, the judgment of the learned Munsif restored and there will be a joint decree against defendant 2 on contest and ex parte against defendant 1 with costs throughout. Leave to appeal under the Letters Patent is refused.

K.S./R.K. *Appeal allowed.*

1. Raghunathji Tarachand v. The Bank of Bombay, (1910) 34 Bom 72=2 I C 173=11 Bom L R 255.
2. Niamat Rai v. Din Dayal, 1927 P C 121=101 I C 373=54 I A 211=8 Lah 597=8 P L T 647 (P C).

A. I. R. 1936 Patna 486

JAMES AND VARMA, JJ.

Emperor

v.

Hardwar Sah — Accused.

Death Ref. No. 14 and Criminal Appeal No. 76 of 1936, Decided on 29th April 1936, from reference of Sessions Judge, Saran, D/- 23rd March 1936.

Criminal Trial — Accused charged with murder by poisoning — No motive proved, though conduct of accused on day of crime suspicious — Evidence of poison-vendor not convincing—Witnesses on point of vital importance regarding motive not examined——Circumstantial evidence held did not establish crime beyond doubt and accused held not guilty.

In a criminal trial an accused was charged with murder by poisoning. The conduct of the accused on the day of the crime was suspicious. though motive for the crime was found to be

lacking. The evidence of the poison-vendor, who supplied the poison to the accused was not convincing. The Sessions Judge convicting the accused of murder, did not even examine witness to a point of vital importance like the threats of the accused to the deceased for proving motive:

Held: the circumstantial evidence as it was presented to the Court was not such as to make it clear beyond possible doubt that the accused had murdered the deceased. There was ground for doubt of which the benefit must go the accused: *Woolmington* v. *Director of Public Prosecutors*, (1935) *A C* 462, *Ref.* [P 490 C 1]

Asst. Govt. Advocate—for the Crown.

P. C. Wanuk and *Anand Prasad*—for Accused.

James, J.—The appellant, Hardwar Sah, has been sentenced to death for the murder of his mistress Mt. Zainab, the daughter of a woman named Mt. Killia. The mother, Killia, is a prostitute by profession who more recently, being advanced in years, has lived mainly on the earnings of her daughter, Zainab. During 1933 Mt. Zainab was kept by a Brahman named Ramautar Tewari, who describes himself as a seller of ornaments for Sonars, but who also appears to work as a purohit. After that she was kept by the appellant, Hardwar Sah, a bania of Chapra. He at first kept her at her mother's house, paying the mother Rs. 20 monthly for Zainab and Rs. 6 for the rent of the house. At some time early in 1935 Hardwar Sah took Mt. Zainab to his own house, where he lived with his wife, undertaking to pay Rs. 10 monthly to Mt. Killia. She says that he paid her for two or three months, and then ceased to make payments; and that when she went to his house to demand payment of the arrears she was rudely rebuffed. However that may be, at about the end of the third week of last September Mt. Zainab left Hardwar Sah's house and returned to her mother's house at Chapra, saying that she had quarrelled with the wife of Hardwar Sah and that Hardwar Sah had beaten her and his wife as well. The former lover Ramautar Tewari then appeared and advised Mt. Killia to take Zainab to a house which she had in the country at Chaumukha, saying that otherwise Hardwar Sah would do Zainab some injury; so in the afternoon Mt. Killia went to Chaumukha taking with her Zainab together with her granddaughter Tuntun, her grandson Tota and her servant Rangi. It is said that on that night Ramautar Tewari came out to Chaumukha, where he slept with Zainab, and that on the next day Hardwar Sah came to Chaumukha endeavouring to persuade Zainab to return with him to Chapra.

According to some of the witnesses who gave evidence at the trial, Hardwar Sah on this occasion said that if Mt. Zainab would not return he would take her life and his own. She refused to return with him; and on that night there was a quarrel between them which attracted some attention from outsiders. Hardwar Sah returned to Chapra alone on the following morning. On 29th or 30th September Hardwar Sah again went to Chaumukha, where he is said to have come across Zainab in the bazaar and to have attempted to take her away by force, which was prevented by the people about the bazaar. It is said that on this occasion again he said that if Mt. Zainab did not come with him he would take her life and end his own. If we accept the evidence of Sarju Prasad, a poison-vendor who gave evidence at the trial, Hardwar Sah before he went to Chaumukha on this occasion had purchased 8 annas weight of arsenic which should be 99 grains. Hardwar Sah stayed at Chaumukha for three or four days, and it was agreed in the end that Mt. Zainab should live at Killia's house in Bhagwan Bazar at Chapra, and that Hardwar should visit her there and pay a certain amount to Killia. The party then returned from Chaumukha to the house in Bhagwan Bazar which Hardwar Sah visited every night. On the night of 3rd October Hardwar Sah and Ramautar Tewari met near the Bhagwan Bazaar liquor shop in Chapra where they quarrelled and fought. The fight was stopped by the Assistant Sub-Inspector Bhubaneshwar Singh who is said to have subsequently accompanied Ramautar Tewari in search of Zainab to the house of Mt. Killia and to that of Sheikh Nazir who is married to Zainab's sister.

We now come to the occurrences of 10th and 11th October. According to the poison-vendor, Sarju Prasad, Hardwar Sah on 10th October purchased another 99 grains of white arsenic. The account of the events which followed rests upon the evidence of Mt. Killia and of the members of her family. Hardwar Sah is said to have slept on the night of the 10th with Zainab. It appears that when he left her on the morning of the 11th

she was suffering from some pain in her stomach which was attributed to flatulence. Mt. Killia says that in the morning she purchased sweetmeats for a pice which Zainab ate, and that at midday Hardwar Sah came back. Hardwar Sah gave two annas to Tota, Killia's grandson, whom he sent out for some rasgoolla and kachauri which Hardwar Sah offered to Zainab. Zainab would not eat it, apparently because she was feeling unwell ; and Hardwar Sah then gave Zainab some white powder to lick saying that it was medicine. Tota Nut when he was examined by the Deputy Superintendent of Police said that Hardwar Sah when he arrived brought with him a yellow packet of paper which he said contained medicine for relieving stomach-ache which may possibly be true. Killia says that Zainab was attacked by severe vomiting while Hardwar Sah was with her and that he then went away saying that he would bring her medicine. Zainab's condition rapidly became worse, so that Mt. Killia, at some time in the afternoon, sent Tota to Nazir Mian, telling him to call Dr. Haridhan Bose. Tota and Nazir went to the house of Dr. Haridhan Bose, but he could not be found. At about 10 o'clock that night Tota was again sent to Nazir Mian, who came to the house; and then set out to bring any doctor whom he could find. He brought Dr. N. R. Bose who arrived at the house at about 11-30 p. m. The doctor diagnosed the case as one of poisoning, and said that Mt. Zainab must be taken to the hospital. He took her to the hospital in the car which had brought him to the house, taking up a constable who happened to be outside and sending another constable to the thana to give information of this case of suspected poisoning. Dr. Bose made over Zainab to the dresser of the hospital.

It appears that by that time she was dead though the point is not clear. She was dead when the Assistant Sub-Inspector arrived at the hospital at 1-15 a. m., when an inquest report was drawn, and the statement of Mt. Killia was recorded. The post mortem examination was held on the following day by Dr. S. N. Santra, Assistant Surgeon of Chapra, who was assisted by Dr. N. N. Roy, medical officer to the jail. The Assistant Surgeon set aside the viscera of Mt. Zainab to be forwarded to the Chemical Examiner, reserving his opinion as to the cause of death until the Chemical Examiner's report should be received. The Sub-Inspector Maulavi Aminul Haq, who at once took over the investigation on the assumption that the case was one of poisoning, forwarded also to the Chemical Examiner a bed-sheet which contained purged matter of Zainab, together with some other faecal matter and vomited matter. Arsenic was detected by the Chemical Examiner in the viscera ; and also in the faecal matter which had been taken from the ground and in the stains in the bed sheet, as well in the earth on which Zainab had vomited. Other articles found in the house and forwarded to the Chemical Examiner were two paper purias containing white powder, one of which was found to contain calomel, while of the other the Chemical Examiner reported that it contained no poison, without telling us what it did contain. Another officer who has not been examined as a witness searched the house of Hardwar Sah. The investigating officer gives us to understand that a packet of white powder was discovered at that search which was found to be of boric acid, and that some other substance was found which on examination proved to be alum.

Mr. Manuk on behalf of the appellant argues in the first place that the witnesses have varied their story so much in essential details that their evidence ought not to be acted upon; and further that the evidence of the poison-vendor should be regarded as untrustworthy ; and that in any event there is nothing to indicate that Hardwar Sah administered the poison with homicidal intent. Mr. Manuk draws attention to the variations in the witnesses' accounts of what happened on the morning of 11th October. (His Lordship after discussing the evidence proceeded.) It is possible that the witnesses, having decided in their own minds that the poison which killed Zainab was contained in the white powder which she said had been administered to her by Hardwar Sah at midday, made contradictory statements in points of detail, lest the admission that Zainab already had pain in her stomach when Hardwar Sah came to the house at noon should be taken to imply that the poison had been taken in some other way independently of Hardwar Sah.

This concerted prevarication on most important points of detail does without doubt make the case difficult; but Zainab did die of arsenic poisoning, and for practical purposes it matters little whether the arsenic was contained in the white powder which was administered at noon, or whether it was administered in some other way. When Hardwar Sah was with Zainab it was noticed that there was a pandan there which Hardwar Sah took away with him when he left. The evidence of Tota Nut and Rangi, that they saw a yellow puria of medicine in Hardwar Sah's hand when he arrived at noon may possibly be true; but the puria may merely have been the calomel of which what was left was afterwards found in Mt. Killia's house.

All the witnesses of Killia's family say that Hardwar Sah had been saying that if Zainab would not come to him he would take her life and his own. Mr. Manuk suggests that Hardwar Sah could have no motive for killing Zainab, because she evidently preferred his company to that of Ramautar Tewari though she may have been unwilling to go to his house. It would appear to be Mt. Killia who was preventing Zainab from going to Hardwar Sah's house, the reason being that Hardwar Sah had fallen into arrears in his payments to Killia. It appears from Mt. Killia's evidence that even after the return from Chaumukha, Hardwar Sah had paid nothing and that she was pressing for payment; but this would not in itself give Hardwar Sah any motive for murdering Zainab. The former lover was persistent in his attentions; and he may have been favoured by Killia, but Hardwar Sah was evidently preferred by Zainab. Killia had apparently some influence over her daughter but, long before these events the daughter had endeavoured to free herself by a petition to the Sub-divisional Magistrate. The discarded lover had for some time been saying that Hardwar Sah must not be permitted to approach Zainab, because he would murder her, with some justification if the evidence regarding Hardwar Sah's threats were accepted; but bearing a very different significance if that evidence is treated as untrue.

It is said that Hardwar Sah at Chaumukha persistently threatened to end Zainab's life and his own, if she would not return to his house. On this matter we have the evidence of members of Killia's family, and of Ganesh Kalwar of Chaumukha, who says that Hardwar Sah used these words on two occasions when there was a disturbance in Chaumukha at night which brought the people of the mahalla out during Hardwar Sah's first visit to Chaumukha, and afterwards in the bazaar when Hardwar Sah seized Zainab and attempted to take her away. Mr. Manuk criticises the evidence of Ganesh Kalwar, because under cross-examination he did not remember any other remark of Hardwar Sah than this threat to end her life and his own. This would not necessarily cast doubt on the truth of his evidence, because he was cross-examined five months after the occurrence. Other witnesses who were present on these occasions were either not examined at all, or were merely tendered for cross-examination. The learned Sessions Judge does not believe the account of these threats because nothing was told to the police of them in the earlier stages of the investigation. Killia stated in her first information that Hardwar Sah had made a threat of this kind on the evening of 10th October; but if he had begun to talk in this manner at Chaumukha a fortnight earlier, so significant a fact would not have been omitted in the statements of members of the family who were there. (His Lordship then proceeded to discuss the evidence of Sarju Prasad, the poison-vendor, and proceeded.) If evidence to the effect that Hardwar Sah had been uttering threats to end Zainab's life and his own had been accepted by the learned Sessions Judge and the assessors, this account of purchase of arsenic by Hardwar Sah would have borne a different aspect. If Hardwar Sah, immediately before going to Chaumukha and uttering these threats, had provided himself with 99 grains of white arsenic, the threats and the purchase of arsenic taken together would have rendered further search for motive, or consideration of grounds for inferring intention unnecessary, even if we applied to the fullest extent the rule laid down in 1935 A C 462 (1). I think that it would have been better if the learned Sessions Judge had insisted upon the examination of these witnesses to the threats who were merely tendered in the Sessions Court;

1. Woolmington v. Director of Public Prosecutions, (1935) A C 462=104 L J K B 433=153 L T 232=51 T L R 446.

and he might well have gone further, and have called the witness who was not even tendered. Witnesses to a point of such vital importance ought not to be merely "tendered," as it is called, for cross-examination. As the matter stands, the evidence of the poison-vendor does not convince us; it may be true, but we are not sufficiently sure.

If a trap was laid for the appellant, it must be said that he walked thoroughly into it; and that whether he is innocent or guilty, his behaviour on 11th October was such as to justify the utmost suspicion. Mr. Manuk argues rightly that poisoners do not present their poison direct to the victim in the form of a powder to be swallowed as medicine: the poison is ordinarily administered cunningly and disguised ; and indeed it may be regarded as probable that the white powder administered at midday was innocuous. But the administration of an innocuous white powder in this fashion, leaving the calomel lying about to be discovered by the police, would be in accordance with the manner of poisoners. If Hardwar Sah had given arsenic in some other manner, he over-reached himself in his cunning; because if the white powder had not been given, the case might have been regarded as one of cholera, whereas after the administration of the white powder, although the medical officer waited for the report of the Chemical Examiner, the police naturally assumed at once that the case was one of arsenic poisoning. It would not be proper for us to discuss the alternative explanation of this matter suggested by learned counsel for the defence. It is sufficient to say that the circumstantial evidence, as it was presented to the Court, was not such as to make it clear beyond possible doubt that Hardwar Sah murdered Zainab. His conduct, as described by the witnesses, on 11th October, was such as to give rise to suspicion; but motive is found to be lacking when the evidence of the threats is discarded, and unless the evidence of the poison-vendor is accepted, there is not even actually a weak link in each chain; and there is ground for doubt, of which the benefit must go to the appellant. The reference is discharged ; the appeal is allowed ; and the appellant is acquitted, and will be discharged from custody.

Varma, J.—I agree.

V.B.B./R.K. *Appeal allowed.*

A. I. R. 1936 Patna 490

MACPHERSON, J.

Kapileswar Maharana — Plaintiff — Petitioner.

v.

Abdul Rahman—Defendant—Opposite Party.

Civil Revn. No. 79 of 1936, Decided on 6th May 1936, from order of Dist. Judge, Manbhum-Sambalpur, D/- 2nd January 1936.

Civil P. C. (1908), S. 115, O. 9, R. 13—Summons duly served on defendant — Suit transferred at defendant's instance to another Court — Ex parte decree — District Judge in appeal restoring case to file on sufficient ground—Plaintiff claiming interference on ground that Courts below did not decide question of limitation as it was case of defendant having been served—Case held to be one of non-service and circumstances held did not justify interference in revision.

In a suit filed, the defendant was duly served. At the instance of the defendant, suit was transferred to another Court. At the hearing the defendant not appearing the suit was decreed ex parte. The defendant applied to set aside the order on the ground that he had no notice of the date fixed for hearing in the transferee Court. The trial Court found he could not be excused for the gross negligence. In appeal the District Judge finding sufficient ground for the appellant's non-attendance restored the suit to file. In revision the plaintiff urged that the question of limitation was not decided by the lower Court and that application to set aside ex parte decree was barred as the defendant was duly served and limitation ran from date of decree:

Held: that circumstances of the case were peculiar and interference was not justified. The action of the trial Court bore a close analogy to proceeding ex parte. It was not unreasonable to treat the case as practically one of non-service of summons on the defendant.

[P 491 C 1, 2]

R. S. Chattarji—for Petitioner.

S. C. Mazumdar—for Opposite Party.

Order.—The petitioner brought a suit against the opposite party in the Court of the Munsif at Jamshedpur and summons was served upon the defendant. At the defendant's instance the suit was transferred from Jamshedpur to Purulia where it was registered on 15th August 1934, and 18th September was fixed for hearing. At the hearing the defendant did not appear and the suit was decreed ex parte. On 23rd May 1935, the defendant applied under O. 9, R. 13 to set aside the ex parte decree on the ground that he had no notice of the date fixed for hearing, his pleader who had appeared in the transfer matter before the

District Judge having informed him that notice would be issued on him from the Court of the Munsif of Purulia. No notice had been issued, and he knew nothing of any proceedings or the ex parte decree until 9th May when he found his pay attached by the order of the Court.

The Munsif of Purulia found that the defendant was led away by the advice of his pleader that he would receive notice from the Purulia Court of the date fixed, but that he ought to have made inquiries both at Jamshedpur and at Purulia in regard to what was happening and he must have been aware of the date. His gross negligence in not appearing could not be excused because of his reliance upon the wrong advice of his pleader. On appeal by the defendant the learned District Judge found that there was sufficient ground for the appellant's non-attendance on 18th September which date had been fixed on a date which was not even fixed for the attendance of parties; the defendant could have had no knowledge of any order passed on 15th August and it was not the duty of a party to attend daily in order to ascertain when his case is going to be taken up. He accordingly allowed the appeal and restored the suit to the file. The order of the District Judge on the facts is not and cannot be gainsaid. It is also incredible that the defendant who moved for a transfer of the suit to Purulia should not appear at the Court to which the suit had been transferred at his instance. The Munsif of Purulia was not well advised in the circumstances in hearing the suit ex parte.

But the point upon which the revision is sought is limitation. Neither of the Courts below dealt with it. Reliance is placed by the petitioner on Art. 164, Lim. Act, which provides limitation of 30 days from the date of the decree or, where the summons was not duly served, from the date when the applicant has knowledge of the decree. It is urged that the summons having been duly served on the defendant the period of limitation is 30 days from the date of the decree. The opposite party urges that by reason of the justice of his case, this Court in the exercise of a proper discretion will not interfere in revision. The petitioner's reply is that it cannot be said that the case does not come under S. 115, Civil P. C., inasmuch as the Courts below did not merely decide the question of limitation wrongly but did not decide it at all. The circumstances of the present case are altogether peculiar, and I am not prepared to interfere in revision. The action of the learned Munsif bears a close analogy to proceeding ex parte when the defendant is absent because the summons has not been served upon him. It is not unreasonable to treat the present case as practically one of non-service of summons on the defendant. Accordingly I discharge the rule. I direct that the costs of the application, the appeal and revision (pleader's fee in the High Court, one gold mohur) shall follow the event.

V.B.B./R.K. *Rule discharged.*

A. I. R. 1936 Patna 491

WORT, J.

Gobardhan Mahton and *others*—Defendants—Appellants.

v.

Sita Ram Singh and *others*—Plaintiffs and others—Defendants—Respondents.

Appeals Nos. 395 and 396 of 1933, Decided on 27th January 1936, from appellate decrees of Sub-Judge, Shahabad, D/- 23rd December 1932.

(a) Civil P. C. (1908), S. 151 and O. 41, R. 23 — Trial Court deciding suit on merits and on preliminary point—No remand under O. 41, R. 23.

Where the trial Court has decided the case on the merits as well as on the preliminary point, the appellate Court cannot remand the case under O. 41, R. 23. If the case is remanded the remand is not under O. 41, R. 23, but under the inherent powers of Court under S. 151. [P 492 C 1]

(b) Civil P. C. (1908), S. 151 and O. 41, R. 23—Remand to begin de novo trial again—Remand is under S. 151 — No appeal lies from such order.

Where the appellate Court remands the case to be begun as de novo, the remand is under S. 151 and not under O. 41, R. 23 and no appeal lies from such order of remand. [P 492 C 2]

(c) Practice—Amendment—Rule as to.

An amendment which has the result of starting a new action should not be allowed. [P 492 C 2]

B. C. Sinha—for Appellants.

Dasu Sinha—for Respondents.

Judgment. — These appeals are from the judgment of the Subordinate Judge remanding the matter to the trial Court to be re-heard after allowing amendments in the pleadings which were asked for for the first time before the appellate Court, that is to say before the Subordinate Judge. The actions were brought by the plaintiff-respondents for ejectment from

a part of a holding on the allegation that the defendants had used portions of the holdings rendering them unfit for purposes of the tenancies. The actions were heard together and the judgment of the trial Court disposed of both the suits. There were two khatas, Nos. 78 and 91. In khata No. 78 there were plots 404 and 405 and in the other khata there was plot 406, and the two sets of defendants were alleged to have misused portions of these plots in the two different actions respectively. Amongst other points decided by the trial Judge was that the actions were not maintainable. The learned Judge decided that the actions were not maintainable because he came to the conclusion which was not reversed in appeal, that the two khatas formed one holding and that therefore the plaintiffs should have brought one action with regard to the two khatas and should have claimed as they did ejectment not from a part of the holding but from the whole holding. That the learned Judge was right is not disputed. But the trial Judge went on to decide the case on the merits and came to the conclusion that there was in fact no encroachment. The learned Judge in appeal, stating that the plaintiffs alleged that the trial Court had decided the case on a preliminary point, remanded the case under O. 41, R. 23, Civil P. C., or purported to do so. Now, as the trial Judge had heard the case on its merits as well as on a preliminary point, and would have dismissed the suit on either ground, it is quite obvious that, whatever the Judge in appeal may have stated, he had no jurisdiction to remand the case under O. 41, R. 23 for the simple reason which I have stated more than once that the trial Court decided the case on the merits as well as on the preliminary point. Whatever the Judge thought that he may have been doing, it is quite clear if he remanded the case, he remanded it not under O. 41, R. 23 but under the inherent powers of the Court under S. 151, Civil P. C.

There is another matter which leads me to the same conclusion. The Judge from one point of view, it may be said, did not purport to act under O. 41, R. 23 as he merely stated that the plaintiffs alleged that the remand had been under that order and rule. In addition to that, in coming to the conclusion that the amendment asked for should be allowed to the plaintiffs (and therefore the defendants in one suit being liable, if the encroachment was established, for the encroachment in what was in the other suit in the trial Court) the Judge held that in allowing the remand the defendants should be allowed to file written statements and issues should be settled ; in other words the actions were to begin de novo as one action and tried all over again. It is quite clear therefore that if he had any power to remand it was under S. 151, Civil P. C. That would appear to me to dispose of the appeal because, as pointed out by the learned advocate for the respondents, it not being a remand under O. 41, R. 23, there is no appeal to this Court.

One other point is raised, but I am not sure that it really makes much difference; but it is a fact that if the plaintiffs were now forced to bring one action their action would be barred by limitation ; that is quite clear. But even although that be so, it would not entitle them necessarily to contend that the Judge was wrong in allowing the amendment which he did allow. If that were the only point, I should have come to the conclusion that not only did the appeal fail, but interference with the judgment of the Judge in the Court below was beyond my jurisdiction. But this is a very exceptional case and the order which the learned Judge in the Court below has made has a very far-reaching effect. It is clear that the object of amendments is primarily for the purpose of enabling the parties to place their pleadings in conformity with the evidence, or, if amendments are sought at an early stage of the case and before evidence has been given, to place their pleadings in conformity with the evidence which they propose to give. In this case something entirely different has happened. The effect of the learned Judge's order has been to allow the plaintiffs not merely to amend their plaint in conformity with the evidence or in conformity with the facts as now established, but the amendment has the result of allowing them to start an entirely new action—an action against defendants not made parties to the suit and adding parties. It is not a question of amendment at all.

In the circumstances which I have stated it will make the defendants liable for encroachment or breaches of their implied obligations as terms for which on

the facts they cannot be responsible. But that of course relates rather to the merits than the point to which I am addressing myself at the moment. The point really is this : has the learned Judge in the Court below jurisdiction to allow an amendment which does not amend the action as it at present stands, but allows the plaintiffs to start a new action ? In my judgment quite clearly he has no such jurisdiction ; and therefore, although no appeal lay to this Court from the order of the Subordinate Judge, I propose to exercise my powers of revision under S. 115, Civil P. C,, and to set aside the order of the learned Judge. In these circumstances the plaintiff's actions will be dismissed. Treating the appeals as applications in revision, the rule will be made absolute with costs : hearing fee two gold mohurs.

K.S./R.K. *Rule made absolute.*

A. I. R. 1936 Patna 493

AGARWALA AND DHAVLE, JJ.

Thakur Deyal Singh and *others*—Defendants—Appellants.

v.

Rai Promatha Nath Mitra and *others* —Plaintiffs and another — Defendant — Respondents.

Appeals Nos. 702 and 1761 of 1932, Decided on 5th May 1936, from appellate decrees of Offg. Sub-Judge, Gaya, D/- 29th February 1932.

(a) Lease—Covenant not to alienate demised property without lessor's consent—Property sold in execution of rent decree—Covenant held running with land and binding on assignee from lessee.

In a lease there was an express covenant not to transfer the demised property without the consent of the lessor. The property was sold in execution of a rent decree, the auction-purchaser in his turn transferring it to others :

Held: the express covenant in restraint of alienation was a covenant running with the land and therefore binding on the auction-purchaser. It bound not only the lessee but also assignees from him: 1923 *Cal* 679; *Williams* v. *Earle*, (1868) 3 *Q B* 739; *McEacharn* v. *Colton*, (1902) *A C* 104; *West* v. *Dobb*, (1869) 4 *Q B* 634, *Foll.*; *Goldstein* v. *Sanders*, (1915) 1 *Ch* 549, *Rel. on.* [P 494 C 2]

(b) Lease—Covenant in restraint of alienation—Transfer to original lessees—Forfeiture clause held still applied.

Under a lease with restraint of alienation the property was transferred to persons, whom the lessors had previousiy accepted as tenants :

Held: the covenant applied to a re-assignment to the original lessee and there was forfeiture: *McEacharn* v. *Colton*, (1902) *A C* 104 and *S. A. No.* 1468 *of* 1930, *Rel. on.* [P 494 C 2]

(c) Transfer of Property Act (1882), S. 114—Covenant in restraint of transfer in lease—Transferee original lessee—S. 114 is confined to forfeiture for non-payment of money and hence not applicable.

Where property in a lease with restraint on its alienation is re-assigned to original lessee, S. 114 cannot apply, as it is confined to forfeiture for non-payment of money. It is sufficient that the lessor insists upon his covenant. No one has a right to put him in a different situation: 1919 *Mad* 12; *Hill* v. *Barclay*, (1811) 34 *E R* 238, *Foll.*; 1920 *Mad* 312, *Ref.* [P 494 C 2; P 495 C 1]

(d) Lease—Lease with covenant in restraint of alienation—Landlord condoning breach on receipt of consideration—Estoppel held did not arise and landlords held not refrained from enforcing their right on subsequent occasion.

On one occasion the landlords condoned the breach of the covenant in restraint of alienation in a lease, and it was suggested that the landlords were estopped from asserting their right on any subsequent occasion :

Held: estoppel did not arise, and the mere fact that the landlords refrained from enforcing their right on one or more previous occasions, whether for consideration or not, did not amount to a surrender of their right to enforce it when a subsequent occasion arose. [P 495 C 1]

(e) Bengal Tenancy Act (8 of 1885), S. 155—Lease with covenant not to alienate—Transferee from lessee is not tenant and so not entitled to benefit of S. 155.

Section 155 enables the Court to relieve against forfeiture in a suit for the ejectment of a tenant on the ground inter alia that he has broken a condition on the breach of which he is, under the terms of a contract between him and the landlord, liable to ejectment. A transferee from a lessee who is bound by a covenant not to alienate is not a tenant and therefore is not entitled to the benefit of the section : 1917 *Cal* 236, *Rel. on.* [P 495 C 1, 2]

(f) Lease — Suit for ejectment — Original tenant not entering appearance nor appealing against decree for ejectment—Landlord held entitled to eject transferees from such tenant.

In a suit for ejectment by the landlord the original tenant, who was also a party, did not enter appearance and a decree for ejectment had been passed against which he had not appealed. The transferees from such tenant claimed that the landlord had no right to eject them :

Held: landlord was entitled to eject the transferees: 13 *C L J* 672 and 1917 *Cal* 236, *Foll.* [P 495 C 2]

(g) Deed—Construction—Jamognama reciting direction as to scale of nazrana—Landlords held not bound to accept nazrana in lieu of enforcing their right of forfeiture.

Where in the Jamognama of a certain year certain orders for the payment of nazrana point to a scale of nazrana, it does not imply that the landlords are bound to accept nazrana in lieu of enforcing their right of forfeiture. The document should be read as a whole and construed fairly. [P 496 C 1]

K. Hasnain, *N. K. Prasad* 2, *A. N. Lal* and *Rameshwar Prasad*—for Appellants.

P. R. Das, *S. M. Mullick* and *S. K. Mitra*—for Respondents.

Agarwala, J.—Second Appeal No. 702 of 1932 arises out of a suit by the lessors for recovery of possession on breach of a covenant not to transfer the demised property. In 1863 the ancestors of the plaintiffs, who were the proprietors of an 8 annas share in mauzas Pandepura and Dihri, granted a mukarrari lease of 7½ annas to Gouri Singh and Gobind. The interest of each of the lessees in the mukarrari was specified to be one-half. The lease contained a covenant by the lessees not to alienate the demised property without the consent of the lessors. Gouri Singh sold a 1-anna share to three persons in 1864 without the consent of the lessors. In 1899, however, the sons of the purchasers executed a Jamognama in respect of this 1-anna share in favour of the lessors, containing all the terms of the original grant of 1863. It is not disputed that one result of this was that the rent of the 1-anna share was separated from the rent payable for the remainder of the mukarrari property. In 1906 the purchasers sold the 1-anna share to defendants 1-7 without the consent of the lessors. Thereafter the latter sued defendants 1-7 for rent and, in execution of the decree obtained in that suit the 1-anna share which was purchased by defendant 8. On 23rd February 1925, defendant 8 re-sold his interest to defendants 1-7 by a sale-deed which was registered on 25th May 1925. Two years later defendants 1-7 instituted a suit for partition of the 1-anna share. This suit was decreed. Pending an appeal from the decree the lessors served on defendants 1-7 a notice alleging that their purchase was in contravention of the terms of the lease and demanding possession. The partition decree was confirmed in appeal. In the meanwhile, on 11th August 1928, the lessors instituted the present suit for recovery of possession. Defendant 8 did not enter appearance. The suit was decreed in the trial Court and this decision was affirmed in appeal. Defendants 1-7 have preferred this second appeal.

The Courts below held that the covenant in restraint of alienation was a covenant running with the land and, therefore, it was binding on defendant 8, the purchaser in execution of the rent decree, and on defendants 1-7 who had re-purchased from him. In 37 C L J 538 (1), Mukerjee and Chotzner, JJ., following (1868) 3 Q B 739 (2), (1902) A C 104 (3) and (1869) 4 Q B 634 (4), held that an express covenant not to transfer the demised property without the consent of the landlord is a covenant running with the land and, therefore, that it was enforceable against a person who purchased the lessee's interest in execution of a decree for rent obtained by the lessor against the lessee. In the present case, therefore, the covenant in restraint of alienation was binding on defendant 8, the auction-purchaser. A covenant running with the land binds not only the lessee but also assignees from him although they are not expressly mentioned: (1915) 1 Ch 549 (5).

It was, however, contended by the appellant that, inasmuch as the transfer to defendants 1-7 was a transfer to persons whom the lessors had previously accepted as tenants, it was not a transfer which brought the forfeiture clause into operation. This was negatived in (1902) A C 104 (3), where it was held that a covenant by a lessee, not to assign without the lessor's consent, applies to a re-assignment to the original lessee. This case was followed by Ross and Chatterji, JJ. in S. A. No. 1468 of 1928 which was decided on 13th June 1930. It was not contended that a covenant by a lessee not to assign without the landlord's consent implies that the landlord's consent will not be unreasonably withheld. The answer to this is that the landlord's consent was never asked for, so that there is no question of it being unreasonably withheld: see (1891) 1 Q B 417 (6). It was suggested, however, that in such a case the Court should relieve against forfeiture if in fact the transferee is a person to whom the landlord could not reasonably object. The

1. Saradakripa Lala v. Bepin Chandra Pal, 1923 Cal 679=74 I C 555=37 C L J 538.
2. Williams v. Earle, (1868) 3 Q B 739=37 L J Q B 231=9 B & S 740=19 L T 238=16 W R 1041.
3. McEacharn v. Colton, (1902) A C 104=71 L J P C 20=85 L T 594.
4. West v. Dobb, (1869) 4 Q B 634=38 L J Q B 289.
5. Goldstein v. Sanders, (1915) 1 Ch 549=84 L J Ch 386=112 L T 932.
6. Barrow v. Isaacs, (1891) 1 Q B 417 = 60 L J Q B 179=39 W R 338=64 L T 686=55 J P 517.

power of a Court of equity to relieve against forfeiture is reproduced in S. 114, T. P. Act, 1882, and is confined to forfeiture for non-payment of money. 42 Mad 654 (7), following (1811) 18 Ves 56 (8), at p. 64, where, with regard to the right of re-entry on breach of a covenant in restraint of alienation Lord Eldon said: "It is sfficient that the lessor insists upon his covenant; and no one has a right to put him in a different situation": see also 38 M L J 190=55 I C 781 (9).

It was also argued that as the landlords had recognized Gouri Singh's transferees on payment of a nazrana by them, it should be held that the object of the proviso for re-entry on breach of the covenant in restraint of alienation was merely to secure payment of a sum of money and, therefore, that the Court has power to relieve against the forfeiture. There is nothing in the terms of the lease to indicate that this was the intention of the parties, and it cannot be inferred that this was the intention from the fact that on a previous occasion the landlords condoned a breach of the covenant on receipt of consideration for so doing. It was suggested, however, that by this conduct 'the landlords' had waived the right to insist upon re-entering on breach of the covenant or were estopped from asserting their right. No question of estoppel can possibly arise and the mere fact that the landlords refrained from enforcing their right on one or more previous occasions, whether for consideration or not, does not amount to a surrender of their right to enforce it when a subsequent occasion arises.

The next point raised was with respect to the Bengal Tenancy Act, 1885. S. 155 of that Act enables the Court to relieve against forfeiture in a suit for the ejectment of a tenant on the ground inter alia that he has broken a condition on the breach of which he is, under the terms of a contract between him and the landlord, liable to ejectment. Even assuming that the lease in the present case is governed by the Act, S. 155 is of no assistance to the appellants unless he can show that he is a tenant of the respondents. A transferee from a lessee who is bound by a covenant not to alienate is not a tenant and, therefore, is not entitled to the benefit of the section, see 21 C W N 117 (10), where it was held that a purchaser in execution of a decree obtained against the lessee, the landlord not having recognized him as a tenant, is a trespasser, and, therefore, that S. 155 does not apply to a suit to eject him.

Lastly it was argued that unless the landlord proves his right to immediate possession he is not entitled to succeed in a suit for ejectment even against a trespasser. Reliance is placed upon the judgment of Suhrawardy, J. in 47 C L J 21 (11). The reasoning of the learned advocate for the appellants is that the landlords not having instituted within one year of the transfer a suit to eject the transferor, their right to re-enter is barred by Art. 1, of Sch. 3, Ben. Ten. Act, and, therefore, they have no right to immediate possession. In the case last referred to a similar contention was upheld. This decision was approved by Guha and Ghose, JJ. in 36 C W N 819 (12). In the first of these two cases the original tenant contested the suit and the second case was a suit for ejectment against the original tenant only. In the present case defendant 8 (the transferor) did not enter appearance in the suit and a decree for ejectment has been passed against him against which he has not appealed. In this respect the facts of the present case are similar to those in 13 C L J 672 (13), where the landlord was held entitled to eject the transferees, and which was approved by Sanderson, C. J. and Mookerji, J. in 21 C W N 117 (10). I would accordingly dismiss this appeal with costs. The facts of second appeals No. 1761 of 1932 are similar to those of Second Appeal No. 702 of 1932, and the questions of law which arise there are the same. This appeal must also be dismissed with costs.

Dhavle, J. — I agree. The learned

7. Krishna Shetti v. Pinto, 1919 Mad 12 = 50 I C 898=42 Mad 654=36 M L J 367.
8. Hill v. Barclay, (1811) 18 Ves 56=34 E R 238 11 R R 147.
9. Vittappa Kudva v. Durgama, 1920 Mad 312 =55 I C 781=38 M L J 190.
10. Dwarika Nath v. Mathura Nath, 1917 Cal 236=34 I C 833=24 C L J 40=21 CWN 117.
11. Ataharuddin Taluqdar v. Murari Mohan Dutt, 1928 Cal 193 = 107 I C 735 = 47 C L J 21.
12. Sm. Swarnamoyee Debya v. Afiraddi, 1932 Cal 787 = 139 I C 239 = 60 Cal 47 = 36 C W N 819.
13. Budhimanta Paramanik v. Sarat Chandra Banerjee, (1911) 13 C L J 672=6 I C 147.

advocate for the appellants has laid much stress inter alia on the recital in the Jamognama of 1899 that the Rai Sahibs passed orders for the payment of nazrana hasb sharah wo riwaj ke. But though this may point to a scale of nazrana, it does not by any means imply that the landlords were bound to accept nazrana in lieu of enforcing the forfeiture. We have to read the document as a whole and construe it fairly ; and when this is done, the meaning is perfectly clear and free from any reasonable doubt notwithstanding the criticism which has been levelled before us against particular words or expressions.

V.B.B./R.K. *Appeals dismissed.*

A. I. R. 1936 Patna 496

COURTNEY-TERRELL, C. J. AND DHAVLE, J.

(*Firm*) *Ramanand Ganpat Rai* — Appellants.

v.

Rakhal Mandal and *others* — Respondents.

Appeals Nos. 296 and 325 of 1934, Decided on 26th March 1936, from order of Dist. Judge, Manbhum, D/- 27th August 1934.

(a) Civil P. C. (1908), O. 21, R. 50—Ex parte decree against firm mentioning also individuals constituting it — Execution—Objection by partners *A* and *B* that they were not personally liable—*A* and *B* proceeding under O. 9, R. 13 to set aside ex parte decree — Proceeding dismissed on decree-holder contending that decree was against firm—Decree-holders held could not subsequently contend that decree was against individuals.

Decree-holders obtained an ex parte decree against a firm mentioning also individuals constituting it. In execution certain property was sold, but partners *A* and *B* objected that they were not personally liable. Subsequently *A* and *B* proceeded under O. 9, R. 13 to set aside decree which was passed ex parte. Decree-holders resisted the proceedings on the ground that the decree was against the firm. The proceedings were dismissed on ground that the decree was against the firm :

Held : that in view of what happened in the proceedings under O. 9, R. 13, it was no longer open to the decree-holders to contend that what they had was a decree against the individuals composing the firm, and not merely a decree against the firm itself and they not having applied under O. 21, R. 50, could not proceed against *A* and *B* personally. [P 497 C 2]

(b) Limitation Act (1908), Arts. 166 and 181 — Execution — Sale void being beyond Court's jurisdiction—Objection to such sale is governed not by Art. 166, but by Art. 181.

A sale, in execution, which is void as being entirely beyond the jurisdiction of the Court does not require to be set aside at all. Objection to such sale is governed not by Art. 166, but by the residuary Art. 181 : 1928 *Cal* 60, *Rel. on.* [P 497 C 2; P 498 C 1]

(c) Civil P. C. (1908), S. 11 — Execution—Doctrine of constructive res judicata does not apply to execution proceedings.

The doctrine of constructive res judicata as applied to execution proceedings is not governed by any specific provisions in the Civil Procedure Code, and may easily be carried too far. Hence it is not applicable to execution proceedings. [P 498 C 1]

G. P. Das—for Appellants.

A. B. Mukherji and *R. S. Chatterji*—for Respondents.

Dhavle, J.—These are appeals by the decree-holders. A decree was obtained against a firm mentioning also the eight individuals that constituted the firm. Execution was taken and a certain property was brought to sale and purchased by the decree-holders. Upon this judgment-debtor 1 and seven sons of judgment-debtor 2, who had died since the passing of the decree, objected that the property did not belong to the firm ; that the decree-holders had not obtained any order under O. 21, R. 50, making the partners of the firm personally liable and that the sale was accordingly without jurisdiction. This objection was disallowed by the learned Subordinate Judge, but was allowed on appeal by the District Judge and that gives rise to one of the two appeals before us. The other appeal arises out of another objection raised by judgment-debtor 1 and one of the sons of judgment-debtor 2, since deceased, to a fresh execution on the same grounds as were mentioned in connexion with the ex post facto objection to the sale. This objection also has been fully allowed by the District Judge though it was only allowed in part by the Subordinate Judge.

The first point raised before us on behalf of the decree-holder appellants is that the decree under execution was not a decree against the firm at all and that it was, therefore, unnecessary to obtain any order under O. 21, R. 50. In support of this contention the learned advocate has referred us to the plaint and decree and other papers, none of which is included in the paper book. If the matter had only rested there, however, the appellants' contention would have been irresistible; but it appears that at a later

stage judgment-debtors 1 and 2 applied under O. 9, R. 13, (as the decree had been passed ex parte against them) to have it set aside. This application was dismissed, but only on the finding that though they had not been individually served with summonses the decree was quite valid in view of the service of summons on defendant 4 who had been stated by the plaintiffs to be the manager of the business of the firm. The learned Subordinate Judge who dealt with the application further held that it would be

> open to defendants 1 and 2 to come under O. 21, R. 50, Civil P. C., in the execution stage to object to the attachment of their personal properties,

and that they could have no relief in the shape of the reversal of the decree already passed. This order was taken up in appeal, and, we understand, upheld on the same footing. The learned advocate for the appellants has laid stress on the fact that the application for re-hearing thus failed. But that does not accurately sum up the position at all. The ex parte decree as against these judgment-debtors was undoubtedly upheld, but upheld on the footing not that it was a decree against the eight individuals composing the firm, but that it was a decree against the firm itself, and that these judgment-debtors, as among the individuals constituting the firm, were to be protected by O. 21, R. 50, which in such cases requires a decree-holder to obtain the leave of the Court in the case of a decree passed against a firm to proceed against the individuals composing that firm. The learned advocate has laid stress on the observation of the learned Subordinate Judge that these two judgment-debtors were partners of the firm; but the decision substantially was that no individual liability had been brought home to them by the decree as it stood, and that this question was to be decided in the execution proceedings under O. 21, R. 50. It has been suggested by the learned advocate that in so holding the Courts acted without jurisdiction. It is obvious, however, that the application for re-hearing was resisted by the decree-holders and that on the footing that though the ex parte decree, if it was to be construed as a decree against individuals as distinguished from the firm constituted by these individuals and others would have had to be set aside, what they had obtained was a decree not against the individuals but against the firm.

The learned advocate as a matter of fact had to concede that the contention that what the decree-holders had really obtained was a decree against the individuals and not merely a decree against the firm was never advanced below until the matter came to this Court. It seems to me that in view of what happened in the proceedings under O. 9, R. 13, it is no longer open to the decree-holders to contend that what they have is a decree against the individuals composing the firm and not merely a decree against the firm itself. The learned advocate has also contended that if the decree is to be taken as a decree against the firm, the adjudication that is required under O. 21, R. 50, is to be found in the order on the application of judgment-debtors 1 and 2 under O. 9, R. 13. As I have already said, there are undoubtedly observations to that effect in the judgment of the learned Subordinate Judge, and also we understand in the appellate judgment, but their effect is, in my opinion, entirely nullified by the express reservation that it was open to these defendants to come under O. 21, R. 50.

The next point urged by the learned advocate is that the application attacking the execution sale is barred by limitation as it was made more than thirty days after the date of the sale. A number of rulings on this point were considered by the lower Courts, but it does not seem necessary to discuss them in detail. Art. 166, Lim. Act, does prescribe a period of thirty days from the date of the sale for applications under the Civil Procedure Code to set aside a sale in execution of a decree (including any such application by a judgment-debtor). The words included in brackets were added to the section by Act 1 of 1927, and the learned advocate for the decree-holders, has contended that the article now covers all applications made by judgment-debtors to set sales aside. This contention is perfectly correct in terms, but it does not seem to have much bearing upon the facts before us. It is true that the objection of the judgments-debtors prayed for setting the sale aside; but there is no dispute that a sale which is void as being entirely beyond the jurisdiction of the Court does not require to be set aside at all, as was

indeed pointed out by Page, J. in 55 Cal 96 (1).

For the reasons given by that learned Judge, though the facts before him were different, it seems clear that the limitation applicable to an objection of the kind that we have before us is that given not in Art. 166 but in the residuary Art. 181. There is no dispute that from this point of view the objection was not time barred. This is the view that was taken by the learned District Judge, and, in my opinion, it is the correct view. The learned advocate has also urged what he called constructive res judicata in that one of the judgment-debtors had made an objection to the execution at an earlier stage and is not shown on that occasion to have advanced the contentions which he urged in connection with the present applications; but the doctrine of constructive res judicata, as applied to execution proceedings, may easily be carried too far. The matter is not governed by any specific provisions in the Civil Procedure Code, and as the learned District Judge has pointed out the previous objection appears to have been filed not by judgment-debtor 1 at all but only by the other judgment-debtor. As to the liability of the sons of judgment-debtor 2, the learned advocate has frankly conceded that the prayer that was made on behalf of the decree-holders in the second execution case, namely the warrants, is entirely untenable against the sons of the deceased judgment-debtor. The result, in my opinion, is that the appeals both fail. I would dismiss them with costs.

Courtney-Terrell, C. J.—I agree.

D.S./R.K. *Appeal dismissed.*

1. Monmatha Nath Ghose v. Lachmi Debi, 1928 Cal 60=105 I C 65=46 C L J 579=55 Cal 96.

A. I. R. 1936 Patna 498

MOHAMAD NOOR AND ROWLAND, JJ.

Barhamdeo Singh — Defendant — Appellant.

v.

Kari Singh—Plaintiff—Respondent.

Appeal No. 1443 of 1932, Decided on 5th February 1936, from appellate decree of Dist. Judge, Monghyr, D/- 9th July 1932.

(a) Promissory Note—Suit on note written on one of leaves of bahi—If genuineness of note is proved, regular course of business regarding bahi is immaterial.

Where plaintiff sues on a hand-note which is written on one of the leaves of his bahi, the suit must be decreed if the hand-note is proved to be genuine. The question of the book not having been kept in the regular course of business is immaterial. [P 498 C 2]

(b) Promissory Note—Consideration proved but different from that mentioned in note—Suit is not liable to dismissal on this ground.

Under S. 118, Negotiable Instruments Act, there is a presumption that a hand-note was given for consideration. If a hand-note mentions one kind of consideration but it is found that there is a consideration of a different nature, the suit is not liable to be dismissed for this reason. [P 498 C 2, P 499 C 1]

Ganesh Sharma—for Appellant.

K. P. Jayaswal and *G. P. Singh* — for Respondent.

Mohamad Noor, J.—This appeal has arisen out of a simple money suit based on a hand-note for Rs. 1,600 said to have been executed by the defendant on one of the leaves of a bahi. The trial Court dismissed the suit, holding that the hand-note was not genuine. On appeal by the plaintiff the learned District Judge has come to a different conclusion and has decreed the suit. The appeal seems to be concluded by the findings of fact. There is no question which can be gone into in a second appeal. Two points were urged on behalf of the appellant. One was that the suit ought not to have been decreed, as according to the learned District Judge the bahi, on one of the leaves of which the hand-note was executed, was not kept in the regular course of business. It is obvious that the plaintiff's suit was not based upon any account entered into the bahi but on the basis of the hand-note, and the hand-note alone. Once the hand-note is proved to be genuine, the question of the books not having been kept in the regular course of business is immaterial.

The next question urged was that the hand-note recites that the consideration passed in cash. This has not been accepted by the learned District Judge. He has held that in fact the consideration for the hand-note was the previous dues payable by the defendant to the plaintiff. The learned Advocate has contended that on this finding the suit ought to have been dismissed. The suit, as I have said, is based upon a hand-note, and under S. 118, Negotiable Instruments Act, there is a presumption that it was given for consideration. In this case while the hand-note mentions one kind of consideration the finding of the learned District

Judge is that there was a consideration of a different nature, namely the previous dues. I do not think that the suit was liable to be dismissed for this reason. I would dismiss this appeal with costs.

Rowland, J.—I agree.

K.S./R.K. *Appeal dismissed.*

---

* A. I. R. 1936 Patna 499

MOHAMAD NOOR, J.

Gauri Shanker Sahay—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 276 of 1936, Decided on 24th June 1936, from order of Magistrate, 1st Class, Chapra, D/- 23rd March 1936.

*** Railways Act (1890), S. 108—"Reasonable and sufficient cause"—It is question of fact — No hard and fast rule — Accident taking place in running train through neglect of passenger—Even then he is entitled to pull alarm signal for reasonable and sufficient cause.**

Section 108 uses the words "reasonable and sufficient cause." "Reasonable and sufficient cause" is a question of fact to be determined according to the circumstances of each particular case. No hard and fast rule can be laid down. Where an accident takes place in the train itself while it is running, even through the fault or neglect of the passenger himself, he is entitled to pull the alarm signal if there is reasonable and sufficient cause for so doing: 1926 *Bom* 288, *Disting.* [P 499 C 2]

A passenger was standing near the door of the compartment on account of great rush and his thali and gold kantha worth about Rs. 125 fell down while the train was running and he pulled the chain:

Held: that there was reasonable and sufficient cause for using the chain. [P 501 C 1]

S. N. Sahay and *Murli Manohar Sinha*—for Petitioner.

Order.—The petitioner Gauri Shanker Sahay has been convicted by a Second Class Magistrate of Chapra under S. 108, Railways Act, and sentenced to pay a fine of Rs. 10 for pulling the chain of the alarm signal of a third class compartment while the train was running between Chupra Kutcheri and Goldinganj Railway Stations of the Bengal and North Western Railway. His appeal having been dismissed by the Deputy Magistrate of Chapra with appellate powers, he has come up in revision.

The petitioner admitted having pulled the chain, but justified his act by alleging that there was great rush of the passengers in the compartment and he could not get a seat. He was near the door of the compartment when in consequence of the melee his thali and gold kantha fell from the train and therefore he pulled the chain. When the chain was pulled the train was stopped and was taken back to the place where the articles had fallen down. They were then picked up by the petitioner. The prosecution case was that the story of the petitioner so far as it relates to the dropping down of the thali was correct, but that the gold kantha had not fallen down and this part of his case was false. Both the Courts below have accepted the prosecution case and have disbelieved the fact that the gold kantha had fallen down. The trying Magistrate was of opinion that as the thali (plate) had dropped through his own neglect the petitioner was not justified in stopping the train, while the Court of appeal has held that the falling down of a thali worth Rs. 1-8-0 only was not a sufficient cause for pulling the chain. The view of law taken by the learned trying Magistrate is, in my opinion, wrong. S. 108, Railways Act, uses the words "reasonable and sufficient cause. "Reasonable and sufficient cause" is a question of fact to be determined according to the circumstances of each particular case. No hard and fast rule can be laid down. It cannot be held that if an accident takes place through the fault or neglect of a passenger himself he is not entitled to pull the alarm signal. The learned Magistrate has referred to a decision of the Bombay High Court in 95 I C 58 (1).

The fact of that case was different. There a passenger had left behind his coat containing valuables on the platform and he stopped the train to take it back. This is quite a different thing from an accident happening in the train itself while it is running. The unreasonableness of the view taken by the learned trying Magistrate will be apparent if I give a few examples. Take for instance the case of a child falling from a train through the neglect of his mother. Can it be said that she will not be justified in taking steps to stop the train? Take a second case. A passenger boards a train just when it is moving and is standing on the foot board. There is no door at that stop to permit him to enter into the com-

1. Emperor v. Kaikobad Sorabji, 1926 Bom 288=95 I C 58=27 Cr L J 730=28 Bom L R 486.

partment. A passenger travelling in the compartment on the footboard of which this man is standing realising the danger of his falling down, pulls the chain. Can the man who pulled the chain be held liable? It is needless for me to multiply instances in which, in my opinion, though an accident has taken place through the fault of a passenger himself, he will be justified in pulling the chain. I, however, agree with the learned Magistrate in the Court of appeal that in this particular case the pulling of the chain was unreasonable if it was only to save a thali worth Rs. 1-8-0 and had the findings of the Courts below that the kantha had not fallen been based upon some evidence, I would not have thought it fit to interfere. In my opinion, the findings are based upon no evidence.

The fact gathered from the evidence of the witnesses is that when the train was stopped the guard of the train (P. W. 1) went to the compartment where the petitioner was and asked him the reason of his stopping the train. He is said to have stated that a "silver thali had falled down." Whether the petitioner said that his thali was of silver has not been discussed by either of the Courts below and is, in my opinion, not believable. It has apparently been added to make the petitioner's case absurd. To proceed with the story: the train was taken back to the place where, as I have said, the articles had fallen down. The guard (P. W. 1) in his examination-in-chief seems to have deposed that the fallen articles were picked up by the petitioner in his presence and that it was only a phool thali. In cross-examination he has given a go-by to this story and it appears that not the guard (P. W. 1), but the assistant guard, who has not been examined in this case was with the petitioner when the latter picked up the article which had fallen down. Therefore, there is no evidence to show that the story of the petitioner that his gold kantha had fallen down is false, as nobody on behalf of the prosecution who had seen the petitioner picking up the fallen articles has been examined. On the other hand, the Assistant Station Master of Goldinganj has deposed that the petitioner when made over to him then and there stated that his gold kantha had also fallen down and that he in fact produced it from his pocket. It may be that the thali being a bigger thing was in the hand of the petitioner and he had put the kantha in his pocket when the guard (P. W. 1) reached the spot. The learned Magistrate has in my opinion, needlessly commented upon the evidence of the Assistant Station Master and the prosecution have unreasonably been allowed to declare this witness hostile and permitted to cross-examine him. There is nothing to show that he was in any way partial towards the accused.

The only reason which the learned trying Magistrate has given for not believing this witness is that he treated the petitioner as a passenger, and not as an accused. I am unable to understand what other treatment the learned Magistrate expected the Assistant Master to mete out to the petitioner. The Assistant Station Master says that he allowed him to sit in the verandah while he himself was working in the room. The petitioner was accused of a trifling offence punishable with a fine of Rs. 50 only. I do not think the Assistant Station Master would have been justified in treating him as a criminal and putting him into trouble. The only thing which the Assistant Station Master had to see was that the petitioner did not abscond. Having satisfied himself in that respect he was perfectly justified in treating him with courtesy and consideration. I regret to say that the evidence of the guard (P. W. 1) is not satisfactory and I am surprised to find that the learned Magistrate has relied upon him. His evidence is inconsistent, as I have pointed out. In his chief he claimed that the fallen articles were picked up in his presence, but in cross-examination he said that it was done in the presence of the Assistant Guard and that he reached the spot some time later and saw a thali only. This witness married a second time in village Nawagaon from where the petitioner comes. He knew the petitioner from before. It appears that in connexion with the second marriage of the witness the people of Nawagaon created some trouble and in fact an order under S. 144, Criminal P. C., was issued against this witness, his father and brother prohibiting him from marrying or taking part in the marriage of the girl. In disobedience of the order he did marry, with the result that he was prosecuted under

S. 188, Penal Code, and the prosecution was withdrawn on his paying a certain donation to the Jubilee Fund. No doubt, this witness has denied that the petitioner was one of those persons who had taken part in stopping his marriage ; but reading the evidence as a whole I am not prepared to place much reliance upon his evidence.

In short, in my opinion, the finding of of the Courts below that only the thali had fallen down from the train, and not the kantha is based upon no evidence whatsoever. The Courts below have disbelieved the story of the petitioner on the ground that it was unlikely that the kantha could have fallen down. I do not consider the story to be so improbable. The guard has made another unbelievable statement. He has said that there was no rush, but he admits that it was a marriage season and lagan time. Anybody who has experience of trains knows the condition of third class compartments during that season. Apart from this there is the evidence of a defence witness who has sworn that there was a great rush in the compartment, that the petitioner got into it just at about the time when the train was leaving and some articles of his fell down and that he at once gave out that his thali and kantha had fallen down.

I think there is reason to believe that the petitioner's kantha had also fallen down and that it was worth Rs. 125. Under the circumstances I am not prepared to hold that the pulling of the chain was unreasonable and without sufficient cause. I would, therefore, set aside the conviction and sentence and direct that the fine if paid be refunded to the petitioner.

R.W./R.K. *Conviction set aside.*

A. I. R. 1936 Patna 501

VARMA, J.

Bhubneshwar Prashad—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 325 of 1936, Decided on 14th July 1936, from order of Sess. Judge, Bhagalpur, D/- 8th June 1936.

Criminal P C. (1898), S. 242—Court must comply with both parts of S. 242 and should indicate in order sheet that it has done so—Non-compliance with provisions of S. 242 vitiates trial.

Non-compliance with the provisions of S. 242 vitiates the trial. The Magistrate must comply with both the parts of S. 242. He must explain the substance of the charge to the accused and also ask him whether he pleads guilty to the charge or not and should indicate in his order sheet that he has done so although a detailed note of the proceedings is not necessary : 1927 *Cal* 196, *Rel. on* ; *Case law discussed.* [P 502 C 1,2]

Yasin Yunus and *K. P. Sukul*—for Petitioner.

Govt. Pleader—for the Crown.

Order.—The petitioner Bhubneshwar Prashad who at the time of the occurrence was a mukhtar practising at Monghyr has been convicted under S. 47 (a), Excise Act, and sentenced to pay a fine of Rs. 200, in default to undergo six months' rigorous imprisonment by a Magistrate of the First Class of Bhagalpur. There were two other accused with him who were convicted under the same section but sentenced to six months' rigorous imprisonment each. On appeal the learned Sessions Judge confirmed the conviction and the sentences passed upon the various accused. Bhubneshwar Prashad, mukhtar, alone has come up in revision before this Court. Mr. Yasin Yunus appearing on behalf of the petitioner has taken me through the evidence in the case to show that his client is not guilty of the offence. He has also raised a point of law and that is that the provisions of S. 242, Criminal P. C., were not complied with. In view of the order that I propose to pass it is not necessary for me to go into the various discrepancies and the criticisms advanced by Mr. Yunus. When the rule was issued by Noor, J. he drew the attention of the Magistrate particularly to this ground taken in the petition for revision. The learned Magistrate has sent an explanation which runs as follows :

The provision of S. 242, Criminal P. C., was duly complied with. The particulars of the offence were stated to the accused.

While forwarding this explanation of the Magistrate the learned District Magistrate has made the following remarks :

I have the honour to forward the original record of the case and to say that the Magistrate reports that he complied with the provisions of S. 242, Criminal P.C., but it is unfortunate he did not record the question put and the answers given in writing. His report on the point is enclosed. I have nothing further to add.

Looking at the order-sheet of the learned Magistrate it appears that the report of the Excise Officer was received on

18th December 1935 and on the third date the charge-sheet was received and the case was transferred to Mr. S. N. Lal, the gentleman out of whose judgment this petition arises. The fourth order dated 8th January 1936 runs as follows :

Not a single prosecution witness present. Summon them for 25th January 1936. The accused on bail of Rs. 250 each. They plead not guilty.

Now S. 242 runs as follows :

When the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked if he has any cause to show why he should not be convicted, but it shall not be necessary to frame a formal charge.

Now, from the order sheet it appears that only the second part of S. 242 has been complied with, if at all ; that is the accused was asked if he pleaded guilty to the charge or not and the petitioner pleaded not guilty. There is nothing in the record to indicate that the substance of the charge was explained to the petitioner which is required by the first part of S. 242. The Magistrate in his explanation says that the particulars of the offence were stated to the accused. He might have done so, but it would have been better if he had indicated in the order-sheet that both parts of the section were complied with which would have prevented the petitioner from raising this point of law. It is not necessary to record the whole of the conversation that passed between the Magistrate and the accused but there must be some indication in the record as to what has been done and from the order-sheet in this case it appears that the accused merely pleaded not guilty to the charge whatever it was and we do not know what was the question put to the accused. The case in 54 Cal 359 (1) is an authority for the proposition that non-compliance with the provisions of S. 242 vitiates the trial.

The learned Government Pleader has relied upon various decisions of other Courts which require to be noticed. The first case relied upon is 33 Cr L J 938 = 1932 Nag 127 (2). This was a case in which it appears from the judgment that the Court was uncertain whether the Magistrate did omit to mention to state the particulars of the offence to the accused. The records contain no note of the particulars of the offence being mentioned to the accused and there it was held that it was a mere irregularity. The learned Judge further referred to the case in *Abdul Rahman* v. *Emperor* (3) and was of opinion that perhaps the decision in 54 Cal 359 (1) would have been different if the attention of their Lordships were drawn to the decision of the Judicial Committee of the Privy Council in *Abdul Rahman* v. *Emperor* (3). Ultimately the case was decided on the ground that it was a mere irregularity, and not an illegality, which was curable by Ss. 535 and 537, Criminal P. C.

The next case is 1934 Nag 258 (4). That was a case in which the point raised was that the lower Court did not comply with S. 242, Criminal P. C., but the judgment shows that the order-sheet in that case ran as follows: "Particulars of the offence explained to the accused. They pleaded not guilty." It is exactly this point that I have been emphasizing in the earlier portion of my judgment that if the Magistrate noted that the particulars of the offence were explained to the accused, then there was nothing to be said and, as I have said, the Magistrate ought to have indicated that both parts of S. 242 were complied with, although a detailed note of the proceedings was not required to be recorded in the order-sheet showing that the first portion of the provisions of S. 242 as well as the second portion of S. 242 were complied with. Therefore this case does not help the prosecution very much.

Now it is curious that the latter case of the same Court did not take its stand on that ground because although they referred to this case they really did go upon this: that S. 242 does not say that the Magistrate shall make a record of what he stated to the accused in explaining the offence. It is sufficient if he has shown that he had orally explained the particulars of the offence to the accused and asked him to show cause. The latter decison, as I have said, of the Nagpur Court did not take its stand upon the view of law taken in the earlier decision in 1932 that the whole thing was curable by Ss. 535 and

1. Gopal Krishna Saha v. Mati Lal Singh, 1927 Cal 196=99 I C 411=28 Cr L J 155=31 C W N 167=54 Cal 359.
2. Lahani v. Khushal, 1932 Nag 127=1932 Cr C 678=140 I C 113=33 Cr L J 938=28 N L R 163.
3. 1927 P C 44=100 I C 227=28 Cr L J 259=54 I A 96=5 Rang 53 (P C).
4. Jagannath Singh v. Emperor, 1934 Nag 258 =1934 Cr C 1297=153 I C 427.

537, Criminal P. C. The case in 42 Mad 787 (5) was an appeal against acquittal on behalf of the Crown. The accused was charged with an offence under S. 162 (c), Madras Local Boards Act (5 of 1884) in that he had erected without permission a masonry pial in the public street in front of his house and that he had failed to remove the same within the time allowed by the notice issued to remove the same by the Union Chairman of the locality. The accused pleaded that the notice issued by the Union Chairman was not a legal one. The Court of first instance found that the Chairman was authorized by the President of the Taluka Board under S. 98 (2), Local Boards Act to issue notices to remove encroachment on public roads, that the same was valid and that the accused was therefore guilty. On appeal against the conviction by the accused the Sub-Divisional Magistrate acquitted the accused holding that the delegation of the duty to issue the notice to anyone was not valid. Thereupon on that view of the law the conviction was set aside by the appellate Court. On appeal their Lordships upheld the view taken by the trial Court so far as the authority to delegate the power was concerned. Incidentally I find a paragraph in the judgment which runs as follows:

> The case against the accused being a summons case no charge was necessary and as the accused was represented by a vakil, he must have been aware of the charge against him and could not have been prejudiced by the Magistrate's omission to explain it to him.

How this point arose it is not very clear to me from the report that has been placed before me. So it is not safe to express one's opinion one way or the other on the strength of that paragraph in the judgment. In the result even if it be held that the Nagpur decision was different from that of the Calcutta view, I would prefer the Calcutta view according to the practice of this Court to the Nagpur view and would set aside the conviction and sentence passed upon the petitioner and remand the case to the trial Court to be disposed of in accordance with law.

R.M./R.K. *Conviction set aside.*

5. Public Prosecutor v. Shankaralinga Moopan, 1919 Mad 52=50 I C 1003=20 Cr L J 395= =42 Mad 787=37 M L J 92.

A. I. R. 1936 Patna 503

DHAVLE, J.

Sankatha Rai—Petitioner.

v.

Khaderan Mian—Opposite Party.

Criminal Revn. No. 124 of 1936, Decided on 6th April 1936, from order of Dist. Magistrate, Shahabad, D/- 11th January 1936.

Criminal P. C. (1898), Ss. 236, 237 and 403 (2)—Accused committing offences under Ss. 160 and 323, Penal Code, in same transaction—Acquittal under S. 160 does not bar subsequent prosecution under S. 323.

Where accused, along with complainant, committed an offence under S. 160, Penal Code, and also committed offence under S. 323, Penal Code, by causing hurt to the complainant in the same incident, the accused while being tried under S. 160, cannot be charged under S. 323 in view of S. 236, Criminal P. C. The offence of causing hurt in the course of an affray is an entirely distinct offence from the affray itself on the ground among others that the affray is committed not alone by the party causing the hurt and the party receiving the hurt. In such case, the matter is governed not by sub-s. (1) but by sub-s. (2), S. 403, Criminal P. C., and the acquittal under S. 160, Penal Code, does not bar subsequent prosecution under S. 323: 1925 *All* 299, *Rel. on*; 1921 *Pat* 22 and 1930 *Pat* 26, *Expl.* [P 504 C 1]

J. N. Sahai and *Tarkeshwar Nath*—for Petitioner.

L. N. Singh and *M. Rahman*—for Opposite Party.

Order.—The petitioner in revision has been convicted of an offence under S. 323, Penal Code, for hurt caused to one Khaderan and sentenced to a fine of Rs. 30 with 2 months' rigorous imprisonment in default. It appears that along with Khaderan and 3 other persons he had in this very connection been prosecuted by the Police for an offence under S. 160, Penal Code. In that trial the petitioner and Khaderan were both acquitted, and I understand that the reason for the petitioner's acquittal was the view of the Magistrate that the petitioner was away in Benares. It has been urged by the learned Advocate for the petitioner that that trial on the charge of affray and the finding that the petitioner was away in Benares are a bar to the conviction of the petitioner under S. 323 in the same connection. The learned Advocate has endeavoured to bring his plea within sub-s. 1 of S. 403 which provides that:

> A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in

force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under S. 236, or for which he might have been convicted under S. 237.

But can it really be said in the present case that when the petitioner and others were being tried for the affray, a charge under S. 323 could also have been framed against the petitioner and tried? The terms of Ss. 236 and 237, Criminal P. C., make it clear that the answer must be in the negative. What is more, it has been pointed out by the learned Advocate who appears for the other side that Khaderan himself being under trial at that time, the most direct evidence of the offence under S. 323 would have been necessarily wanting in that case. Precisely the same question was considered by Mukerji, J. in 47 All 284 (1) where the learned Judge pointed out how the offence of causing hurt in the course of an affray in the public street is an entirely distinct offence from the affray itself, on the ground among others that the affray is committed not alone by the party causing the hurt but by both parties, namely the party causing the hurt and the party receiving the hurt. Where the two offences are connected with each other in that manner, the matter is governed not by sub-s. 1 but by sub-s. 2, S. 403, Criminal P. C., and this sub-section definitely provides for a separate trial of the second offence. The learned Advocate has referred to 2 P L T 31 (2), a case in which Jwala Prasad, J. (sitting singly) held that the principle of autrefois acquit applied to offences under S. 338, Penal Code, and S. 16, Motor Vehicles Act, and observed that the petitioner before him could not be tried a second time on the same facts cognate to or involved in the offence with which he was previously charged. The observation is of somewhat general character, and the matter has to be decided on the wording of sub-s. 2, S. 403 and of sub-s. 1, S. 235 which is referred to in the former sub-section. Plainly we have here a series of acts so connected together as to form the same transaction in the course of which two distinct offences, one under S. 160 and another under S. 323, were committed.

1. Emperor v. Ram Sukh, 1925 All 299=86 I C 64=26 Cr L J 688=47 All 284=23 A L J 8.
2. Maksuddan Misri v. Emperor, 1921 Pat 22=59 I C 207=22 Cr L J 63=2 P L T 31.

The learned Advocate for the petitioner also cited 11 P L T 722 (3) which contains an exposition of the English Common Law and S. 403. But it is difficult to see anything in the decision that goes really to help the petitioner. As the learned Chief Justice pointed out in that case, the second trial was not barred because "the petitioner was never in peril of punishment and cannot rely on the plea of autrefois convict" in respect of the offence that was tried on the latter occasion. It does not seem necessary to refer to several other cases to which reference has been made at the Bar because it is clear on the wording of the provisions of the law already referred to that we have here a case of distinct offences coming within sub-s. 2 of S. 403 and not a case of offences coming within S. 236 or S. 237 of that Code. The learned advocate has also urged that the petitioner ought at least be given the benefit of the doubt in view of the fact that the Magistrate who tried the case under S. 160, Penal Code, accepted the petitioner's alibi at Benares. But the evidence on which that Magistrate accepted the plea was not before the Magistrate who tried the case under S. 323. The conviction in the present case must, of course, be based on the evidence adduced in this case. Whether the acquittal of the petitioner in the case of affray was or was not justified by the evidence before the Magistrate is not really for consideration in the present case, not that I have any desire to throw any doubt upon it. But that case must be treated as entirely separate from the present case, and I do not see how the acceptance of the petitioner's plea of an alibi in that case can be at all used in the present case. It seems to me that that consideration ought to be entirely excluded in the present case. In my opinion the conviction of the petitioner cannot be interfered with on the two grounds that have been urged before me. The petition in revision is accordingly dismissed.

D.S./R.K. *Petition dismissed.*

3. Babulal Mahton v. Ram Saran Singh, 1930 Pat 26=1930 Cr C 2=117 I C 625=30 Cr L J 806=9 Pat 585=11 P L T 722.

A. I. R. 1936 Patna 505

WORT, AG. C. J. AND DHAVLE, J.

Mahabir Das—Plaintiff—Appellant.

v.

Sadho Choudhuri and *another*—Defendants—Respondents.

Appeal No. 905 of 1935, Decided on 23rd April 1936, from decision of Dist. Judge, Monghyr, D/- 18th September 1935.

Civil P. C. (1908), O. 41, R. 11—Elaborate questions of fact and also question of law falling to be decided—Such case calls for appellate judgment—Court should not dismiss appeal summarily.

Some elaborate questions of fact and also a question of law as to whether the Mahant had power to make certain grants fell to be decided and the appellate Court dismissed the appeal summarily under O. 41, R. 11:

Held: that in these circumstances the case was one where appellate judgment was called for and therefore the appellate Court was wrong in dimissing it summarily under O. 41, R. 11: 1934 *Pat* 341, *Disting.* [P 505 C 2]

A. B. Mukharji and *D. C. Varma*—for Appellant.

Sarju Prasad and *Ramnandan Prasad*—for Respondents.

Wort, Ag. C. J.—This is an appeal from an order of the District Judge of Monghyr dismissing summarily under O. 41, R. 11, an application by the plaintiff to appeal from the decision of the Subordinate Judge of Monghyr, in an action in which the plaintiff questioned the validity of certain alienations, or to be more exact leases granted to the defendants by a former mahant. It would appear that the plaintiff was the chela of the Guru Mahant Jagannath Das, shortly before whose death disputes arose between the plaintiff and the mahant. These disputes appear to have been settled by an ekrarnama under which the succession to the asthal was granted to the plaintiff. The former mahant died in November 1931, and shortly after that disputes began to arise between the persons who had been settled on the land in dispute, the settlement to which I have just referred, with the result that certain proceedings were brought under S. 145 Criminal P. C., which were decided in favour of those persons. Hence the suit out of which this appeal arises. One of the questions which has been argued before us is that the appeal is not competent and in support of this argument, reliance is placed upon the decision of the learned Chief Justice and Varma, J. in 13 Pat 540 (1). There, under the revisional powers of this Court, a question was raised as to whether a Judge dismissing an appeal summarily under O. 41, R. 11 was refusing to exercise his jurisdiction by refraining to state the views which he held of the case in a formal judgment. The decision of the Court was against that contention; but in the course of his judgment, the learned Chief Justice made this statement:

> In so far as the Courts in this province are concerned, there is, so far as I know, no practice of requiring lower appellate Courts to write judgments in support of orders under O. 41, R. 11. There is no appeal from such orders and in dealing with such an order under a petition for revision the High Court should merely examine the matter presented to the lower appellate Court.

It was upon that observation that Mr. Sarju Prasad, appearing on behalf of the respondents, placed reliance for his contention that the appeal before us is not competent. In my judgment, however, this is not a case in which we could properly decide that question having regard to the view which I take of the order of the learned District Judge. It will be seen from a perusal of the judgment of the trial Court that somewhat elaborate questions of fact fell to be decided, and also a question of law, perhaps not quite so serious, as to whether the mahant had power to make the grants to which I have referred, assuming for the purpose of that point that grants had in fact been made. But that rather indicates the seriousness of the step which the learned District Judge took in dismissing the application summarily. The matter is, as I have indicated, very largely a question of fact over which this Court has no jurisdiction in second appeal and it is somewhat surprising in the circumstances, therefore that the learned Judge took the course which I have stated he adopted. In the circumstances the case seemed to be one where an appellate judgment was called for. I think therefore that the learned Judge was wrong in dismissing it summarily. As already pointed out, this is a second appeal to this Court. But having regard to the view which I take of the order of the learned Judge, and having regard to the

1. Makhu Sahu v. Kamta Prasad Sahu, 1934 Pat 341=150 I C 817=13 Pat 540=15 P L T 293.

fact that I do not propose to decide the question of whether a second appeal lies in a matter of this kind, I propose to deal with this appeal as an application in revision under S. 115, Civil P. C. Doing so in no way conflicts with the decision of the Division Court presided over by the learned Chief Justice to the effect that it was unnecessary for the learned Judge to express reasons for dismissing a case summarily under O 41, R. 11, Civil P. C. Treating this case as a rule under S. 115, I make the rule absolute and direct that the case be remanded to be heard and determined according to law. Hearing fee three gold mohurs.

Dhavle, J.—I agree.

D.S./R.K. *Case remanded.*

A. I. R. 1936 Patna 506

ROWLAND AND VARMA, JJ.

Lal Babu—Decree-holder—Appellant.

v.

Rang Bahadur Singh — Judgment-debtor—Respondent.

Appeal No. 313 of 1935, Decided on 24th July 1936, from appellate order of Dist. Judge, Patna, D/- 14-9-1935.

(a) Civil P. C. (1908), Ss. 47, 151, O. 32, R. 7 (2), O. 47, R. 1—Adjustment of decree effected by next friend of minor decree-holder, during execution proceedings, without sanction of Court sought to be set aside —S. 47 bars fresh suit—Proper remedy is by application for review or by invoking inherent jurisdiction of Court.

Where an order recording a compromise or an adjustment of a decree effected by next friend of a minor, without the sanction of the Court, during the execution of a decree in favour of the minor, is sought to be set aside on the ground that compromise has been obtained by fraud, S. 47 bars a fresh suit for setting aside the adjustment and the proper remedy is by an application for review or by invoking the inherent jurisdiction of the Court. Such an application comes under S. 47 and the Court has power to take action under S. 151 independently of O. 47, R. 1: 1920 *Pat* 750 and 1918 *Cal* 551, *Rel. on.* [P 507 C 1; P 508 C 1]

(a) Civil P. C. (1908), O. 32, R. 7—Powers of next friend acting for minor are not wider after decree—O. 32, R. 7 or principle therein applies to agreements in execution proceedings.

The powers of a next friend acting for a minor in the course of a suit are not wider after the decree than before it. O. 32, R. 7, or at any rate the principle embodied in it, is applicable to agreement in execution proceedings: 1933 *Mad* 456 and 1920 *Pat* 750, *Rel. on.* [P 507 C 2]

K. P. Jayaswal and *Rajeswari Prasad* —for Appellant.

K. Husnain and *G. P. Singh* — for Respondent.

Rowland, J.—The appellant, Lal Babu was the holder of a decree for money. The decree was obtained in a suit in which Lal Babu, who is a minor, appeared through his maternal grandfather as his next friend and a decree was passed for Rs. 2,366-8-0. The same next friend acting for the minor decree-holder put the decree in execution and during the pendency of that execution a petition was presented to the Court apparently signed by the judgment-debtor and also by the next friend on behalf of the minor decree-holder reporting to the Court that the claim and decree had been satisfied by mutual agreement on the judgment-debtor executing in favour of the decree-holder a certain sale deed. On this petition the Court passed an order under O. 21, R. 2, Civil P. C., directing satisfaction of the decree to be noted and striking off the execution. Thereafter an application was presented on behalf of the minor through the same next friend praying to the Court to vacate the above order, to set aside the entry of satisfaction and to restore the execution proceeding. At the hearing of this application Dhanukdhari denied that there had been any agreement between him and the judgment-debtor to accept that sale deed in full satisfaction, denied that he had signed the compromise petition and alleged that a fraud had been practised on him. It was further stated that the sanction of the Court had not been taken to the compromise and adjustment of the decree and that the arrangement was against the interest of the minor. The Subordinate Judge did not record a definite finding as to the genuineness of Dhanukdhari's signature, but held that assuming it to be genuine it must have been obtained by misrepresentation; he found in favour of the applicant on the remaining points and allowed the application in face of objections by the judgment-debtor both on the facts and on the question of law.

The judgment-debtor appealed to the District Judge who set aside the finding of the Subordinate Judge that there had been deception practised against the next friend of the minor. The District Judge found—and it is not disputed—that no consent of the Court had been taken to adjustment of the decree and he expressed no opinion as to whether the alleged agreement and adjustment was against the interest of the minor. In his opinion the

procedure followed in making this application was incorrect, the proper remedy being by a separate suit. He reversed the decision of the Subordinate Judge and the result is the present appeal. In O. 32, R. 7 (2), Civil P. C. it is indicated that an agreement or a compromise entered into without the leave of the Court with reference to a suit in which a minor is concerned is voidable against all parties other than the minor; and the District Judge relied on the word "voidable" for the proposition that such an agreement or compromise is not void.

The proposition may be conceded: it is established by the authority in this Court in 2 Pat 538 (1) that a decree passed on such a compromise will stand until vacated in a proper proceeding. It may be that to set aside a compromise decree in a suit the proper remedy is a separate suit; but what we are dealing with here is an adjustment of a decree in the course of execution proceedings, and S. 47, Civil P. C., reserves for determination by the Court executing the decree and not by a separate suit all questions between the parties relating to the execution, discharge or satisfaction of the decree. Therefore, the view of the District Judge cannot correctly apply to the facts of this case. It is clearly pointed out in 5 Pat L J 379 (2) that S. 47 bars a fresh suit. It is there observed that the proper remedy appears to be either by application for review or by invoking the inherent jurisdiction of the Court. Therefore, it seems that this application cannot be defeated and should not have been dismissed by the District Judge on the ground that the petitioner ought to have had recourse to a separate suit.

But Mr. Khurshaid Husnain for the respondent has taken a new objection which appears to have been raised for the first time in this Court. He contends that the provisions of O. 32, R. 7 which require the consent of the Court to any compromise of a claim in a suit do not apply to any proceedings taken after the decree has been passed, and that after the decree has been passed the next friend or guardian for a minor can record satisfaction or enter into any arrangement on his behalf without asking the permission of the Court. This is a novel proposition which in my view is against both principle and authority. The broad principle is that a minor is incapable of entering into a contract and that valid contracts can only be entered into on behalf of a minor in very limited circumstances by persons whom the law especially authorises to act for the minor, and to the limited extent to which such persons have authority. Where there is no law giving a person authority to act on behalf of a minor such authority will not ordinarily be deemed to exist and the minor will not ordinarily be bound by the acts of such a person. Secondly, the Code itself makes it clear that the next friend or guardian acting for a minor in a litigation is in the exercise of his powers as such not exempted from restriction merely because a decree has been passed. O. 32, R. 6 debars him from receiving money or moveable property on behalf of the minor without the permission of the Court, and requires the Court to take security from him and give proper directions to protect the property from waste. Therefore, on a consideration of the provisions of the Code I have little doubt that the powers of a next friend after decree are not intended to be wider than such powers before the decree. It has been held by a Full Bench of the Madras High Court in 56 Mad 430 (3) that O. 32, R. 7 is applicable to agreements in execution proceedings; and in this Court it has been said in 5 Pat L J 379 (2), that whether or not O. 32, R. 7 applies in its terms, at any rate, the principle is applicable. Therefore, Mr. Khurshaid Husnain's objection should, in my opinion, fail.

It was lastly contended by Mr. Khurshaid Husnain that, assuming the minor to be entitled to relief against the bargain entered into on his behalf without the consent of the Court, his remedy could only be given to him in a proceeding framed either as a suit or as an application for review. As above pointed out, the remedy by suit is not available to the minor by reason of S. 47 of the Code. Therefore, Mr. Khurshaid Husnain has argued that this application is

1. Ishan Chandra Kundu v. Nilratan Adhikari, 1923 Pat 375=72 I C 1049=2 Pat 538=4 P L T 311.
2. Ramgulam Sahu v. Sham Sahai Das, 1920 Pat 750=62 I C 234=5 Pat L J 379=1 P L T 663.
3. Muthalakkammal v. Narappa Reddiar, 1933 Mad 456=142 I C 622=56 Mad 430=64 M L J 437 (F B).

not maintainable because it does not refer to O. 47, R. 1 of the Code, but cites S. 47 and S. 151 of the Code, and invites the Court to use its inherent jurisdiction. The objection seems to me in this case particularly to be a very technical one. As regards the nature of the application what we have to consider is not so much what order or rule of the Code has been cited by the party, but what is the substance of the relief asked for. The prayer was to vacate an order which had obviously been passed by the Court under a misapprehension that the Court had power to pass it, whereas the Court had in fact no power to pass such an order in consequence of the minority of the decreeholder which was not at the time brought to the notice of the Court. This may have been a ground on which the Court could be moved to review its order; but I am also of opinion that in such circumstances as these the Court has power to take action independently of O. 47, R. 1. In 26 C L J 317 (4) it was held that an application similar to the present one came under S. 47, Civil P. C., and the Court had power to deal with it thereunder. I am of opinion that this is a matter in which the Court had power to act under S. 151 and that, therefore, no objection is sustainable against the procedure followed. I would allow the appeal and restore the order of the Subordinate Judge, awarding to the appellant his costs of the District Judge's Court and of this Court.

Varma, J.—I agree.

R.M./R.K. *Appeal allowed.*

4. Jagannath v. Jaladhar, 1918 Cal 551=40 I C 839=26 C L J 317.

A. I. R. 1936 Patna 508

MACHPERSON AND MOHAMAD NOOR, JJ.

Chand Mul—Plaintiff and *another*—Pro forma Defendant—Appellants.

v.

Naku Manjhi and *others*—Defendants—Respondents.

Appeal No. 287 of 1931, Decided on 21st April 1936, from appellate decree of Judicial Commissioner, Ranchi, D/- 5th July 1931.

Chota Nagpur Tenancy Act (6 of 1908), S. 76 — Pardhani village — Proprietor and pardhan — Record of pardhan's customary rights—Rights of proprietor are subject to rtghts of pardhan and of the raiyats—Pardhan given power to control reclamation of waste land—Proprietor held could not give permanent lease without consent of pardhan.

A proprietor has a right to settle his land in any way he likes, but this right is subject to the rights which others have acquired either by contract or custom. His position is similar to the position if a proprietor creates a tenure and thereby limits his right over the land of such a tenure. Pardhani villages are something like tenures though not exactly so. A pardhan partakes of the position of a tenure holder and also of a raiyat of a privileged class in respect of the lands actually held by him. He is for some purposes an agent of the proprietor, though of course a hereditary agent not removable according to the will of the proprietor. At the same time he is for certain purposes an agent for the raiyats also and custodian of their interest. When the village is pardhani the rights of the proprietor in that village are subject to the rights of the pardhan and of the raiyats of the village of which the pardhan is the custodian. [P 510 C 1, 2]

The land of a village had been recorded under khata No. 1 being the khas khata of the proprietor and khata No. 2, the pardhani khata. In the remarks column of khata No. 1, consisting of waste land, it was mentioned that the raiyats could reclaim the land, of that khata with the permission of the pardhan. In the record of the customary rights of the pardhan it was recorded that the pardhan had a right to settle the uncultivated lands of the village. The proprietor granted a permanent lease to a stranger:

Held: that the proprietor could not make a raiyati settlement of the land without the consent of the pardhan. [P 509 C 2; P 511 C 1]

G. C. Mukharji—for Appellants.

C. P. Sinha—for Respondents.

Mohamad Noor, J.—This is an appeal by the plaintiff and his lessor, defendant 4, against the dismissal by the lower appellate Court of the plaintiff's suit for a declaration that he has obtained from defendant 4 a permanent raiyati right in the land in suit and that the principal defendants (defendants 1 to 3) have no right, title or interest therein, and for a decree for confirmation of possession in respect of the land in suit, or, in the alternative, for recovery of possession of the same. The plaintiff also asked for damages and for a permanent injunction against the principal defendants restraining them from interfering with the plaintiff's possession over the land in suit and for costs and such other relief as the plaintiff may be found entitled to. The pro forma defendant (defendant 4) Raja Wazir Narayan Singh is the proprietor of gadi Serampur in the District of Hazaribagh. The plaintiff obtained from him a raiyati lease of certain uncultivated lands situated in

several villages of which 290·68 acres, situated in village Jhalakdiha, is the subject matter of the present suit.

The plaintiffs' case is that when after taking the lease he went to reclaim the land in question he was obstructed by the principal defendants. The result was a criminal case which was pending when the present suit was instituted. Similar suits were instituted by the plaintiff in respect of the lands of other villages against different defendants. All of them were tried together. We are however in this appeal concerned with one suit only, namely No. 85 of 1927. It was contested by defendants 1 to 3. They denied the right of defendant 4 to settle the lands with the plaintiff and alleged that the land in suit had all along been in their possession. Defendant 1, Nakoo Manjhi, according to the records prepared at the last settlement operation, is a pardhan of the village Jhalakdiha and defendants 2 and 3 are raiyats of the village. In the written statement of these three defendants however pardhani is claimed by all of them. The learned Munsif decreed the suit except in respect of the lands which had already been reclaimed by the raiyats of Jhalakdiha. On appeal by the defendants the learned Judicial Commissioner of Chota Nagpur has dismissed it. The plaintiff and defendant 4 have preferred this second appeal. The appeal was first disposed of on compromise, but on an application of defendant 1 the compromise decree was set aside and the appeal was heard on merits.

The land of village Jhalakdiha has been recorded under two khatas. Khata No. 1 which consists of about 300 acres is the subject-matter of the present suit and is the khas khata of the proprietor in his direct possession. The remaining land, also about 300 acres, has been recorded in khata No. 2, the pardhani khata of defendant 1. In the remarks column of khata No. 1, which consists of waste and jungle lands only, it is mentioned that the raiyats can reclaim the land of this khata with the permission of the pardhan. In the record of the customary rights of the pardhan (pardhani hakukat) it is recorded in column (gha) (6) that the pardhan has a right to settle the uncultivated lands of the village. The former entry is at least to be presumed to be correct and the latter about the customary rights of the pardhan is conclusive evidence of his rights under S. 132, Chota Nagpur Tenancy Act. It is on the strength of these two entries that the learned Judicial Commissioner has held that the plaintiff did not acquire any valid raiyati right in the land in suit from the pro forma defendant, and that that defendant had no right to make raiyati settlement of the land. Now the simple question involved in the appeal is whether the learned Judicial Commissioner is right in his interpretation of the effect of the two entries referred to above and whether the defendant 4 could make a raiyati settlement of the land ignoring the pardhan. I have already stated that the entries in the Record of Rights are both in the remarks column of the khatian of khata No. 1 which is recorded in the name of the proprietor and also in the record about the customary rights of the pardhan, and, in my opinion, on these entries the decision of the learned Judicial Commissioner is correct.

The entry in the remarks column of khata No. 1. which is the subject-matter of the suit, as I have said, is that the raiyats can reclaim the land with the permission of the pardhan. This clearly shows that the power of the pardhan to control the reclamation of the waste lands of the village is not confined to the lands which have been recorded in his khata, that is, khata No. 2, but extends to khata No. 1 also. The learned Advocate, who appeared on behalf of the appellant, has contended that the entry in the remarks column of the Record of Rights does not take away the inherent right of the proprietor to make settlement of the land as he likes, or to bring it into his direct cultivation. This is the view which seems to have appealed to the learned Munsif and it was on that basis that he decreed the plaintiff's suit. But the learned Judicial Commissioner has rightly pointed out that the inference to be drawn from these entries leads one to the irresistible conclusion that the rights of the proprietor to reclaim waste lands of the village are subject to the consent of the pardhan and cannot be carried on over his head. The villagers have a prior right to reclamation and the pardhan is the custodian of the right of the villagers. If the proprietor can settle the lands with strangers over the head of the pardhan, or bring them under his own cultivation, the Record of Rights which makes it in-

cumbent even for the raiyats to obtain the permission of the pardhan for bringing the land under cultivation becomes absolutely nugatory. This entry in my opinion, should be read along with the entry in the pardhani records of the village which was entirely ignored by the learned Munsif. It was contended before us, as it was contended before the Courts below, that the entry in the pardhani record Ex. A (2) relates to the land of khata No. 2 only, which is the pardhani khata of defendant 1, but the learned Judicial Commissioner has rightly overruled this contention. The heading is: "The rights of the pardhans in the village."

This right is not confined to the land which has been recorded in the pardhani khata of the defendant, that is, khata No. 2. This is supported by the fact that according to the entry in the remarks column of khata No. 1 the permission of the pardhan to make reclamation has been made a condition precedent to the reclamation by the raiyats. To hold otherwise will result in bringing about an anomalous position. A serious conflict will arise between the proprietor and the pardhan. Suppose that the pardhan allows a certain raiyat to make reclamation of the land as he is authorised to do under the entry in the remarks column of khata No. 1, or makes settlement as he is authorised to do under the custom recorded in the pardhani record, the man who takes this settlement from him is bound to come into clash with the man who may have taken settlement from the proprietor. The learned advocate contended that the custom, which has been recorded, is unreasonable inasmuch as it takes away from the landlord his undoubted right of dealing with the land and that we should not give effect to it. I do not, however, think that the custom recorded in the Record of Rights is unreasonable. No doubt a proprietor has a right to settle his land in any way he likes, but this right is subject to the rights which others have acquired either by contract or custom. The learned Judicial Commissioner has rightly pointed out that the position is similar to the position if a proprietor creates a tenure and thereby limits his right over the land of such a tenure. Pardhani villages are something like tenures though not exactly so. A pardhan partakes the position of a tenure-holder and also of a raiyat of a privileged class in respect of the lands actually held by him.

He is for some purposes an agent of the proprietor, though of course a hereditary agent not removable according to the will of the proprietor. At the same time he is for certain purposes an agent of the raiyats also and custodian of their interest. When a village is pardhani it is obvious that the rights of the proprietor in that village must be subject to the rights of the pardhan and of the raiyats of the village of which the pardhan is the custodian Under S. 64, Chota Nagpur Tenancy Act, a custom is recognised under which raiyats are entitled to bring land under cultivation without the consent of the landlord. This clearly shows that the legislature has recognised custom in derogation to the theoretical right of the landlord. The learned advocate further argued that the entry in the remarks column of the Record of Rights was beyond the power of the Settlement Officer to record as the law authorised him to record customs only in respect of the tenancy of the pardhan, and the rights to be recorded must be the rights of the tenants of the land and not of the outsiders. He contended that the lands of khata No. 1 are outside the tenancy of the pardhan and, therefore, the custom recorded in respect of it in favour of the pardhan was beyond the scope of the authority of the Settlement Officer. In my opinion this argument cannot be accepted. The pardhan is a pardhan of the village, and the village under the Chota Nagpur Tenancy Act, means:

> In any local area in which survey has been made a Record of Rights prepared under any enactment for the time being in force, the area included within the same exterior boundary in the village map finally adopted in making such survey and record, etc., etc.

Therefore, when defendant 1 has been recorded as pardhan of the village Jhalakdiha, it means that he is the pardhan of the entire area of the village. He may, however, have different rights over different areas included within the village. He has got some higher rights in the land of khata No. 2, but he has still got some right over the lands of khata No. 1. The record in my opinion is in favour of the landlord, inasmuch as the complete right of pardhanship has been given to the pardhan only in the lands of khata No. 2 and only a limited right in the lands of

khata No. 1. The area included in khata No. 1 is no doubt in possession of the landlord and he has all rights over it subject to such rights as have been specifically recorded in favour of the pardhan or raiyats of the village. In these circumstances I find no merits in this appeal, and I would dismiss it with costs.

Macpherson, J.—I agree entirely.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1936 Patna 511

WORT, J.

Jai Narain Lal and *others* — Defendants—Appellants.

v.

Kashilal and *another*—Plaintiffs—Opposite Parties.

Civil Revn. Petn. No. 10 of 1936, Decided on 13th March 1936.

(a) Civil P. C. (1908), S. 11—Suit for rent in respect of land alleged to be within plaintiff's patti—Suit dismissed—Subsequent suit for rent or alternatively for assessment of fair rent in respect of same land but alleging that it fell within separate patti of plaintiff—Suit held barred by res judicata.

The suit for rent in respect of land alleged to be within plaintiff's patti was dismissed because the fact that land fell within plaintiff's patti was not proved. The plaintiff brought a second suit and claimed rent, or alternatively assessment of fair rent, in respect of the same land but now alleging that he had a separate patti and the land was within that patti :

Held : that the second suit was barred by res judicata. [P 511 C 2; P 512 C 1]

(b) Jurisdiction — Rent — Assessment of—Courts have no jurisdiction to assess fair rent except in cases governed by statute— (*Obiter*).

Obiter.—No Court in Bihar or any other part of India has any jurisdiction whatever to assess fair rent except in cases governed by the Bengal Tenancy Act. Under the general law no Court has jurisdiction to make a contract between the parties. An assessment of fair rent is tantamount to making a contract between the parties and any Court attempting to exercise such jurisdiction would have jurisdiction only under statute. [P 511 C 2]

B. N. Mitter and *Ramswarup Sinha*—for Petitioners.

Janak Kishore—for Opposite Parties.

Order. — The decision of the Privy Council in 17 P L T 93 (1) has nothing whatever to do with this case. Their Lordships there decided that Beni Prasad had a right ex debito justitiae, and the Judge refusing the relief asked of him was failing to exercise his jurisdiction or acting with material irregularity. There is no question here that the plaintiffs had a right ex debito justitiae. On their own application they claimed to have a preliminary point decided by the Judge who has decided it against them. I should have felt very much inclined to hold, had it been possible to exercise my jurisdiction, in favour of the plaintiffs, because as far as I can see from what has been stated in this Court the matter was clearly res judicata. The former suit was an action by the respondents before me claiming that they had a three annas odd interest in a certain mahal, that the land, which the defendants-petitioners before me were in possession of, had fallen entirely within their patti, and consequently the plaintiffs were claiming rent as against the defendant-petitioners in that action. The action was dismissed as the Judge came to the conclusion that the case, that the land for which the plaintiffs were claiming ground-rent had fallen entirely within patti, was not made out and the action, as I have said, was dismissed.

Now, the plaintiffs brought another action and the action was clearly the same as it was on the former occasion. In this second action the claim was that the plaintiffs had a separate patti and the land was clearly within that patti : that the defendants were in possession. The plaintiffs, therefore, claimed rent or, in the alternative, an assessment of fair rent. Incidentally it is necessary perhaps to point out that no Court in this Province or any other part of India, as far as I know, has any jurisdiction whatever to assess fair rent except in cases governed by the Bengal Tenancy Act. The land in suit is governed by the Transfer of Property Act and no Court has under the general law jurisdiction to make a contract between the parties. An assessment of fair rent is tantamount to making a contract between the parties, and any Court attempting to exercise such a jurisdiction would have jurisdiction only under statute, and in this case, as I have indicated, the statute does not apply. If the plaintiffs make out their title to the land, they are entitled to sue for use and occupation; but every time they go to the Court making such a claim they must prove the value of such use and occupation. The plaintiffs may succeed in this case or they may not. Even

1. Atma Ram v. Beni Prasad, 1935 P C 185=157 I C 894=62 I A 257=57 All 678=17 P L T 93.

if they succeed, next time they make such a claim against the defendant-petitioners, it would be necessary for them to give such evidence as regards the value of the land as would enable a Court to grant such compensation for the period of time in suit.

In my judgment I have no jurisdiction to set aside the order of the learned Judge in the Court below as it was a matter of law which was entirely within the competence of the learned Judge to decide. But a clearer case on the principle of res judicata, on the facts as asserted in this case, I have never come across. With this observation I must dismiss the application, but in the circumstances of the case without costs.

D.S./R.K. *Application dismissed.*

A. I. R. 1936 Patna 512

AGARWALA AND MADAN, JJ.

Mangar Koiri and *others*—Petitioners.

v.

Emperor—Opposite party.

Criminal Revn. No. 335 of 1936, Decided on 24th July 1936, against order of Sess. Judge, Gaya.

Arms Act (1878), S. 19 (f)—Weapon found in room of house belonging to joint family—Room not proved to be in exclusive possession of any member—No member other than head of family can be said to be in possession of weapon.

Where a weapon is found in a house belonging to a joint family but there is no evidence that the room in which the weapon is kept is in the exclusive or particular possession of any member of the family, it cannot be inferred that the weapon was in possession of any other person than the head of the family: 15 *All* 129 and 1933 *All* 112, *Rel. on*; 1932 *All* 441, *Not foll.* [P 512 C 2]

Baldeo Sahay and *Rajkishore Prasad*—for Petitioners.

Asst. Govt. Advocate—for the Crown.

Agarwala, J.—This is an application from an order of the Sessions Judge of Gaya confirming an order convicting the petitioners under S. 19 (f), Arms Act, and sentencing them to rigorous imprisonment for nine months each in respect of the possession of a weapon which in the record is called a karabin, a small quantity of gunpowder and a few pieces of copper. It appears that the police searched the house of the petitioners in consequence of information that stolen property was stocked there and in the course of the search discovered the karabin, gunpowder and the copper. The petitioners had no license for the karabin and the sanction of the District Magistrate having been accorded the prosecution was launched. It has been found that the accused Mangar is the head of a joint family of which the other accused are members. The karabin and other articles were found in a loft in one of the rooms of the house concealed under bhusa stacked in the loft. There is no evidence that this room was in the particular possession of any member of the family or that any of the accused persons was in exclusive possession of the karabin. The learned Sessions Judge, founding his decision on a case decided by Bennet, J. sitting singly, 1932 All 441 (1), held that in circumstances such as in the present case all the senior male members of a joint family are in possession of whatever is in the house.

The view taken by Bennet, J. in that case differs considerably from the view taken in other decisions of the Allahabad High Court and other High Courts. In 15 All 129 (2), Knox and Blair, JJ. said that where articles are found in a house belonging to a joint family in such place or places as several persons living in the house may have access to, there is no presumption as to possession and control that those articles are in the possession and control of any other person than the house master. The decision of Bennet, J. in 1932 All 441 (1) was commented on by Pullan and Thom, JJ. in 1933 All 112 (3) where their Lordships were not prepared to agree with the view taken by him. In the absence of proof in the present case that the room in which the weapon was kept was in the exclusive or particular possession of any member of the family, I am not prepared to hold that it can be inferred that the weapon was in the possession of any other person than the head of the family, the petitioner Mangar. I would, therefore, discharge the rule so far as this petitioner is concerned and confirm it with respect to petitioners Hulas Koiri and Bala Koiri whose convictions and sentences are set aside.

Madan, J.—I agree.

R.M./R.K. *Order accordingly.*

---

1. Emperor v. Sikhdar, 1932 All 441=1932 Cr C 561=139 I C 153=33 Cr L J 719=54 All 411=1932 A L J 570.
2. Empress v. Sangam Lal, (1893) 15 All 129=1893 A W N 48.
3. Kaul Ahir v. Emperor, 1933 All 112=1933 Cr C 160=143 I C 114=34 Cr L J 517=55 All 112=1932 A L J 1072.

A. I. R. 1936 Patna 513

COURTNEY-TERRELL, C. J. AND DHAVLE, J.

Secy. of State—Defendant 1 — Appellant.

v.

Lodna Colliery Co., Ltd. and *others* — Plaintiffs and others—Defendants—Respondents.

Appeals Nos. 83, 84 and 85 of 1932, Decided on 5th December 1935, from decision of Sub-Judge, Dhanbad, D/- 17th February 1932.

(a) Land Acquisition (Mines) Act (18 of 1885), Ss. 5 and 6—Object.

The object of the Act is that all persons interested shall be compensated when the person entitled to work in the mines has been restricted. Compensation payable is not limited to the actual worker but to all persons who have interest in the mines or minerals unworked or ungotten : *Smith* v. *Great Western Ry. Co.*, (1878) 3 *A C* 165, *Ref.*

[P 516 C 1 ; P 523 C 1]

(b) Land Acquisition (Mines) Act (18 of 1885), S. 5—Restriction has effect against whole world.

The effective part of the declaration is the restriction and this would have effect against the whole world. [P 516 C 2]

(c) Land Acquisition (Mines) Act (18 of 1885), Ss. 5 and 6—Effect.

The effect of Ss. 5 and 6 is merely to provide that the restriction shall not be imposed unless the Government shall be willing to compensate all persons interested. The obligation to compensate follows upon the imposition of the restriction and is not dependent on an announcement by the Government that they are willing to pay such compensation. In short if they care to restrict they must also compensate. Moreover it hardly lies in the mouth of the Government to claim protection from the obligation to compensate by alleging the irregularity of their own conduct.

[P 516 C 2 ; P 517 C 1]

(d) Limitation Act (1908), Art. 2 — Art. 2 applies only to suits for compensation and damage for tortious acts of public officer purporting to act in pursuance of statutory power.

The object of the article is the protection of public officials who, bona fide purporting to act in the exercise of a statutory power, have exceeded that power and have committed a tortious act ; it resembles in this respect the English Public Authorities Protection Act. If the act complained of is within the terms of the statute, no protection is needed, for the plaintiff has suffered no legal wrong. The protection is needed when an actionable wrong has been committed and to secure the protection there must be in the first place a bona fide belief by the official that the act complained of was justified by the statute, secondly the act must have been performed under colour of a statutory duty, and thirdly the act must be in itself a tort in order to give rise to the cause of action. It is against such actions for tort that the statute gives protection. Art. 2 has no application to suits to recover statutory compensation independently of any question of tort: *Fry* v. *Cheltenham Corporation*, (1911) 81 *L J K B* 41 ; *Geddis* v. *Bann Reservoir*, (1878) 3 *A C* 430 and 1935 *All* 538, *Ref.*; 1934 *Pat* 507, *Dissent.*

[P 517 C 1, 2]

(e) Land Acquisition (Mines) Act (18 of 1885), Ss. 5 and 6 — Restrictions lawfully imposed — Every person interested becomes entitled to compensation and refusal to pay or assess compensation makes Government liable for direct recovery by suit under Art. 120, Lim. Act.

Once restriction is lawfully imposed under Ss. 5 and 6, compensation becomes payable to all person interested, and if the public Government or public authority refuses to pay any compensation or to take necessary steps for assessing compensation, they are liable to a suit by any person interested for the direct recovery of that which would have been payable had the procedure of statute been followed. Such a suit does not depend on any tort and the article of limitation applicable is Art. 120 : *Bentley* v. *Manchester, Sheffield and Lincolnshire Ry. Co.*, (1891) 3 *Ch D* 222 and 20 *Cal* 51 (*F B*), *Ref.* [P 518 C 1]

(f) Land Acquisition (Mines) Act (18 of 1885), Ss. 5 and 6 — Licensee legally restricted over part of area—Licensee liable to pay minimum royalties and rate of profit — Licensor's claim cannot be postponed till particular coal required.

Where a licensee from a lesser of mining lease is legally restricted from working the mineral (coal) under a particular area out of the entire area conferred under his license, and such licensee is liable to pay rate of profit and minimum royalty to licensor, both the licensee and the licensor are entitled to statutory compensation. To the claim for compensation by the licensor in such circumstances it is no defence to say that until the particular coal is required the licensor has no grievance and that other area can be worked and he will get his royalty, etc., out of it : *Eden* v. *North Eastern Ry. Co.*, (1907) *A C* 400, *Ref.* [P 518 C 1, 2]

(g) Land Acquisition (Mines) Act (18 of 1885), Ss. 5 and 6—Measure of compensation.

Compensation jointly payable to the working lessee and other lessees and persons interested in the mine or mineral unworked or ungotten or working of which is restricted, cannot exceed the aggregate value of coal so raised and sold, less the working costs : *Eden* v. *North Eastern Ry. Co.*, (1907) *A C* 400, *Ref.* [P 518 C 2]

(h) Land Acquisition (Mines) Act (18 of 1885), Ss. 5 and 6—Payment to one claimant is no defence against claim by another.

The payment by the Secretary of State to one claimant, for instance, person immediately entitled to work mine of the whole value of the coal does not constitute a defence against a claim by another claimant who has lost his profit by reason of the restriction even though such claimant be overpaid : *Barnsley Canal Co.* v. *Twibell*, (1843) 13 *L J Ch* 434, *Ref.*

[P 519 C 1]

(i) Land Acquisition (Mines) Act (18 of 1885), Ss. 5 and 6—Lump sum compensation on arbitration — Award cannot be examined subsequently.

Where a lump sum is awarded as a compensation to a claimant as a result of arbitration agreed to by parties, it is not permissible subsequently to go into evidence to explain award : *Duke of Buccleuch* v. *Metropolitan Board of Works*, 5 *H L* 418 and *Attorney-General for Manitoba* v. *Kelly*, (1922) 1 *A C* 268, *Ref.* [P 519 C 1]

(j) Land Acquisition (Mines) Act (18 of 1885), Ss. 5 and 6 — Coal under-ground acquired compulsorily — Royalty owner — S. 23 (2), Land Acquisition Act has no application.

When coal underground is acquired the compulsory acquisition gives to the royalty owner an immediate instead of the deferred payment which he would otherwise receive. The circumstances are very different from those which surround a compulsory acquisition of land and S. 23 (2) is clearly inapplicable. Prompt instead of deferred payment of royalty cannot be considered as a grievance. [P 520 C 1]

(k) Civil P. C. (1908), S. 35 — Order for costs discretionary.

Costs are in the discretion of the Court, and provided there was material for the exercise of discretion an appellate Court will not interfere even though the lower Court has not specifically referred to it : *Donald Campbell & Co., Ltd.* v. *Pollak*, (1927) *A C* 732, *Ref.* [P 520 C 2]

(l) Civil P. C (1908), S. 35, O. 41, R. 22 — No cross objection merely on order for costs.

No cross-objections can be urged in appeal against an order for costs : 1934 *Pat* 134, *Ref.* [P 527 C 1]

(m) Land Acquisition (Mines) Act (18 of 1885), S. 6 — Parties can enter into agreement as to amount of compensation.

Notwithstanding the provisions of S. 6 the parties are competent to enter into an agreement as to the amount of compensation, and such an agreement can be enforced in an ordinary way : 1922 *P C* 365, *Ref.* [P 523 C 1]

Sultan Ahmad, *S. M. Mullick* and *N. C. Ghose*—for Appellant.

N. C. Chatterji, *B. N. Mitter*, *S. N. Banerji*, *Jyotirmoy Ghosh*, *Sarat Ch. Basu*, *S. C. Bose* and *K. N. Moitra* — for Respondents.

Courtney-Terrell, C. J.—The plaintiffs in the suits out of which these appeals arise seek to recover from the Secretary of State, defendant 1 the appellant, compensation which they say has become due to them under certain provisions of the Mines Acquisition Act and complain that the Secretary of State has declined to follow the prescribed procedure for assessing such compensation and has declined to pay the statutory or any compensation, wherefor they have been compelled to resort to the civil Court. The facts as to which there is little or any dispute are as follows : The Raja of Jharia is the landlord of a large area. In the year 1894, by two documents (Exs. 12 and 12-A) he granted a permanent marousi mukarrari of the surface and subsoil of 468 bighas, including the 9·03 acres with which this case is concerned to two persons hereinafter referred to as Banerjie and Laik. Banerjie and Laik transferred their rights to Messrs. Turner Morrison & Co on 5th June 1897, by a document (Ex. 12-B). These persons in turn on 4th February 1928, transferred their rights to the Lodna Colliery Co., Ltd. (Ex 12-D) who in turn transferred such rights to the Lodna Colliery Co. (1920) Ltd. on 6th June 1929 by Ex 12-E.

Banerjie and Laik had on 14th April 1896, by patta Ex. 13, granted a sub-lease of the right to recover minerals (at a cash rental and a tonnage royalty with a minimum), of an area of 190 bighas (including the 9·03 acres above referred to) out of the said 468 bighas to one Golap Chandra Sarkar. This was a perpetual lease. He in turn by Ex. 14 granted a sub-lease of his sub-soil rights in the said 190 bighas to one Ramlal Singh on 30th September 1899, reserving a tonnage royalty with a minimum. Ramlal Singh by Ex. G-2 granted a sub-lease to Bipin Behari Bose who carried on business under the style of the North Barakar Coal Co. This lease is dated 4th February 1909. The business of Bipin Behari Bose was in 1924 converted into a Limited Liability Company and since that year has been in possession of the mining rights under the said Sarkar. The situation in 1920 was that the Lodna Colliery Co. (1920) Limited was the mokarraridar of the 468 bighas : Sarkar was the lessee of the mining rights in the 190 bighas of that area with an obligation to pay royalty on the coal raised by him, and Bipin Behari Bose was the tenant under Sarkar. The E. I R. Co., Ltd., had about 1920 acquired the surface rights in an area of 9·03 acres out of the 190 bighas beneath which the Sarkars and their assigns or sub-lessees had the working lease of the mining rights, and had constructed railway sidings thereon.

Sarkar is now dead, leaving two sons Jitendra and Rishendra, who are the plaintiffs respectively in suit No. 73 of 1930 which has given rise to first appeal No. 84 of 1932 and suit No. 55 of 1930 which has given rise to appeal No 85 of 1932. The Lodna Colliery Co. (1920), Ltd. is the plaintiff in suit No. 54 of 1930 which has given rise to first appeal No. 83 of 1932. In this suit the Secretary of

State is defendant 1, the North Barakar Coal Co (1920) Limited is defendant 2 and Bipin Behari Bose, is defendant 3; the two brothers Rishendra and Jitendra Sarkar are defendants 5 and 6, the present Raja of Jharia is defendant 7, the late Raja's widows are defendants 8 and 9 and the receiver of the Jharia Raj estate is defendant 10. The plaintiff Company complains, that it has been restricted by Government under the Mines Acquisition Act from working (through its lessees) under this area of 9·03 acres; that the plaintiff company is a person interested in that it is entitled to a royalty from the North Barakar Coal Co., Ltd. the Company's lessee and that notwithstanding the restriction the Government took no step to ascertain the statutory compensation payable to the plaintiff Company and refuses to pay any such compensation. In suit No. 73 of 1930, which has given rise to first appeal No. 84 of 1932, Jitendranath Sarkar, one of the two sons of Golap Chandra Sarkar deceased, claims that he also is a person interested under the lease of 30th September 1899 (Ex. 14) to a share in the royalty payable to his father by the North Barakar Coal Co. Ltd. Suit No. 55 of 1930 giving rise to first appeal No. 85 of 1932 is a similar suit by Rishendra Sarkar for the half-share to which he is entitled. In Jitendra's suit the Secretary of State is defendant 1, the parties interested in the Jharia Raj above referred to are defendants 2 to 5 inclusive. The Lodna Colliery Co. (1920) Limited, plaintiffs in appeal No. 83 of 1932 are defendants 6, Rishendra Sarkar is defendant 7, Bipin Behari Bose, is defendant 8 and the North Barakar Coal Co., (1920) Ltd., is defendant 9. In appeal No. 85 arising out of the suit brought by Rishendra Sarkar the same parties appear as defendants but Jitendra is in turn made defendant 5.

For an extension of the Jharia Damuda Branch of the East Indian Ry., the surface rights in the area of 9·03 acres out of the 190 bighas under which the plaintiffs had interests as lessors, and under the surface of which Bipin Behari Bose, had the working colliery rights, were acquired by the Government in various small instalments. On 19th September 1921, Bipin Behari Bose, by Ex. G-2, gave notice to the Bihar and Orissa Government and to the Agent of the East Indian Ry., of his intention to work the coal mines under the said 9·03 acres. The procedure is governed by the Mines Acquisition Act, and under that Act in the event of such a notice, if the Railway Company or other Government authority interested in the surface rights consider that the surface is endangered, they are at liberty to publish a declaration prohibiting or restricting work under the area in question, and thereupon the persons interested became entitled to compensation, and machinery is provided for estimating the compensation.

The Government did in fact publish a declaration. They seem to have been unaware at the time that anyone save Bipin Behari Bose (or as he called himself "The North Barakar Coal Co.") was interested in the working of the mine. The precise form of the declaration is a matter of some importance. It is set forth in Ex. 17, but at the moment it is sufficient to say that mine working under the area in question was restricted to the extent that those working it were compelled to leave large quantities of coal for the support of surface. Bipin Behari Bose then put in a claim for compensation on the ground that he had lost the profits which would accrue to him if he had raised and sold the coal which had to be left to support the surface. By an agreement between the Government and Bipin Behari Bose, the quantity of coal so locked up was ascertained at 256,000 tons and the amount of profit thereon was assessed by a selected arbitrator with the result of an award to Bipin Behari Bose of Rs. 1,81,000. There is no evidence that the existence of the plaintiffs (to whom Bipin Behari Bose had to pay royalty) was brought to the notice of the Government, or that Bipin Behari Bose brought the proceedings to the notice of his lessors. The declaration of the Government was published on 11th March 1927 by which time the North Barakar Coal Co. Ltd., had taken over the rights of Bipin Behari Bose. An examination of the declaration of restriction made by the Government will show that the North Barakar Coal Co. (1920) Ltd., is treated as the only person interested in the working of the mines and an expression of willingness to pay compensation to the company is recited, after which the declaration goes on to impose the restrictions. It has been contended on behalf of the Secretary of State that the declara-

tion does not in express terms say that the North Barakar Coal Co. Ltd., is the only person entitled to compensation, nor does it in express terms say that the Government were prepared to pay compensation to all persons interested and that the restriction takes effect as regards the North Barakar Coal Co. Ltd., only, and hence that the plaintiffs not having been restricted are in no case entitled to compensation. We have been referred to the terms of the Act which are as follows :

Section 5. (1) At any time or times after the receipt of a notice under the last foregoing section and whether before or after the expiration of the said period of sixty days, the Local Government may cause the mines or minerals to be inspected by a person appointed by it for the purpose ; and

(2) If it appears to the Local Government that the working or getting of the mines or minerals or any part thereof, is likely to cause damage to the surface of the land or any works thereon, the Local Government may publish a declaration of its willingness, either,

(a) to pay compensation for the mines or minerals still unworked or ungotten, or that part thereof, to all persons having an interest in the same ; or

(b) to pay compensation to all such persons in consideration of those mines or minerals, or that part thereof, being worked or gotten in such manner and subject to such restrictions as the Local Government may in its declaration specify.

(3) If the declaration mentioned in case (a) is made, then those mines or minerals, or that part thereof, shall not thereafter be worked or gotten by any person.

(4) If the declaration mentioned in case (b) is made, then those mines or minerals, or that part thereof, shall not thereafter be worked or gotten by any person save in the manner and subject to the restrictions specified by the Local Government.

(5) Every declaration made under this section shall be published in such manner as the Local Government may direct.

Section 6. When the working or getting of any mines or minerals has been prevented or restricted under S. 5, the persons interested in those mines or minerals and the amounts of compensation payable to them respectively shall, subject to all necessary modifications, be ascertained in the manner provided by the Land Acquisition Act, 1870, for ascertaining the persons interested in the land to be acquired under that Act, and the amounts of compensation payable to them, respectively.

The object of the Act is that all persons interested shall be compensated when the person entitled to work the mines has been restricted. In 3 A C 165 (1) Lord Cairns construing the similar provisions of the English Act said :

We have a provision that the lessee shall be dealt with and compensated, and that he shall not work. We have then a provision that all other persons shall be compensated according to their interests, and the inevitable conclusion from that is, that those other persons who are so compensated, or who may be so compensated, shall not work any more than the lessee might work. It would be a matter of astonishment if any Court of Equity could hesitate, if that be the construction of the Act, in prohibiting those other persons who either are to be or may be, thus compensated, from working, just as they would prohibit the lessee himself.

Moreover the conduct of the Government clearly shows that the declaration was published under S. 5, sub-s. (2) and they had an indemnity from the Railway Company in respect of any compensation which might be payable by reason of the restriction [see the letter from the Agent of the Railway Company to the Chief Inspector of Mines, dated 8th December 1926 Ex. 2 (Z) 2 at p. 152]. The Railway Company also [see letter Ex. 2 (Z) 2 at p. 152 of the record] intended that an effective declaration should be published and that they were prepared to indemnify the Local Government. The form of the declaration itself, in so far as the restrictions are concerned (see p. 155), contains no limitations as to the persons to be restricted from working. An attempt has been made to argue further that the compensation to the North Barakar Coal Co., was not made under S. 6 of the Act, but was a private voluntary settlement of a dispute, and this attitude was taken up in the letter appearing at p. 211 from the Secretary to Government to the Advocate of the plaintiffs. It is however admitted in this letter that the declaration was published under S. 5, sub-s. (2) and in my opinion, the argument is not sustainable.

The effective part of the declaration is the restriction and this would have effect against the whole world. The effect of Ss. 5 and 6 is merely to provide that the restriction shall not be imposed unless the Government shall be willing to compensate all persons interested. The obligation to compensate follows upon the imposition of the restriction and is not dependent on an announcement by the Government that they are willing to pay such compensation. In short if they care to restrict they must also compensate. Moreover it hardly lies in the mouth of the Government to claim protection from the obligation to compensate by alleging the irregu-

1. Smith v. Great Western Ry. Co., (1878) 3 A C 165=47 L J Ch 97=37 L T 645=26 W R 130.

larity of their own conduct. The main contention on behalf of the Secretary of State is that the plaints disclose no cause of action and that if the claims are for damages suffered by reason of a restriction imposed under the Act, Art. 2, Lim. Act applies and the suits are time barred. The matter of the cause of action is necessarily bound up with the question of limitation. Art. 2 is as follows:

> For compensation for doing or for omitting to do an act alleged to be in pursuance of any enactment in force for the time being in British India.

The period of limitation is ninety days, it is to be counted from the time "when the act or omission takes place." The object of the article is the protection of public officials who, while bona fide purporting to act in the exercise of a statutory power, have exceeded that power and have committed a tortious act; it resembles in this respect the English Public Authorities Protection Act. If the act complained of is within the terms of the statute, no protection is needed, for the plaintiff has suffered no legal wrong; the protection is needed when an actionable wrong has been committed and to secure the protection there must be in the first place a bona fide belief by the official that the act complained of was justified by the statute, secondly the act must have been performed under colour of a statutory duty, and thirdly the act must be in itself a tort in order to give rise to the cause of action. It is against such actions for tort that the statute gives protection: see 3 A C 430 (2). Art. 2 has been construed in like manner by the Courts in India: see 1935 All 538 (3). My attention has been called to a judgment of this Court delivered by me in 16 P L T 61 (4) in which another construction was placed upon Art. 2, Lim. Act. In view however of the argument which has been addressed to us in this case, I am of opinion that the construction I then adopted was erroneous. These suits are not for damages in respect of any alleged tort, they are suits to recover statutory compensation and the Government having admittedly refused to take the necessary statutory procedure for assessing compensation and having refused to pay any compensation are liable to a suit by the plaintiff for the direct recovery of that which would have been payable had the procedure of the statute been followed. The contention that the plaintiff's suit is in respect of a tortious act on the part of Government is based on Para. 15 of the plaint in appeal No. 83:

> The plaintiff company submit that the said declaration was illegal and ultra vires in that it did not provide for payment of compensation to the plaintiff company or to other persons (besides defendant 2) interested in the said mines and that in any view such declaration cannot affect the rights of the plaintiff company to full compensation in respect of the same restrictions.

The meaning of these words is, in my opinion, that the plaintiffs complain not of the restriction itself but of the failure of the Government to pay the compensation which is a liability following upon a lawful restriction. The opening words of para. 16:

> The plaintiff company is a person interested in the mines of which the working or getting has been prevented or restricted and it submits that it is entitled to full and proper compensation in respect of such prevention or restriction.

put the meaning of the claim beyond all doubt. A further contention was that the word "compensation" includes not merely damages for a tort but must be construed as including a sum of money to which the plaintiff might be entitled as statutory compensation independently of any question of tort. This contention also is unsound. A similar argument was used in 81 L J K B 41 (5) in which the defendants sought the protection of the Public Authorities Protection Act. It is true that the words of that Act differ slightly from the words of Art. 2 and read thus:

> Where after the commencement of this Act any action, prosecution or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance or execution or intended execution of any Act of Parliament . . . .

And the word 'compensation' is not used; but the meaning of the section is precisely similar. The suit was brought to recover compensation under the Workmen's Compensation Act. The Court of appeal pointed out that the right to compensation was a statutory right, that the suit did not depend in any way upon tort and that the defendants were

2. Geddis v. The Bann Reservoir, (1878) 3 A C 430.
3. Shiam Lal v. Abdul Raof, 1935 All 538=1935 Cr C 560=155 I C 131=1935 A L J 459 (F B).
4. Sundarji Shivji v. Secy. of State, 1934 Pat 507=151 I C 995=13 Pat 752=16 P L T 61.
5. Fry v. The Cheltenham Corporation, (1911) 81 L J K B 41.

not entitled to the benefit of the limitation. Treating the restrictions as having been lawfully imposed, compensation became payable to persons interested and the cause of action arises if the public authority refuses to follow the procedure for ascertaining such compensation or refuses to pay such compensation if awarded: see (1891) 3 Ch D 222 (6). The compensation is payable from the moment the restrictions are imposed notwithstanding that the right to enforce the payment by recourse to the civil Court does not arise until the compensation is refused by the public authority. It was argued on behalf of the plaintiffs that the refusal to follow the prescribed procedure and to pay compensation give rise to continuing cause of action so that there is no period of limitation. But in my opinion this contention is unsound and Art. 120 of the Act with a six years period is really applicable.

On behalf of the Secretary of State it was argued that the plaintiffs have stipulated for a minimum royalty only and that they could not have compelled the North Barakar Coal Company to work the coal at all. It is said that the Government have merely made a private bargain with the North Barakar Coal Company that they shall not work the coal but has not prevented them from paying the minimum royalty and as the plaintiffs have no cause of action against the North Barakar Coal Company for refusing to work the coal, they can have no claim against the Government for having induced the North Barakar Coal Company to exercise its right to refrain from working. It was sought to establish an analogy with the case of a patentee who having been granted an exclusive license to work an invention at a minimum royalty without any covenant on the part of the licensee to work the invention at all, has no cause of action against a third person who induces the licensee not to work but arranges that the licensee shall merely pay the covenanted minimum royalty. In the case before us, however, the licensee was clearly ready and willing to work the coal under the area in question, and had he done so would have been obliged to pay the royalty and having been legally restricted from so working both the licensee and the licensor are entitled to statutory compensation.

It is also argued that the North Barakar Coal Company in order to earn the rate of profit and pay the minimum royalty it has made for some years past need not immediately work this particular coal area but might work the other coal in the mine and that until this particular coal is required if at all the plaintiffs have no grievance for they will get their minimum royalty. Dealing with a similar argument in (1907) A C 400 (7) at p. 405 Lord Loreburn, L. C. said :

> I cannot think that such a principle could be defended. It would make the measure of payment depend upon the size of the coal-field, and the length of the term. If it were applied to building land worth £200 an acre over all, the sum payable for a small part of it taken compulsorily might be much less than the selling value on the plea that the whole of the land would not be sold for building at once, and that it was to be assumed the plot compulsorily taken would have been the last to be sold for building. Whether the land is 'taken' or is 'used' within the meaning of the Act seems to me a matter indifferent. The value must in either case be paid.

I have now to deal with the measure of compensation payable to the plaintiffs. The suits are brought not for compensation in respect of damage to the reversion of the lease and the sub-lease, but in respect of the loss of the royalty to which each plaintiff respectively would have been entitled had the coal locked up been raised and sold by the working lessee, the North Barakar Coal Company. Considering the claims of the plaintiffs and the North Barakar Coal Company collectively, it is contended on behalf of the Secretary of State, and rightly contended, that the compensation jointly payable to them could not exceed in the aggregate the value of the coal so raised and sold, less the working costs, for the value so ascertained would have to be divided amongst the claimants, each of the lessors taking out of such sum his appropriate royalty and the balance going to the North Barakar Coal Company as their profit. This principle was clearly explained in 1907 A C 400 (7). It is contended however on behalf of the Secretary of State as a matter of fact that the North Barakar Coal Company were actually paid and received the whole of the compensation

6. Bentley v. Manchester, Sheffield and Lincolnshire Ry. Co., (1891) 3 Ch D 222=60 L J Ch 641=65 L T 22.

7. Eden v. North Eastern Rly. Co., (1907) A C 400=76 L J K B 940=97 L T 254=71 J P 450=23 T L R 685=51 S J 623.

including that which would have been payable to each of the plaintiffs, and therefore the Secretary of State should not be bound to pay compensation twice over. But the payment by the Secretary of State to one claimant of the whole value of the coal does not constitute a defence against a claim by another claimant who has lost his profit by reason of the restriction : see 13 L J Ch 434 (8).

Then we are asked, in the event of a judgment in favour of the plaintiffs, that judgment should be awarded to the Secretary of State against the North Barakar Coal Company to recover that part of the compensation which has in fact been paid to them and should have gone to the plaintiff. I will deal with this contention later. It is first necessary to investigate the question of fact as to what was awarded and paid to the North Barakar Coal Company. The Company no doubt sought the entire value of the coal locked up, alleging that they were entitled to it as their loss of profits. There is also no doubt that the amount of coal so locked up was estimated at 2,56,733 tons, but the matter of the sum to be paid to the North Barakar Coal Company as their profit in respect of such quantity of coal then went on to arbitration and a definite sum was awarded. It may be the fact that the sum was arrived at by taking the value of the coal at such price as was likely to obtain within the period during which the Coal Company would have been able to raise the coal if it had not been hindered by the restrictions, and the net result may have been obtained by deducting the working expenses. The fact remains however that a lump sum was awarded and it is not permissible to go into evidence in order to explain the award : see 5 H L 418 (9) and (1922) 1 A C 268 (10). In short it may well be, and indeed it is very likely, that the North Barakar Coal Co. were overpaid. But even if that fact were established, the question whether in the present suit the North Barakar Coal Co., can be compelled to disgorge to the Secretary of State the amount so overpaid is a very different one.

On behalf of the Secretary of State it has been suggested that all the parties are before the Court and that it would be a hardship to drive the Secretary of State to further litigation. The question however cannot be determined in this simple manner. The pleadings do not exhibit any such claim by the Secretary of State against the North Barakar Coal Co. Alternatively it was suggested that instead of a judgment in favour of the plaintiffs against the Secretary of State, judgment might be entered for the plaintiffs against the North Barakar Coal Co for money had and received from the Secretary of State for the benefit of the plaintiffs. The plaintiffs however, while not refusing to ask for relief against the North Barakar Coal Co. naturally did not welcome the suggestion with any enthusiasm, and it was pointed out on behalf of the North Barakar Coal Co., that the pleadings disclosed no claim by the plaintiffs against them for the money which might have been payable by the Secretary of State. On behalf of the Secretary of State it was contended that the question of the liability of the North Barakar Coal Co. to the plaintiff company in the suit by that company was comtemplated by reason of the last four words of issue 5 before the learned Judge: "Is the plaintiff entitled to any compensation ; if so from whom ?" The learned Judge who tried the case had settled the issues, but commented upon this issue as follows :

The plaints would show that the plaintiffs claim compensation from defendant 1 though all the persons interested in the property have been made parties. But somehow or other an issue came to be framed as to who was liable for compensation to the plaintiffs. At the time of hearing, a petition was filed by defendant 2 (the North Barakar Coal Company) praying to delete this portion of the issue. This petition was opposed by defendant 1 and it was alleged, perhaps for the first time, that the amount of compensation that was paid to defendant 2 included compensation payable to all the persons interested, and that therefore the plaintiffs' decree, if any, should be against defendant 2 and not against defendant 1. When this position was created, the learned advocates of the plaintiffs stated that in case the Court finds that the amount of compensation payable to them was included in the amount paid to defendant 2, the Court may pass a decree against defendant 2. In such circumstances the issue above referred to was allowed to stand. Later on however the plaintiffs chose to stick to the position taken in the plaints, and it was urged on their behalf in argument that they had their

8. Barnsley Canal Co. v. Twibell, (1843) 13 L J Ch 434=7 Beav 19.
9. Duke of Buccleuch v. Metropolitan Board of Works, (1872) 5 H L 418=5 Ex Ch 221=41 L J Ex 137=27 L T 1.
10. Attorney-General for Manitoba v. Kelly, (1922) 1 A C 268=91 L J P C 101=126 L T 711=38 T L R 281.

S. N. DAR, ... LL
Vakil High Court.
SRINAGAR (Kashmir)

claim against defendant 1, and that if defendant 1 had made payment to defendant 2 in excess of what was payable to him, it was the look-out of defendant 1 to take steps for having the excess amount refunded. I have already noted that the case made out in the plaint seems to lay a claim against defendant 1 only. There is no indication in any of the plaints from which it can be said that the plaintiffs sought any relief as against defendant 2.

At no time before the suit or in his written statement has the Secretary of State taken up the attitude that the plaintiffs should look to the North Barakar Coal Co for such compensation as might be due to them out of the amount already paid to the North Barakar Coal Co. Nor have any of the plaintiffs made any such claim in their plaints, and the North Barakar Coal Co. made no claim against the Secretary of State based on its liability to pay royalty to any of the plaintiffs. In my opinion the learned Judge took the correct view of the matter and the plaintiffs have not seriously sought before us a judgment against the North Barakar Coal Co. As to the amounts which have been awarded by way of compensation there has been no serious contest on the part of the Secretary of State as to the accuracy with which the amounts have been calculated. The royalty has been computed on the basis of the quantity of coal locked up as admitted by the Secretary of State.

The plaintiffs have however filed a cross-objection complaining that they should have been awarded a further sum of 15 per cent under S. 23 (2), Land Acquisition Act to compensate them for the compulsory nature of the acquisition. They invoke the preamble of the Mines Act and S. 6, but the conditions of the Land Acquisition Act are to be applied "subject to necessary modifications." When coal underground is acquired the compulsory acquisition gives to the royalty owner an immediate instead of the deferred payment which he would otherwise receive. The circumstances are very different from those which surround a compulsory acquisition of land and in my opinion S. 23 (2) is clearly inapplicable. Prompt instead of deferred payment of royalty cannot be considered as a grievance. This cross-objection was not seriously pressed; it has no merit and must be dismissed. The only other matter to be dealt with is the objection on behalf of Bipin Bihari Bose and the North Barakar Coal Company, who have been made defendants in the plaintiffs' suit to the order of the learned Judge that each of the defendants shall bear his own costs. It is contended that costs should have been awarded against the plaintiffs in favour of the North Barkar Coal Company and Bipin Bihari Bose, but the North Barkar Coal Company have throughout denied the right of the plaintiffs to receive any compensation [see Ex. 2 (w), a letter from Messrs. Morgan & Co , Solicitors for the North Barakar Coal Company, to Messrs. Orr Dignam & Co for the plaintiff company, dated 20th May 1930 at p. 263]. Moreover the right of the plaintiffs to receive compensation is expressly denied in para. 11 of the written statement of the North Barakar Coal Company Ltd., in Appeal No. 83 of 1932 and in para. 6 of the written statement in the suit by Rishendra Nath Sarkar. In para. 8 of the written statement the North Barakar Coal Company make a similar denial of the rights of the plaintiffs to receive compensation. The North Barakar Coal Company have been guilty of a breach of the duty laid down in S. 108, Cl. (n), T. P. Act, according to which they should have given notice to their lessors of the interference with their rights by reason of the restriction. Finally costs are in the discretion of the Court below: provided that there was material for the exercise of this discretion, an appellate Court cannot interfere: see (1927) A C 732 (11). In the result I would dismiss the three appeals of the Secretary of State with costs to each of the contesting respondents. There will be one set of costs to the Lodna Coal Company and one set of costs to the other two plaintiffs Jitendra and Rishendra to be divided between them equally.

Dhavle, J.—These are appeals by the Secretary of State, the principal defendant in 3 suits for compensation for restrictions imposed, under S. 5 (2) (b), Land Acquisition (Mines) Act, 1885, on the working of the top section of No. 11-12 Combined Seam of the Lodna Colliery lying under certain portions of the East Indian Railway near Jharia. Appeal No. 83 arises out of Title Suit No. 54 instituted by the Lodna Colliery Co. (1920) Ltd., holding (under a series of assignments) a permanent mukarrari of the

11. Donald Campbell & Co. v. Pollak, (1927) A C 732=96 L J K B 1093=137 L T 656=43 T L R 495=71 S J 450.

mauza under the zamindar, inclusive of the subsoil rights. Appeals Nos. 84 and 85 arise out of Title Suits Nos. 73 and 55 instituted by Jatindra Nath Sarkar and Rishendra Nath Sarkar, sons of the late Babu Golap Chandra Sarkar who in 1896 obtained a maurasidar mukarrari of 190 bighas out of the mauza, for mining coal, on a rent of Rs. 1,110-8-0 together with a royalty of 9½ pies per ton of coal subject to a minimum of Rs. 100. In 1899 Babu Gopal Chandra Sarkar made what is called a kaimi settlement with one Ram Lal Singh, for working the coal "according to his wish" on a royalty of 6 annas per ton of coal and 2 annas per ton of coal-dust subject to a minimum of Rs. 3,000 a year. From Ram Lal Singh, Bipin Bihari Bose, a defendant in all the three suits before us, obtained a similar settlement in 1909 to work the coal "at his sweet will" on the same royalty subject to a higher minimum. Carrying on business as the North Barakar Coal Company (converted into a Limited Liability Company in 1924), Bipin Bihari Bose in September 1921, gave to the local Government and the East Indian Railway Co., a 60 days' notice of his intention "to work . . . . . under the surface acquired by Government for the East Indian Railway Company."

This was both intended and taken as a notice under S. 4, Land Acquisition (Mines) Act, and led to an inspection of the mine under S. 5 (1) of the Act by the Chief Inspector of Mines. It appeared necessary to restrict the working of the coal to save the surface and the works of the East Indian Railway Company, a state-owned railway thereon, and a protracted correspondence followed, some of which is before us, between the Local Government, the Chief Inspector, the Coal Company, and the East Indian Railway Company, which would have to bear the burden of the compensation payable under the Act for the restrictions. The East Indian Railway Company thought that the Assisted Sidings Agreement entered into by the Coal Company made compensation unnecessary, but this was (I understand) later on discovered to be a mistake. The Coal Company had no objection to the restrictions proposed and even pressed for the statutory declaration imposing them, but would not agree to give up their claim to compensation though it was pointed out to them that this might hold the declaration up indefinitely. The position of the Local Government is clearly explained in a letter of 17th March 1925, [Ex. 2 (j) 28 at p. 143, Part 3 of the paper-book of Appeal No. 83] written by Mr. Dain, Secretary to Government to the Agent, East Indian Railway Company, explaining that as Government would render themselves liable to compensate the Colliery Company for the coal left unworked in accordance with an order for restricted working, they were unable to issue such an order unless they were assured either (a) that the Colliery Company were willing to forego compensation, or (b) that the Assisted Sidings Agreement was applicable and sufficient to preclude a claim to compensation or (c) the Railway Administration was prepared to indemnify the Local Government in respect of any compensation awarded, and adding that in consequence they must leave the matter in the hands of the Railway Administration.

A part of the subsequent correspondence is before us, and it was only in December 1926 (see p. 152 of the paper-book) that the East Indian Railway Company wrote that they were prepared to indemnify the Local Government in the event of any compensation being allowed, and asked the Government to publish the necessary declaration restricting the working of the minerals underlying such portion of the land as the railway was unable to relinquish. On 11th March 1927, Government made a declaration under S. 5 (2) (b) restricting the working in certain ways (p. 155 of the paper-book), and this was published in the Bihar and Orissa Gazette of 16th March 1927. A copy of this declaration was sent to the Coal Company on the 30th March, and the company was not long in sending in a claim for compensation amounting to Rs. 9,60,000 (nearly) for the coal locked up by the declaration. Then followed much correspondence (which is not all before us) between the Local Government and the East Indian Railway Company, the latter being apparently anxious that the question of compensation should be settled by the civil Court and not by the Land Acquisition officer under S. 6 of the Act, Government on their part pointing out that having made the declaration it was scarcely open to them to refrain from an award under the Act and insist on a reference to the civil Court and that in

their opinion the best course in the end probably would be to withdraw the declaration but that they would follow the advice of the Railway Administration if the latter were prepared to meet all the expenses involved (see pp. 170 and 172 of the paper-book) Ultimately the question of compensation payable to the Coal Company was referred by agreement between the East Indian Railway Company, and the Coal Company to the arbitration of Mr. Simpson, Chief Inspector of Mines, and Mr. Whitworth, Chief Mining Engineer of the Railway Board. Mr. Simpson was to find the quantity of coal locked up, and found it at over a quarter of a million tons; Mr. Whitworth was to assess on Mr. Simpson's figure the compensation payable to the Coal Company and placed it Rupees 1,81,750 (pp. 179 and 192 of the paper-book). Before this amount was actually paid to the Coal Company, in July 1929, Rishindra Nath Sarkar and the Lodna Colliery Company heard of the matter and started enquiring from the authorities with a view to secure the compensation to which they considered themselves entitled.

None of the superior landlords seems to have been mentioned prior to the settlement with the North Barakar Coal Co. When the landlords came in, arbitration was again proposed, but the Coal Co., disputed the right of the superior landlords to compensation and desired the whole matter be referred to arbitration, while Rishindra Nath Sarkar (if not the Lodna Colliery Co. also) insisted that their right to compensation must be recognised and the arbitration confined to the assessment of the compensation only (see pp. 254 and 278 of the paper-book). The negotiations thus fell through in April 1930, and the Lodna Colliery Co. and Rishindra Nath Sarkar instituted their suits on 15th July 1930, while Jatindra Nath Sarkar followed with his suit on 19th September 1930. It will be seen that the appellant, the Secretary of State, figures in these suits in more than one way, the declaration restricting the working being made by the Local Government, and the claim to compensation being opposed by the East Indian Railway Co.

The principal contention of the appellant is that the plaintiffs have no cause of action against him, as the declaration offers compensation to and restricts working by the North Barakar Coal Co. only. It is pointed out that the leases and subleases do not entitle any of the plaintiffs to work the coal or even to insist on its being worked by the North Barakar Coal Co., but only entitle the Lodna Colliery Co. and the Sarkar brothers perpetually to certain tonnage royalties subject to a minimum, ultimately coming from the party immediately entitled to work the coal; and upon this it is argued that the restrictions imposed by the Secretary of State on the working of the coal by the North Barakar Coal Co. constitute no interference with the rights of any of the plaintiffs. But the plaints are not really based on any interference with the plaintiffs' contractual rights, nor are they based on any tortious act committed by the Secretary of State and entitling the plaintiffs to compensation. It is true that in para. 19 of his plaint Rishindra Nath Sarkar spoke of collusion between the Secretary of State and Bipin Behari Bose and the North Barakar Coal Co. in depriving him of the share of the profits which he would have been entitled to if the working of the coal had not been restricted, but when particulars of this conspiracy were demanded, none was given, and the charge of conspiracy was dropped so much so that it never figured in the issues.

The gist of the suits as I read the plaints (see paras. 16, 12 and 8 respectively) was recovery of statutory compensation for restrictions imposed on the working of the colliery under S. 5 (2) (b) of the Act—compensation which should in the ordinary course have been awarded in the special manner laid down in S. 6 of the Act, but which has to be realized by suit because the special procedure was not adopted, the East Indian Railway Co. taking its stand upon its settlement with the Coal Co. together with the leases of the plaintiffs. The appellant lays stress on the wording of the declaration, which expresses the willingness of the Government of Bihar and Orissa to pay compensation to the North Barakar Coal Co. in consideration of the working being carried out in the manner and subject to the restrictions specified. But it also purports to have been made under S. 5 (2) (b) and recites the notice given by Bipin Behari Bose in accordance with the Act and the inspection made under S. 5 (1) of

the Act. And in order to understand the effect of the actual declaration, we have to consider the powers and the intention of the Local Government. Now, when a declaration is made under Cl. (b), sub-s. 2, S. 5 of the Act, two consequences follow : (1) under sub-s. 4 of the same section the mine

> shall not thereafter be worked .... by any person save in the manner and subject to the restrictions specified ....

and (2) under S. 6

> the persons interested in those mines .... and the amount of compensation payable to them .... shall, subject to all necessary modification, be ascertained in the manner provided by the Land Acquisition Act (1894) ....

It is true, as has been urged for the appellant, that notwithstanding the provisions of S. 6 the parties will be competent to enter into an agreement as to the amount of compensation and that the agreement so made could be enforced in the ordinary way: see 46 Bom 767 (12). But what we have to decide in the present cases is whether it is possible for Government, when proceeding under the Act, by expressing its willingness to compensate the person who was immediately entitled to work the coal and had as such given the notice under S. 4, effectively to limit its liability,

> to pay compensation to all such persons (viz., all persons having an interest in the mine or minerals still unworked or ungotten) in consideration of those mines ..... being worked or gotten in such manner and subject to such restrictions as the Local Government may in its declaration specify: see S. 5 (2) (b).

The Act provides for a notice by the person for the time being immediately entitled to work the coal, but empowers Government upon the receipt of such a notice to restrict the working thereafter by any person, and at the same time—as an essential part of the same transaction—entails upon Government an obligation to pay compensation to all persons having an interest in the mines or minerals still unworked or ungotten. If Government does not publish a declaration as provided in S. 5 before the expiration of the 60 days of the notice, the mine or colliery may under S. 7 be worked thereafter in the usual and proper manner unless and until such a declaration is subsequently made; but here again, whenever Government does make the declaration, the working is restricted for all time and "by any person," and Government becomes liable to compensate all persons having an interest in the working of the mine and thus affected by the restrictions imposed. The compensation payable is thus in no case limited to the actual worker, and the restrictions which are imposed because "it appears to the Local Government that the working or getting of the mines or minerals or any part thereof is likely to cause damage to the surface of the land or any works thereon," must ex necessitate rei be permanent. The coal that is to be left unworked under the declaration in the present cases was in the opinion of the Local Government required for the support of the East Indian Railway Co., and would, if dealt with by Government under the Act, cease to be available not merely to the North Baraker Coal Co., but also to superior landlords of every degree who would all be [as Lord Atkinson put it in (1907) A C 400 (7)] deprived of the use, enjoyment and benefit of it as if it had been destroyed or removed and disposed of; the coal locked up would, as it were, be dedicated to the use of the Company, to support their superincumbent soil, and the compensation payable would be the price the coal would fetch as and when won and raised, less the cost of working the mine, winning and raising the coal, for no appreciable reduction can be made for the remote contingency that should the Railway cease to exist, the owner's right to work and win the coal will revive.

That is the scheme of the Act; piecemeal dealing with the total interest in the coal is not contemplated, and the embargo which is to be perpetual involves (as was only to be expected) payment of compensation to all interests affected. The declaration made by Government must be read in the light of these considerations. It is, moreover, not the case either of the Local Government or of the East Indian Railway Co; that what the declaration was intended to affect was the partial interest of the North Barakar Coal Co., only. Government repeatedly said that they had acted under S. 5 (2) (b) of the Act, and could hardly be conceived to contest the statutory liability to compensate all persons interested on the ground of any irregularity committed by themselves. The declaration, it is true, expressed willingness to pay compensation to the North Barakar Coal Co. (only),

12. Fort Press Co., Ltd. v. Municipal Corporation of City of Bombay, 1922 P C 365=68 I C 980=49 I A 331=46 Bom 767.

but this was obviously an unintended informality. No enquiries were made prior to the declaration regarding the various interests affected or likely to be affected by the restrictions; and even the East Indian Railway Co., which is prosecuting the appeal, says in para. 24 of its grounds of appeal in Appeal No. 83 that it should have been held that the declaration of the 11th March 1927, expressing willingness to pay compensation to the North Barakar Coal Co., was published under the belief that the said company was alone entitled to compensation. It need hardly be added that such a belief could have had no reference to the title-deeds of the parties which were only brought to the notice of Government at a much later stage. It is in fact nobody's case that in issuing the declaration the Local Government acted, or even intended to act, on the supposition that it had power under the Act to confine the compensation to the North Barakar Coal Co., to the exclusion of such other parties as might be entitled to it under the Act for the restrictions imposed on the working of the coal. Clearly, the Local Government had neither the power nor the intention to impose restrictions on the working of the coal by the North Barakar Coal Co. only or to limit its liability to pay compensation—a liability which is implicit in the statutory proceeding—to that company alone. It follows that notwithstanding its informal character, the declaration must operate as if it had in full compliance with the Act, expressed willingness to compensate all interests concerned and laid the Secretary of State under the statutory obligation to compensate them all. That irrespective of any declaration and restriction under the Act, the plaintiffs were not themselves entitled to work the coal or even to insist on its being worked seems immaterial. As soon as the declaration is made, the coal comes under a perpetual embargo and full compensation becomes payable, which must in part go to the plaintiffs as the superior landlords, exactly as if the North Barakar Coal Co. were to have worked the coal in due course and the tonnage royalties accordingly to have accrued to the plaintiffs.

The Coal Company had power under its lease to work the coal, and Government must have been satisfied that the company was about to work it before imposing the restrictions involved in the declaration. The private settlement between the East Indian Railway Co., and the Coal Co., does not alter the facts that the latter has been compensated on the footing that it had worked the coal in due course, and that the embargo placed on the working of the coal locked up by the statutory declaration (however informal) affects all interests. It is therefore impossible to accept the contention that the plaintiffs are nonetheworse for the declaration because they were not entitled to work the coal or insist on its being worked, nor entitled to any royalties until the coal was actually worked (as worked it has not been, nor ever can be during the tenure of the Coal Co.). In my opinion the coal has been effectively locked up, notwithstanding the unintended informality of the declaration under S. 5, (2) (b). This necessarily entails payment of compensation not only to the Coal Co., but also to the plaintiffs for the tonnage royalties to which they are entitled as superior landlords; and the liability to compensate the latter which is inherent in a proceeding under the Act cannot be evaded by pointing to the contractual relations between them and the Coal Co. Government may not inconceivably have secured a restricted working of the coal by Coal Co., without incurring any liability to the plaintiffs, by an appropriate contract; but in that case a declaration under the Act would have been entirely uncalled for. As it was, Government first made the declaration, and did so without any contract; with any party interested in the coal and after a declaration under the Act, the royalties due to the landlords must, unless they are settled by agreement with them, be paid in the manner indicated in S. 6 of the Act and cannot be justly or successfully withheld by declining to proceed under the section, while no attempt is made to withdraw the declaration. I am therefore unable to accept the contention that the suits should have been dismissed for want of a cause of action.

It has also been contended on behalf of the appellant that the claims of the plaintiffs are barred by limitation. On this point, the lower Court relied upon 34 Cal 470 (13) and 27 Mad 535 (14) and

13. Rameswar Singh v. Secretary of State, (1907) 34 Cal 470=11 C W N 356.
14. Mantharavadi Venkayya v. Secretary of State, (1904) 27 Mad 535.

held that the suits were governed by the six years' limitation laid down in Art. 120, Sch. 1 to the Lim. Act for suits for which no period of limitation is provided elsewhere in the schedule. Sir Sultan Ahmad has argued that the suits are governed by the 90 days' limitation prescribed by Art. 2 of the schedule. This article deals with suits "for compensation for doing or omitting to do an act alleged to be in pursuance of an enactment in force for the time being in British India." And the argument advanced before us, as I understand it, is that these were suits for compensation for omitting to proceed under S. 6, Land Acquisition (Mines) Act after the declaration restricting the working under S. 5. That, however, is not the character of the suits: the compensation claimed is not compensation for omitting to proceed under S. 6, but compensation automatically involved in the imposition of restrictions upon the working of the coal under S. 5.

The language of Art. 2 is very far from happy, as was pointed out in a recent Full Bench decision of the Allahabad High Court 1935 All 538 (3). But the provision has been usually taken to be intended for the protection, by means of a short period of limitation, of those who in the exercise of their statutory powers exceed their authority in good faith and expose themselves to suits for compensation for actionable wrongs. It seems to me that the legislature could hardly have intended by means of a general provision like that in Art. 2 to provide for the failure of the Local Government to adopt the special procedure laid down in S. 6 Land Acquisition (Mines) Act in cases where compensation becomes payable under S. 5 for the imposition of authorized restrictions. In 20 Cal 51 (15) Petheram, C. J. observed that the Limitation Act does not prescribe any period of limitation for money due under a statutory liability to pay it, and therefore held that a suit for the recovery of surplus sale proceeds under the revenue sale law fell not within Art. 62 but within Art. 120, Lim. Act. Similar reasoning would apply to the facts of the present cases with even greater force; for the proceedings under S. 6, Land Acquisition (Mines) Act take so much time that it is scarcely likely that the law would contemplate a period of 90 days only within which suits must be filed by interested parties for the compensation that ought to be automatically given to them, while it might be impossible for the parties (as indeed was the case here) to say when exactly the authorities were in default in omitting to adopt the special procedure for determining and awarding the compensation due under S. 5. If Art. 120 applies, there is no question that the suits are within time; and it seems to me that Art. 2 has no application to suits for recovery of statutory compensation but is confined to suits for recovery of compensation in the sense of damages for acts which are not legalized wrongs but are and remain torts. Learned counsel for the Lodna Colliery Co., respondent in Appeal No. 83, has also suggested that the suits might come within S. 23, Lim. Act.

This section provides that in the case of a continuing breach of contract and in the case of a continuing wrong independent of contract, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong, as the case may be, continues. In my view, however, the suits have been brought not for compensation for such a breach or wrong, continuing or otherwise, but for statutory compensation arising out of (or rather, implied in) restrictions authorised by the Land Acquisition (Mines) Act, plaintiffs being driven (and entitled) to sue because the Local Government declined to proceed under S. 6 as they should have done. Regarded in this light, the suits were not within Art. 2 but within Art. 120, and in my opinion they have been rightly held by the lower Court to be in time. The amount of compensation payable to the plaintiffs has not been the subject of serious dispute before us. The compensation to which the plaintiffs were entitled was the royalties, and these are tonnage royalties on a quantity of coal regarding which also there was no dispute. Learned counsel for the Lodna Colliery Co. did indeed suggest, and his argument was adopted by the advocates for the other plaintiffs, that the plaintiffs were also entitled to the addition of "15 per cent on the market value" provided in sub-s. 2, S. 23, Land

15. Secretary of State v. Guru Proshad Dhur, (1893) 20 Cal. 51 (F B).

Acquisition Act, 1894 which applies to proceedings under S. 6, Land Acquisition (Mines) Act. But as my Lord the Chief Justice pointed out during the arguments, not only does S. 6, make the Land Acquisition Act applicable "subject to all necessary modifications," but further, sub-s 2, S. 23 Land Acquisition Act only provides for the addition of 15 per cent of the market value "in consideration of the compulsory nature of the acquisition" This is clearly inapplicable to the plaintiffs-respondents. Their interest in the coal, whenever wrought and raised, was limited to the tonnage royalties, and what is more, they were none of them entitled to insist on the coal being worked at any time. What the declaration under S. 5 (2) (b), Land Acquisition (Mines) Act has done to them is only to enable them to realise their tonnage royalties in praesenti instead of having to wait for them indefinitely. The legislature could not have intended to award an extra 15 per cent. "in consideration of the compulsory nature" of such an acquisition and in my opinion, the learned Subordinate Judge was right in disallowing this addition to them.

It has also been contended on behalf of the appellant that the North Barakar Coal Co. having been paid in full for all the coal locked up, plaintiffs ought to get their compensation from that Company and not from the Secretary of State, or in the alternative, that if the Secretary of State is held liable to pay the plaintiffs notwithstanding the full payment to the North Barakar Coal Co., he should have a decree for the corresponding amount or amounts against this Coal Company. It is admitted that the Secretary of State did not take up this position in his written statements in the three suits, but it is urged that he was exonerated from doing so by reason of the denial of Bipin Bihari Bose and the North Barakar Coal Company that the plaintiffs were entitled to any money from them. The learned Subordinate Judge seems inadvertently to have framed an issue on the point. The point was thus raised in the lower Court and has been again raised here. Whatever the technical aspects of the matter may be—and it is by no means clear that Ss. 30 and 31, Land Acquisition Act which have been relied on for the appellant are really available where there is no award by a Land Acquisition Officer made after notice to the interested parties—it seems clear that the contention must fail on the merits.

Neither the plaintiffs nor the Secretary of State can have any decree against the North Barakal Coal Company for the royalties unless it is proved that they were included in the payment to the North Barakar Coal Co Sir Sultan Ahmad for the appellant points out that in the claim made by the North Barakar Coal Co. (see p. 165 of the paper-book) the "nett profit" which is claimed is arrived at by deducting the "working cost" from the "gross value." This does not, however, necessarily point to the inclusion of the royalties in the nett profit, for they may have been included in what the Coal Co. put forward as the working cost, though it is not impossible that the Coal Co. might have laid their claim on the footing that the payment of the apparently undisclosed royalties was a matter between them and the superior landlords and was no concern of the Secretary of State. It also appears that in the lower Court the Secretary of State accepted the position that it was not open to him to call the Chief Mining Engineer of the Railway Board to say whether or not his award included royalties. Sir Sultan Ahmad has endeavoured to show that royalties were included in the award by making certain calculations from some of the data found in the claim of the North Barakar Coal Co. itself, but there is nothing to show that these were the lines on which the Chief Mining Engineer proceeded in fact when he made his award, the subject-matter of which was expressed as "the amount of compensation payable to the North Barakar Coal Co." in respect of the quantity of coal found by Mr. Simpson to have been locked up by reason of restrictions imposed on its working. Sir Sultan Ahmad's calculations also proceeded on the footing that the price of coal remained the same throughout the years during which Chief Mining Engineer expected the North Barakar Coal Co. would have been able to raise the coal after the declaration by the Local Government; the Company's figures related to an earlier period. The Chief Mining Engineer as an arbitrator could not be questioned as to the lines on which he had proceeded, and indeed he was not called as a witness in the case. In my opinion the appellant has utterly failed to make out the contention that the

plaintiffs' royalties were included in his payment to the North Barakar Coal Co., and it is clear that payment to the Coal Co, even if made out, would really have been no defence to the suits as constituted.

This disposes of the appeals, and it remains to deal with the only cross-objection urged before us on behalf of the respondents Bipin Bihari Bose and the North Barakar Coal Cc. as regards the costs of the lower Court that they have been ordered to bear. That these respondents were proper parties to the suits is not seriously denied. It is also clear that it was their action during the negotiations that prevented the settlement of the disputes. The learned Subordinate Judge thus had material before him to justify withholding their costs, and if he has not specifically referred to it, that is not a sufficient reason for interference by this Court. So far as the cross-objection seeks costs of the lower Court from the principal defendant, I consider that it does not even lie under O. 41, R. 22, Civil P. C. as I had occasion to show in detail in 13 Pat 200 (16). I would therefore dismiss the appeal with costs, as held by my Lord the Chief Justice, and also dismiss the cross-objections.

V.B./R.K. *Appeals dismissed.*

16. Chanda Bibi v. Mohanram Sahu, 1934 Pat 134=153 I C 412=15 P L T 42=13 Pat 200.

A. I. R. 1936 Patna 527

DHAVLE, J.

Mt. Bibi Alimunnissa—Plaintiff—Appellant.

v.

Shaikh Abdul Aziz and *others*—Defendants—Respondents.

Appeal No. 1400 of 1932, Decided on 18th March 1936, from decision of Addl. Sub-Judge, Monghyr, D/- 27th August 1932.

(a) Mahomedan Law—Wakf—Annuity and maintenance — Difference between—Maintenance refers to duty to maintain, with corresponding right to be maintained, while annuity does not—Certain sum to be given as stipends to wife and daughters—Held annuity allowance.

Maintenance refers to a duty to maintain, with a corresponding right to be maintained; while annuity does not. [P 528 C 2]

Where in a deed of wakf by a Mahomedan, it was provided that a certain sum should be given as stipend to the widow and married daughters of the wakif:

Held: that as the wakif was under no obligation to maintain his widow or daughters, what the wakif provided for his widow and the daughters was more in the nature of annuity allowances than of maintenance, and fact that the recitals in the wakfnama spoke of the "parwarishonafqa" of the wakif s rightful relations was immaterial. [P 528 C 2]

(b) Transfer of Property Act (1882), S. 6 (e)—Right of maintenance in definite sum of money is not mere right to sue.

A right of maintenance in a definite sum of money cannot be mere right to sue. It may not be attachable in advance under Proviso (n) to S. 60, Civil P. C , but that is not sufficient to bring it within Cl. (e), S. 6, T. P. Act, for it will in case of a breach, support a suit for a debt and not for damages. [P 528 C 2]

(c) Transfer of Property Act (1882), Ss 3 and 130—Deed of wakf providing certain sums to be given annually as stipends to certain relatives and after them to their aulad — Annuities held actionable claims under S 3 and could not be transferred by oral hiba.

Where a deed of wakf provided certain sums to be given annually as stipends to certain relatives of the wakif and after them to their aulad (descendants):

Held: that the annuities were actionable claims under S 3; and S. 130, T. P. Act, applied to Mahomedans also and hence annuities could not be transferred by an oral hiba. [P 529 C 1; P 530 C 1]

(d) Words and Phrases—Word 'aulad' includes both sons and daughters and all descendants in male but not in female line.

The word 'aulad' includes both sons and daughters and all descendants in the male but not in the female line. It excludes such heirs as the parents and the husband. [P 530 C 1]

Khurshaid Husnain and *H. R. Kazimi*—for Appellant.

Hasan Jan and *A. A. Khan Warsi*—for Respondents.

Judgment.—This appeal arises out of a suit for arrears of annuity. In 1905 Shaikh Imdad Ali, maternal grandfather of the appellant, executed a wakf of his property for the perpetuation, repairs and administration, etc., of a mosque and a madrasa built by him, and for "the maintenance and provision of his rightful relations." An allowance was fixed for the services of the mutawalli and for the expenses of the two institutions, and in para. 5 the deed of wakf provided that Rs. 800 will be given as stipend to the persons named below and after them to their descendants (aulad) according to the shares fixed by the Mahomedan Law, and in case of absence of descendants (aulad) it will be included in the charities and furtherance of the object of the wakf.

The sum of Rs. 800 was initially payable as an annual "stipend" (wazifa) in the following manner: Rs. 200 to the wakif's

wife, Mt. Bibi Hafiza, and Rs. 150 each to four daughters, Khairan, Idan, Khuban, defendant 3, and Kulsum. The appellant is daughter of Mt. Kulsum who died in 1912, leaving as her heirs the appellant, the parents Imdad and Hafiza, defendant 4, and the husband Hakim, defendant 2. The appellant's case was that all the other heirs of her mother made her a verbal gift of their shares in the annuity payable to Kulsum and that she thus became entitled to Kulsum's entire Rs. 150 a year. Imdad died in 1914, and in 1925 Hafiza, grandmother of the appellant, executed a hiba-bil-ewaz in favour of the appellant in respect of her annuity of Rs. 200. It was thus that the appellant sued for the recovery of Rs. 350 (besides interest) as her annuity for the year 1337 Fasli. The suit was resisted by the present mutwalli, defendant 1, who admitted the plaintiff's right to receive Rs. 75 only out of her mother's annuity but denied the oral hiba alleged by the plaintiff in respect of the shares of the other heirs of Mt. Kulsum and also denied the power of any annuity-holder to transfer his or her annuity. The trial Court found against the defendant on both points and decreed the suit. The lower appellate Court agreed with the trial Court as regards the factum of the oral hiba, but upheld the contention of the defendant mutwalli that Hafiza, in respect of her annuity of Rs. 200, and the heirs of Kulsum other than the appellant herself, in respect of their shares of the annuity that used to be paid to Kulsum, had no right to gift their annuities away. The Subordinate Judge accordingly allowed the appeal and reduced the decree in favour of the plaintiff to Rs. 75 only besides interest, it being common ground that this was the share in the annuity of Kulsum to which the appellant was entitled under the wakfnama.

It has been contended by Mr. Khurshaid Husnain who appears for the plaintiff-appellant that annuities are transferable under the general law, and that the wakfnama contemplates transfers within the circle of the wakif's dependants (or relations, as the word mutalliqin has been rendered) and does not in any way restrict the interest of the annuity-holders except that their shares are to go as an accretion to the charities (the mosque and the madrasa) on failure of aulad. Mr. Hasan Jan, who appears for the other side, has on the other hand argued that what we are dealing with here is maintenance grants—grants for "parwarish o nafqa," as the recitals in the wakfnama put it—and that they essentially import rights to be personally enjoyed and not to be transferred by those on whom they are conferred. He points out that transfers even within the family circle might bring in unintended remote heirs and thus defeat the provisions in the wakfnama making the allowances descendible to the aulad according to the shares fixed by the Mahomedan law and revertible to the charities on failure of such aulad. The difference between an annuity and a maintenance allowance is not a matter of dispute before me; it is agreed that the latter is referable to a duty to maintain, with a corresponding right to be maintained, while the former is not. The wakif was under no obligation to maintain his widow Bibi Hafiza or his daughters who, I am informed, had all been given away in marriage.

That being so, it seems to follow that what the wakif provided for his wife and daughters was more in the nature of annuity allowances than of maintenance; he died about nine years after the creation of the wakf, and from that time onwards even Hafiza ceased to have any right to maintenance. From this point of view the fact that the recitals in the wakfnama speak of the "parwarish o nafqa" of the wakif's rightful relations is immaterial. Let me however assume for a moment that even after the death of the wakif the provision operates as maintenance grants for the relatives, and consider whether these grants can be transferred, as this question has been elaborately discussed before me. Mr. Hasan Jan has relied on Cls. (d) and (e), S. 6, T. P. Act, in support of his contention that the allowances are not transferable. But as regards the latter clause, a right of maintenance in a definite sum of money cannot be regarded as a mere right to sue. It is true that it may not be attachable in advance under proviso (n), S. 60, Civil P. C., but that is not sufficient to bring it within Cl. (e), S. 6, T. P. Act, for it will in case of a breach support a suit for a debt and not for damages.

We are not concerned in this case with Cl. (dd) which was added to the section in 1929 and which provides that a right to future maintenance, in whatsoever

manner arising, secured or determined, cannot be transferred ; for the provision is not retrospective, and the law as previously understood by the Courts was far from uniform. As regards Cl. (d) on which Mr. Hasan Jan has laid great stress, the difficulty lies in establishing that the right to maintenance—I am at present dealing with the matter on the footing that it is a right to maintenance —amounts in the words of the clause to "an interest in property restricted in its enjoyment to the owner personally." In the dedicated property of course no human being has any interest. Mr. Hasan Jan has argued that the grantees may be said to have an interest in the income from the dedicated property in the hands of the mutwalli, but such income could not be said to be existing property, which alone is contemplated in S. 5, T. P. Act : see 12 M I A 275 (1). It has been held in some cases that a right to future maintenance is not property at all; but as will be seen presently, what we have to deal with here is an actionable claim within the definition in S. 3 of the Act. Reference has been made to such cases as 38 Cal 13 (2), 12 C L J 146 (3) and 46 Mad 659 (4), and it has been contended that the transferability or otherwise of the maintenance grants should be determined by the intention of the grantor.

It is, however, not pretended that there is anything in the wakfnama throwing any light on the question of the intention as regards transferability except that in the recitals it speaks of the *parwarish o nafqa* of the *mutalliqin mustahaqin*, and in para. 5 makes the 'stipends' descendible to the aulad according to the shares fixed by the Mahomedan law, with a reverter to the wakif on the failure of aulad. The recital does not import absolute inalienability, for an annual payment could (to give one example) be commuted into a capital sum producing the same return and thus maintain the person in question. Mr. Hasan Jan has argued that if the holder of an allowance for the time being were to have power to transfer his allowance, his aulad might starve and might also on his death get nothing. But as I read the document, it contains no provision for the aulad during the lifetime of the holder, and the transfer of his allowance by a holder need not clash with the right of his aulad to take the allowance after him, since his right to the allowance being limited to his lifetime, the transfer would be similarly limited. Mr. Khurshaid Husnain has argued that the recital regarding the *parwarsih o nafqa* of the *mutalliqin mustahaqin* points to an intention to allow transfers within the family circle. But a transfer need not always be voluntary, and we cannot read the document as providing for voluntary transfers only, while an involuntary transfer may be obtained just as well by a relative as by a stranger.

The trial Court found that there was no intention to prohibit gifts to relations because the language of the wakfnama does not express or imply it, and because Imdad Ali himself had the whole annuity of Kulsum after her death paid to the appellant down to his own death, whilst the defendant mutwalli had attested the hiba-bil-ewaz and had paid the plaintiff in full for several years. I am not, however, sure that this is a case where we can take the action of the wakif from the death of Kulsum to his own death as an indication of what was really intended by the wakfnama. As to the defendant mutwalli, there is clearly no estoppel against him at all. The learned Subordinate Judge apparently began by holding that "the right to the annuities by way of maintenance" was a personal right, and that Hafiza's hiba-bil-ewaz would pass the annuity on the plaintiff's death to her "heirs and legal representatives,"

to the deprivation of other heirs of these grantees who were to enjoy these annuities according to their legal shares under the terms of the wakfnama.

So far as there is any reasoning to be gathered from his judgment, he seems to have fallen into several errors. He has taken no notice of the reasoning of the trial Court. He has not noticed that the wakfnama speaks of aulad and not of heirs. And he does not ask himself what there is in the wakfnama to suggest that the allowances, though they are to descend to the aulad, could not be transferred for the lifetime of each rightful holder. I am unable to see sufficient

1. Rajah Sahib Perhlad Sein v. Baboo Budhoo Singh, (1867-69) 12 M I A 275 (P C).
2. Asad Ali Mollah v. Haidar Ali, (1911) 38 Cal 13=6 I C 826=14 C W N 918=12 C L J 130.
3. Tara Sundari Debi v. Saroda Charan Banerjee, (1910) 7 I C 80=12 C L J 146.
4. Subraya Sampigethaya v. Krishna Baipadithaya, 1924 Mad 22=73 I C 584=46 Mad 659=45 M L J 533 (F B).

reason for holding that they were intended "to be enjoyed by the beneficiaries themselves and nobody else." It seems to me that they are annuities coming within the definition of an actionable claim in S. 3, T. P. Act, a definition which applies to unsecured debts whether "existent, accruing, conditional or contingent." They are, in my opinion, property, but not "property restricted in its enjoyment to the owner personally," even though the interest of each holder is limited to his lifetime and does not descend to his heirs.

The plaintiff sued on the footing that these allowances were "annuity grants;" and annuities as distinguished from maintenance grants have been even held to be attachable under S. 60, Civil P. C.: see 10 C W N 1102 (5). Under S. 130, T. P. Act, actionable claims can be transferred only by the execution of an instrument in writing signed by the transferor, and Mr. Khurshaid Husnain has not been able seriously to argue that the section does not apply to Mahomedans or that the alleged oral hiba by Kulsum's heirs, other than the appellant, to the appellant, can have any operation notwithstanding the section in question. The lower Courts were both of them in error in taking it that para. 5 of the wakfnama made the stipends descendible to heirs. The word used is 'aulad,' which includes both sons and daughters and all descendants in the male but not in the female line. It also plainly excludes such heirs as the parents and the husband.

The provision that the aulad are to take according to the shares fixed by the Mahomedan law has given rise to some dispute before me. Mr. Khurshaid Husnain has argued that the addition "according to the shares fixed by Mahomedan law" could only be intended to determine the proportions between children of opposite sexes; and in support of this contention he has pointed out that if for instance the plaintiff Aliman as sole member of the aulad group surviving Kulsum were to be confined to her share of a half as an heir under the Hanafi law, the remaining half could not go to the charities as it could not be said that it was a case of failure of aulad. The appellant, however, came into Court on another footing altogether, viz , that out of the heirs left by her mother she inherited a half, and the others the remaining half of which they made an oral hiba in her favour. It is curious that though in the lower Courts the wakfnama seems to have been taken to speak not of aulad but of heirs, it was common ground that the plaintiff's share was 8 annas; for if she was to be treated as an heir along with the other heirs, viz. the parents and the husband, she could only take 6/13 instead of a half. Mr. Khurshaid Husnain has argued that that aspect of the matter cannot be further looked into because, though the lower Court has allowed a half, the mutwalli has not appealed.

The mutwalli has not in fact contested the plaintiff's right to a half of her mother's annuity either in the lower Courts (see para. 3 of his written statement) or before me. But Mr. Husan Jan has urged that para. 5 of the wakfnama only entitles the plaintiff to the daughter's share of one-half and excludes the application of the doctrine of the "return." If Mr. Khurshaid Husnain's contention is to be accepted, the provision giving the aulad "the shares fixed by the Mahomedan law" will operate to bring in the ordinary rule of the double share to the male which does not apply to such settlements unless it be otherwise provided in the wakfnama. But if the aulad are to take the shares (saham) fixed by the Mahomedan law and in the absence of aulad the stipend is to revert to the charities, the case where such shares do not exhaust the stipend is left unprovided for. In order, then, to give effect to the intention of the wakif consistently as far as possible with the language used by him we should be face to face with a choice between a group of aulad whose shares do not exhaust the whole and the public charities; and it seems to me that in choosing between the two, we must incline to the latter. It is, however, unnecessary to make any definite pronouncement about this in view of the facts that the plaintiff came to Court with a claim to a half as her mother's daughter and that this claim was admitted by the mutwalli. Mr. Khurshaid Husnain has indeed laid stress on the claim made in para. 3 of the plaint "as heir (and) daughter" to the entire annuity of Rs. 150; but this must be read with para. 4 which explains that claim as resting in part on the

5. Gopal Lal Seal v. Marsden, (1906) 10 C W N 1102.

verbal gift made to the plaintiff by the other heirs of Mt. Kulsum.

We cannot therefore hold on the pleadings that what the appellant took under the wakfnama upon her mother's death was more than a half of the Rs. 150. As to the other half, the oral hiba by the other heirs of Mt. Kulsum can have no effect because not being among Mt. Kulsum's aulad, they themselves were entitled to nothing out of the stipend that used to be paid to her in her lifetime, and this, quite apart from another reason I have already given, viz. that the annuity is an actionable claim and cannot be orally transferred. The order of the lower appellate Court in this respect must, therefore, be upheld upon these grounds, and not on the ground that the stipend was restricted in its enjoyment to the owners personally. As regards Hafiza's stipend, the fact that it is limited to her lifetime does not, in my opinion, in default of any definite indication that these stipends were intended to be inalienable, disentitle the holder to transfer it for her lifetime and no longer. The hiba-bil-ewaz actually makes a gift to the appellant naslan bad nasl, but while on the one hand it is impossible for it to operate after the donor's lifetime, there is on the other no reason why it should not operate during that period. In respect of this annuity, therefore, I must in the result differ from the lower appellate Court and hold that the appellant is entitled to Hafiza's stipend during Hafiza's lifetime only. The appeal will, therefore, be allowed, and the decree of the lower appellate Court modified by allowing to the appellant not the Rs. 75 only that she took as coming within the description of Kulsum's aulad but also the Rs. 200 transferred to her by Hafiza. The appellant will be entitled to proportionate costs in all the Courts; but in view of the fact that the rights of the parties were by no means easy to determine, and that the mutwalli defendant does not seem to have done anything to warrant an order requiring him to pay the costs personally, he will be at liberty to pay them out of the wakf funds in his hands. He will also note that the appellant will have a right to Hafiza's Rs. 200 only as long as the latter lives.

D.S./R.K. *Appeal allowed.*

A. I. R. 1936 Patna 531

JAMES, J.

Hanuman Sahay—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 330 of 1936, Decided on 22nd July 1936, from order of Judicial Commissioner, Chota Nagpur, D/- 29th May 1936.

(a) Criminal Trial—Forgery—Complainant need not be confined to witnesses stated in complaint.

Where a complainant alleges forgery in respect of a document by antedating it, he is not obliged to confine himself to the evidence of the witnesses named in the petition of complaint. [P 532 C 1]

(b) Criminal Trial—Accomplice—Evidence—Value of.

The Court, though it may presume the evidence of accomplices to be unworthy of credit, is not compelled to do so. [P 532 C 2]

W. H. Akbari and *Azizullah*—for Petitioner.

B. P. Sinha and *P. K. Samanta* — for Opposite Party.

Order.—The petitioner has been sentenced to six months' rigorous imprisonment under S. 465, I. P. C., for forgery of a hukumnama by antedating it. The petitioner was mulazim of Mt. Chandrabati Kuer a khorposhdar under the Gawan estate, who died on 25th June 1935. The Courts have found that on 21st October 1935 the petitioner executed a hukumnama, purporting to act as mulazim of Mt. Chandrabati Kuer, which he falsely dated as executed on 16th June 1935. Bhairo Lohar who had been a raiyat of the khorposhdar, and who after her death had become a raiyat of the parent estate, desired to borrow money in October 1935 from Anant Gope and Neju Mian in exchange for a portion of his holding. The three men are found to have gone to the petitioner, who said that he would arrange for the mutation of names, and who realised Rs. 10 as salami and Rs. 2-8-0 as costs, and then wrote out the questioned hukumnama.

Learned counsel for the petitioner in the first place suggests that the learned Judicial Commissioner in dealing with the appeal of the petitioner has made a mistake of record; he remarks as a suspicious circumstance that the date on the hukumnama is in English which the raiyats could not understand. The learned Judicial Commissioner meant that the date was given in the English style, not that

it was written in the English character; and there is no error of record here. The date is given as 16th June 1935 in the Kaithi character. The prosecution witness Anant Gope, one of the persons who was advancing money to Bhairo Lohar, said in cross-examination that he showed the hukumnama to the tahsildar in Asim, that is to say in September, but he promptly corrected himself by saying that he did not remember the month. The Tahsildar Harihar Prasad who was examined as a witness, said that he did not see the hukumnama in September; and this statement of Anant Gope was apparently an inadvertent slip of the tongue which was promptly corrected.

Learned counsel objects that five of the witnesses examined were not named in the petition of complaint and that the two witnesses named in the petition of complaint were not examined. The five witnesses who were not named in the petition of complaint as witnesses were the manager of the estate, the tahsildar, a drummer whose evidence was unnecessary, and two goldsmiths of Gobindpur to whom Anant Gope had sold some gold at about the time when he was making the advance to Bhairo Lohar. The evidence of the drummer, as I have said, was unnecessary; and as for the goldsmiths, the prosecution might well not have heard of them at the time when the petition was drafted. In any view of the matter, in a case of this nature a complainant is not obliged to confine himself to the evidence of the witnesses named in the petition of complaint. Of the two witnesses who were not examined one was Kali Gope who was named as a drummer, probably a mistake for Khiru Chamar, and the other was a Hajam who has not been mentioned by anybody in the course of the case. Their evidence would probably have been as useless as that of the drummer.

Learned counsel's principal argument is based on the fact that the conviction rests in the main on the evidence of three accomplices uncorroborated in material detail. The trying Magistrate came to the conclusion that the three cultivators were duped; and the learned Judicial Commissioner considered that they might well have entered into the transaction with the mulazim of the khorposhdar not realising that his authority had ceased; but even if they are to be regarded as accomplices, it is to be remembered that the Court, though it may presume the evidence of accomplices to be unworthy of credit, is not compelled to do so; and even if these three persons were regarded as accomplices there does not appear to be any reason why their evidence should be regarded as unworthy of credit. It appears that Anant Gope explained quite clearly what had happened as soon as he was questioned by the manager of the Gawan estate; and there is nothing which would indicate that these men were attempting to pass the blame for a transaction with which they themselves were concerned, on to another party.

Lastly it is suggested that even if the petitioner antedated the hukumnama he did not do so dishonestly or fraudulently because no damage has been caused to the Court of Wards; but the premium that might be payable on a transfer of this kind after the death of Mt. Chandrabati Kuer was payable to the wards estate and not to the estate of Chandrabati Kuer or to her mulazi. The petitioner certainly brought himself within the purview of S. 464, I. P. C., when he antedated the hukumnama in order to make it appear that it had been executed during the life of Mt. Chandrabati Kuer. The petition must be dismissed and the petitioner must surrender to his bail and serve out the unexpired portion of his sentence.

B.D./R.K. *Petition dismissed.*

A. I. R. 1936 Patna 532

COURTNEY-TERRELL, C. J. AND DHAVLE, J.

Commissioner of Income-tax, Bihar and Orissa.

v.

Humayun Raza and *another* — Assessees.

Misc. J. C. No. 21 of 1935, Decided on 20th July 1936.

Income-tax Act (1922), S. 4 (3) (ii)—Words "religious and charitable purposes" are to be construed according to general principles of construction and not by reference to personal law of assessee.

The words "religious and charitable purposes" in the Income-tax Act are to be judged not by the personal law of the assessees but according to the general principles of construction applying to statutes: 1931 *Lah* 578, *Foll.*

[P 533 C 1]

Manohar Lal—for Commissioner.

Sultan Ahmad, S. C. Mazumdar and *G. C. Das*—for Assessees.

Judgment.—The facts of this case are simple and are fully set out in the statement of the case by the Commissioner of Income-tax. In our opinion it is not necessary to say more than that we entirely agree with the judgment of the Full Bench of the Lahore High Court in 5 I T C 402=1931 Lah 578 (1) to the effect that the proper construction of the words "religious and charitable purposes" in the Income-tax Act is to be judged not by the personal law of the assessees but according to the general principles of construction applying to statutes. Accordingly we uphold the view of the Commissioner of Income-tax. The assessees have failed and they must pay Rs. 200 as costs of this Court in addition to the amount held in deposit.

R.M./R.K. *Order accordingly.*

1. Umar Baksh v. The Commissioner of Income-tax, Punjab, 1931 Lah 578=132 I C 689=12 Lah 725=5 I T C 402 (F B).

A. I. R. 1936 Patna 533

VARMA, J.

Gudar Sao—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 203 of 1936, Decided on 12th May 1936, from order of Addl. Sess. Judge, Gaya, D/- 25th March 1936.

Penal Code (1860), S. 243—Accused in possession of counterfeit coins—Coins purchased at auction sale openly and no attempt made to pass them as genuine afterwards—No offence under S. 243 held proved.

In course of a search of the house, the accused was found in possession of counterfeit coins which were kept by him under lock and key in a wooden box. The coins were the part of the estate's property and were purchased by the accused at an auction sale openly. After the purchase it was not shown that any attempt had been made to pass the coins to other persons as genuine:

Held: that under such circumstances it could not be held that the accused was in possession of the coins fraudulently or with intent that fraud may be committed and therefore the charge under S. 243 was not proved: 1933 *Oudh* 85, *Disting*. [P 534 C 1]

W. H. Akbari and *Anand Prasad*—for Petitioner.

Asst. Govt. Advocate—for the Crown.

Order.—The petitioner has been convicted under S. 243, I. P. C., and sentenced to one year's rigorous imprisonment. The charge against him runs as follows:

That you, on or about 10th April 1935 at Maulaganj, P. S. Kotwali, District Gaya, fraudulently or with intent that fraud might be committed were in possession of 13 rupees, 3 eight-anna bits, 2 four-anna bits, 12 one-anna bits, all counterfeits of the King's coin, knowing at the time when you became possessed of the said coins that they were counterfeits, and thereby committed an offence punishable under S. 243, I. P. C.

The case for the prosecution is that in the course of a search of the house of the petitioner in connection with an offence under Ss. 457 and 380 of the Code, the coins in question were recovered from a cloth bundle kept inside a black wooden box under lock and key in the south-eastern corner of an east-facing room on the second storey of the house of the petitioner on 10th April 1935, when they were entered in the search-list which is Ex. 1 in this case. An information was lodged by the Sub-Inspector who had recovered the coins, whereupon an investigation was started and the petitioner was sent up for trial. The coins were examined by a poddar (P. W. 8) who found that they were counterfeits, and in fact there is no denial as to this. The defence was that the coins at one time belonged to the Sijuar estate and in the year 1932 were sold as a part of the estate's property. The purchase was ostensibly made by one Motilal but the petitioner had a half-share in it, with the result that the counterfeit coins fell in his share. The petitioner is a goldsmith by caste.

The Courts below have found that these coins were purchased by the petitioner at an auction sale as evidenced by Ex. A; but they were of opinion that the fact that the purchase was made in the year 1932, that at the time of the purchase they were known to be counterfeits, and that they had not been used for the purposes of moulds by the petitioner indicated that they were being kept with a fraudulent intent. The learned Additional Sessions Judge has relied on 143 I C 152 (1), and has held that the ingredients necessary to prove the offence under S. 243 have been established against the petitioner. I am of opinion that on the facts found the important element of the offence that the petitioner was in posses-

1. Emperor v. Sangaram, 1933 Oudh 85=1933 Cr C 113=143 I C 152=34 Cr L J 545=9 O W N 1198.

sion of counterfeit coins "fraudulently, or with intent that fraud may be committed" has not been proved in this case. That this was not the only property purchased at the auction sale is clear from the evidence. Out of the lot purchased these coins turned out to be bad coins. The purchase was made openly and there was no attempt at concealment. After the purchase it is not shown that any attempt has been made by the petitioner to pass on the coins to other persons as genuine.

The fact that the coins were kept in a box and secured in a piece of chint cloth would show that the petitioner wanted that they should not be inadvertently mixed up with good coins; and the fact that the box was locked up does not also go very far against the petitioner, because once having received the coins he had to keep them in his house, and as coins are usually kept in locked up boxes there was nothing unusual in these coins having been found to have been kept similarly. The distinguishing feature of this case from the case relied upon by the learned Additional Sessions Judge is that here the purchase was made openly and there was no attempt to conceal the possession of the coins, while in the other case some of the coins were found in a box which was concealed inside a heap of bhusa evidently with the object of concealment. Under these circumstances, I am of opinion that on the facts found it cannot be held that the petitioner was in possession of the coins fraudulently, or with intent that fraud may be committed and, therefore, the charge under S. 243 has not been proved against him. The rule is therefore made absolute. The petitioner will be acquitted and discharged from bail forthwith.

P.R./R.K. *Rule made absolute.*

A. I. R. 1936 Patna 534

VARMA, J.

Deonandan Jha and *another*—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 229 of 1936, Decided on 9th June 1936, against order of Dist. Magistrate, Darbhanga, D/- 1st April 1936.

Penal Code (1860), S. 411—House occupied by two brothers living jointly—Finding of property stolen by younger brother—From mere fact that members of criminal tribes used to visit him, it cannot be presumed that his elder brother had knowledge that property was stolen one.

A woollen coat and a torch stolen by a person were found in a house occupied by him and his elder brother who used to live jointly. Absconding members of criminal tribes also used to visit the younger brother. The elder brother was convicted under S. 411 :

Held : that he could not be convicted as it was not safe to attribute knowledge to him that the articles in question were stolen simply because his younger brother kept bad company. It was also difficult to hold that his knowledge extended to every item of property received by his younger brother or brought to him by the members of the criminal tribes. There might be strong suspicion against him but for conviction in a criminal case mere suspicion was no proof of the guilt. [P 535 C 1]

S. N. Sahay and *L. K. Chaudhury*—for Petitioners.

Asst. Govt. Advocate—for the Crown.

Order.—The petitioners, who are brothers, were convicted under S. 411, I. P. C. Deonandan Jha was sentenced to six months' rigorous imprisonment and a fine of Rs. 100 in default to undergo six weeks rigorous imprisonment; and Jainandan Jha was sentenced to three months' rigorous imprisonment and a fine of Rs. 50 in default to undergo six weeks further rigorous imprisonment. Their appeal was summarily dismissed and when they came up in revision before this Court the petition of Jainandan Jha was summarily dismissed. Jainandan is the younger of the two brothers but still he is in the position of the karta of the family. The prosecution case is that on 1st December 1935 there was a theft in the house of one Badri Missir and amongst the articles stolen there was a woollen coat (Ex. 1). There was another theft in the house of one Girbardhari Das on 28th December 1935 and amongst the articles stolen was a torch (Ex. 2). As a result of information received by the police the house of the two brothers was searched and the two articles (Exs. 1 and 2) were recovered from the house. It has been urged on behalf of Deonandan that although on the finding the family was joint yet there is nothing to indicate that he had knowledge that the articles recovered were stolen properties. The learned Magistrate, on the other hand, observed as follows :

I am not prepared to believe that Deonandan had no knowledge that these articles are stolen ones inasmuch as from the evidence produced it appears that absconding members of the criminal tribes were found in his house, that suspicious articles like sendhmari were recovered

from the same and it is too much to believe under these circumstances that Deonandan had no knowledge what his brother was doing.

He therefore came to the conclusion that Deonandan must have knowledge. I am afraid, I cannot uphold this view. In the course of the inquiry it was Jainandan who claimed these properties as his own. Jainandan is the younger member of the family and unless he had a stronger personality one would not expect him to be the karta of the family in preference to the elder brother Deonandan. Deonandan was content with a secondary position in the family, and simply because his brother kept bad company it would not be safe to attribute knowledge to Deonandan beyond this: that members of the criminal tribes visited his brother. It is difficult to hold that his knowledge extended to every item of property received by his brother or brought to him by the members of the criminal tribes. There may be a strong suspicion against him, but for conviction in a criminal case mere suspicion is no proof of guilt. I therefore set aside the conviction and sentence passed upon the petitioner Deonandan Jha and direct that he be discharged from bail. The fine, if paid, will be refunded.

D.S./R.K. *Conviction set aside.*

A. I. R. 1936 Patna 535

COURTNEY-TERRELL, C. J. AND DHAVLE, J.

Damar Mahton—Plaintiff—Appellant.

v.

Jagdip Mahton and *others*—Defendants—Respondents.

Appeal No. 1512 of 1931, Decided on 5th August 1936, from decision of Dist. Judge, Patna, D/- 11th May 1931.

(a) Limitation Act (1908), Arts. 125 and 120—Gift of land by deceased in favour of certain person — Daughter of deceased objecting and contesting its registration in alienee's name—Land registered in alienee's name—Mere failure by her to bring title suit afterwards does not amount to constructive alienation by her for purpose of Art. 125 and suit by reversioner to set aside alienation is governed by Art. 120.

A deceased had made a gift of his land to certain person. During the registration proceedings the daughter of the deceased objected and actually contested the registration of the land being effected in alienee's name. The land however was at last registered in the name of the alienee and the daughter did not bring any title suit afterwards. The reversioners of the deceased subsequently brought a suit for a declaration that the alienation was void against them and hence should be set aside :

Held : that the daughter had actually contested the claim of the alienee in registration proceedings and the registration was effected in spite of her objection. So the mere failure of her to bring a title suit afterwards did not amount to constructive alienation for purposes of Art. 125. Art. 125, therefore did not apply and the suit by the reversioners brought more than six years after the land registration entry was barred under Art. 120 : 1919 *Mad* 706, *Rel. on.* [P 536 C 1, 2]

(b) Pleadings—Amendment involving substantial alteration of cause of action should not be allowed.

An amendment which involves a substantial alteration of the cause of action should not be permitted more especially when the suit was brought long after the expiry of the period of limitation: 12 *Mad* 136, *Rel. on.* [P 536 C 2]

B. C. De and *K. Dayal*—for Appellant.

Phulan Pd. Varma—for Respondents.

Dhavle, J.—This appeal arises out of a suit for a declaration of reversionary rights. Makhu Mahton, paternal uncle of the plaintiff and defendant 3, died on 7th March 1917, leaving him surviving as his heirs two daughters Lachmi Kuer, defendant 2, and Barti Kuer who died sometime after. Makhu had a four annas five dams share in two tauzis, and out of this he conveyed certain portions to defendant 1, the then minor son of a daughter of a predeceased son of his, by a deed of gift dated 6th March 1917. There were disputes in the Land Registration proceedings that followed upon Makhu's death, and on 10th July 1917, the Deputy Collector passed orders registering the name of defendant 1 in respect of the entire share of Makhu in the two tauzis. The case of the plaintiff, who is appellant before us, was that the order of the Deputy Collector was obtained by defendant 1 in collusion and concert with defendant 2, and he sought a declaration that the entry is inoperative against the rights of himself and defendant 3 as reversioners of Makhu in respect of the portions not covered by the deed of gift. The suit was contested by defendant 1 on the grounds, principally, that it was barred by limitation and that Makhu's gift to this defendant extended to the whole of his share in the two tauzis. The trial Court upheld both these contentions and dismissed the suit. On appeal the District Judge held that the deed of gift covered only certain portions of the share but that the trial Court was right in finding that the suit was governed not by Art. 125 but by Art. 120, Lim. Act, and was thus barred by time.

It has been contended for the appellant that the suit should have been treated as one governed by Art. 125, Lim. Act, so that, having been instituted in January 1928, it would be within time. The article however only applies to suits during the life of a Hindu female to have an alienation of land (which she takes as a widow) made by her declared to be void except for her life. The learned advocate has relied on such cases in 29 All 239 (1) and 10 Lah 237 (2), in which it was held that for the purposes of this Article of the Limitation Act a formal deed of transfer by the Hindu widow is not necessary, but that any act done by her which necessarily results in an alienation is sufficient. That position may be conceded, but on the findings of fact it does not help the appellant to establish that the suit comes within Art. 125. The appellant did undoubtedly assert collusion between the widow and defendant 1 in the matter of the Land Registration proceedings; but it has been found that she filed a petition of objection to the claim of defendant 1 on that occasion and actually contested it. Mr. De has suggested that collusion may be inferred from the fact that after the decision of the Deputy Collector the widow, defendant 2, did not bring a suit to establish her right to the disputed portions of the property, and he has argued that the reversioner has a right to obtain a declaraiton in order to prevent adverse possession against the widow giving the trespasser a valid title by the expiry of 12 years. But whether the widow was or was not under an obligation *vis-a-vis* the reversioners to get rid of the adverse possession of defendant 1, Art. 125 will not affect the appellant unless there was something amounting to an alienation by her. Defendant 1 obtained the Land Registration entry in spite of a contest offered both by her and by the appellant, and from the mere failure to bring a title suit afterwards, very little more collusion can be inferred against her than against the appellant himself.

Mr. De has also suggested that the widow's inaction may be treated as a case of surrender. But a surrender is a voluntary act and is clearly distinguishable from a failure to bring a title suit which has not been shown by the appellant to be due to any arrangement or understanding with defendant 1. 47 I C 578 (3) is a good illustration of the principle applicable in interpreting alienation for the purposes of Art. 125. That was a suit to have a sale in execution of a mortgage decree declared inoperative against the reversioners because the Hindu widow had withdrawn her defence to the action on a mortgage which was executed by her husband, and the learned Judges held that the withdrawal of the defence would not amount to an alienation by the widow unless it was shown to have been intended by the widow to bring the sale about and actually did so—unless, in other words, there was collusion between her and the person suing on the mortgage. In my opinion the lower Courts were right in holding that Art. 125 had no application to the suit; and there is no question that failing Art. 125, the suit would be within Art. 120 with its limitation of six years from the time when the right to sue accrues. Aggrieved as the appellant is by the Land Registration entries, the right to sue accrued as long ago as 10th July 1917, so that the suit was clearly barred by time.

Mr. De has also asked for leave to amend the plaint on the ground that Lachmi Kuer died during the pendency of the appeal, giving the plaintiff (along with defendant 3) a present right to possession. That however would be a substantial alteration of the cause of action: see 12 Mad 136 (4), and there is the less reason to permit an amendment of that character because the suit was brought long after the expiry of the period of limitation. I would accordingly dismiss this appeal with costs.

Courtney-Terrell, C. J.— I agree.

D.S./R.K. *Appeal dismissed.*

1. Ram Sarup v. Ram Dei, (1907) 29 All 239 = 4 A L J 160=1907 A W N 33.
2. Kanshi Ram v. Mt. Chet Kaur, 1928 Lah 932=111 I C 203 = 10 Lah 237 = 29 P L R 584.
3. Ranga Row v. Ranganayaki Ammal, 1919 Mad 706=47 I C 578=35 M L J 364.
4. Govinda v. Perum Devi, (1889) 12 Mad 136.

A. I. R. 1936 Patna 536

MOHAMAD NOOR, J.

Ramdhani Mahton—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 289 of 1936, Decided on 2nd July 1936, from order of Deputy Magistrate, Gaya, D/- 29-4-1936.

Penal Code (1860), Ss. 426 and 352 — Accused charged and convicted under S. 426 only—Conviction cannot be changed on appeal to one under S. 352.

Where an accused who is charged only with offence under S. 426 is convicted, and on appeal the conviction is altered into one under S. 352, if the accused has not been informed in the trial Court that he had to defend himself against the offence of assault as well, the conviction under S. 352 must be set aside. [P 537 C 1]

Hareshwar Prasad Sinha — for Petitioner.

Qazi Nazrul Hasan — for Opposite Party.

Order.—The petitioner was convicted by the Honorary Magistrate of Jehanabad under S. 426, Penal Code, and sentenced to pay a fine of Rs. 10. On appeal the sentence has been maintained but the conviction has been altered into one under S. 352, Penal Code, as the learned Magistrate in the Court of appeal below held that the conviction under S. 426, Penal Code, was not maintainable. The prosecution case was that the petitioner had closed an old drain of the complainant, and when the latter came to open it armed with an order of the Khas Mahal authorities, the petitioner did not allow him to do so and chased him.

The petitioner was summoned to answer a charge under S. 426 only and was, as stated above, convicted and sentenced under that section by the trial Magistrate. There is nothing to show that the petitioner was ever informed by the learned Honorary Magistrate that he had to defend himself against the offence of assault as well. The conclusion therefore which has been arrived at by the learned Magistrate in appeal cannot be maintained. I express no opinion about the rights of the parties in connexion with the drain. I hope the matter will be settled without any further litigation. The result is that the conviction and sentence are set aside and the fine, if paid, will be refunded.

R.W./R.K. *Conviction set aside.*

A. I. R. 1936 Patna 537

JAMES AND SAUNDERS, JJ.

Raghunath Singh and *others* — Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 533 of 1935, Decided on 19th November 1935, from order of Sess. Judge, Saran, D/- 18-9-1935.

(a) Evidence Act (1872), Ss. 40 to 43—Decree for confirmation of possession is not conclusive of possession on date of judgment.

A decree for declaration of title and confirmation of possession cannot be treated as a conclusive proof of the fact that decree-holder was in actual possession at the date when judgment was pronounced : 1930 *Pat* 162, *Dissent.* [P 538 C 2]

(b) Evidence Act (1872), Ss. 40 to 43—Judgment— Admissible only to show date and its legal consequence.

A judgment is generally speaking only admissible to show its date and its legal consequences : 1932 *Cal* 293, *Foll.* [P 538 C 2]

(c) Criminal P. C. (1898), Ss. 145 and 146—Question of possession—Judgment of Civil Court—Evidentiary value (*Obiter*).

Obiter.—Where a decree for delivery of possession is followed by execution, the proof of formal delivery of possession can be treated as conclusive proof of possession in favour of the decree-holder; but where there has been no execution and all that exists is a simple declaratory decree, the opinion of the civil Court on the matter of possession should not have any weight with the criminal Court on the point of actual possession. [P 538 C 2]

B. P. Jamuar—for Petitioners.

Jaleshwar Prasad—for the Crown.

James, J.—The names of Baldeo Raj and Kapildeo Rai, were entered in the Record of Rights in respect of certain land to which Suchit Singh laid claim. There was a dispute which led to proceedings under S. 144, Criminal P. C., in which Suchit Singh was unsuccessful. Suchit Singh then instituted a suit in the Court of the Munsif of Chapra praying for declaration of title in respect of this land and for confirmation of possession and in the alternative for recovery of possession. On 18th February 1935 the Munsif decreed the suit, making the declaration prayed for, finding that Suchit Singh was in possession, and decreeing what he called confirmation of possession. On 1st April 1935, Ramdahin Singh, son of Kapildeo Rai, was reaping the crop on this land when he was attacked by Suchit Singh who was accompanied by a number of men. Suchit Singh ordered Ramdahin to leave the land; and on his refusing to comply with this order he and his men were attacked by Suchit Singh's party, and a fight ensued, in the course of which grievous hurt was caused to Harnandan one of Ramdahin's men, and several other persons were less severely injured on each side. On these facts Suchit Singh and the men of his party were convicted by the Subdivisional Magistrate of

offences punishable under S. 147 and S. 323, Penal Code, four men being convicted of offences punishable under S. 148 and S. 324 or S: 326. The appeal of the petitioners was dismissed by the Sessions Judge of Saran.

In the trial Court and in the Court of appeal, there was necessarily much discussion of the question of possession. Both Courts found that actual possession was with Kapildeo's family. Mr. Jamuar on behalf of Suchit Singh and the other petitioners argues that the Courts ought not to have arrived on such a finding in face of the decision of the Munsif of 18th February 1935, which was a finding of a competent Court to the effect that possession was with Suchit Singh, but the effect of that decree confirming possession was merely to bar a suit for declaration of title on the part of Kapildeo Rai. The decree could not be of service in any other way to Suchit unless he actually was in possession at the date when it was passed, because in the form in which he obtained his decree, he could not enforce it to recover possession if he was himself out of possession. So far as Kapildeo Rai and his family were concerned, the effect of the decree was to make it impossible for them to sue for declaration of title ; but if at the time when the judgment was pronounced they were in possession of the land, this decree would not in itself have the effect of dispossessing them; nor any other effect than that of barring a suit. The learned Sessions Judge remarked that it was unfortunate that the decree was one of confirmation and not for recovery of possession and that fact is sufficiently clear. The decree was apparently, so far as we can judge from the discussion of evidence in the Court of the Sessions Judge and the Magistrate based on wrong conclusions, since Suchit was not actually in possession of the land ; and the result is that Suchit Singh can only enforce his decree by means of self-help, and practically speaking his opponents can only prevent it by exercising the right of self-defence, since they would not likely be successful in any action which they might take in the civil Court in consequence of acts of trespass committed by Suchit Singh.

Mr. Jamuar suggests that the decree should have been treated as conclusive proof of the fact that Suchit Singh was in possession at the date when judgment was pronounced ; but there appears to be nothing in those sections (Ss. 40 to 43, Evidence Act), which relate to the use of evidence in judgments which would justify that argument ; and indeed it would actually appear that these judgments in the present proceedings could not be properly used as evidence of possession at all.

Mr. Jamuar relies upon the decision of a single Judge of this Court in 10 P L T 862 (1), where it was held in dealing with proceedings under S. 145, Criminal P. C., that an ex parte decree for confirmation of possession made more than four years before the date of the proceedings under S. 145 necessitated the presumption that on the date of that decree, the party who was successful in obtaining it was in possession of the land. With due respect to the learned Judge who decided that case, we find it difficult to agree that the decree for confirmation of possession could be regarded as conclusive proof that the party was in possession on the date of the decree, although in a case under S. 145, since that decree presumably declared title the presumption that possession followed title might possibly have had some force in the state of the evidence in that particular case. The question of how far a judgment of the Court can be used as substantive evidence of the correctness of its finding was discussed in the Calcutta High Court in 59 Cal 136 (2) where it was pointed out that a judgment was generally speaking only admissible to show its date and its legal consequences. In the present case if the decree had been for delivery of possession followed by execution, the proof of formal delivery of possession might well have been treated as conclusive proof in favour of the successful complainant; but where there has been no execution, and all that exists is a simple declaratory decree, I doubt whether the opinion of the Munsif on this matter of possession should have any weight at all with a criminal Court which has to decide the question on the evidence before it. The learned Sessions Judge as he says has treated the judgment of the civil Court as evidence entitled to great respect ; but I am doubt-

1. Kishori Jha v. Anand Kishore Jha, 1930 Pat 162=126 I C 293=31 Cr L J 1005=10 P L T 862.
2. Trailokyanath Das v. Emperor, 1932 Cal 293 =1932 Cr C 262=137 I C 163=33 Cr L J 441=59 Cal 136.

ful whether he did not attach too much weight to it, and I have no doubt in my mind that the decision cannot be challenged on the ground that the weight which he attached to this opinion of the Munsif was less than that required by law.

The petition of Moti Singh who has been bound over for six months under S. 562, Criminal P. C., may be dismissed. The rest of the petitioners must execute bonds under S. 106 of the Code, each in one-hundred rupees with one surety of Rs. 100 to keep the peace for one year, in default of which they will suffer simple imprisonment for that period. The substantive sentences on Raghunath Singh, Jitan Singh, Ramdutt Singh and Suchit Singh will be reduced to four months' rigorous imprisonment each, and those on the remaining petitioners with the exception of Moti Singh, to sentences of two months' rigorous imprisonment.

Saunders, J.—I agree.

V.B./R.K. *Order accordingly.*

A. I. R. 1936 Patna 539

JAMES AND ROWLAND, JJ.

Balabux Marwari—Defendant—Appellant.

v.

Inder Kumar Tewari and *others* — Plaintiffs and *others* — Defendants — Respondents.

Appeal No. 815 of 1933, Decided on 4th August 1936, from appellate decree of Special Sub-Judge, Ranchi, D/- 6th March 1933.

(a) Limitation Act (1908), Art. 60—Customer's money standing to his credit in account of banker is money deposited—Test to see whether money is "deposited"—Specific use of such word is not necessary.

For purpose of Art. 60 in ordinary and popular language the money of a customer standing to his credit in the accounts of a banker is money "deposited," although for certain other purposes the term "deposit" is limited to goods which are placed in the custody of a person with a view to their being returned in specie. For determining whether money has been deposited within the meaning of Art. 60 in a particular case, the Court has to see whether what happened between the parties was of the nature of that sort of current account which a customer keeps with his banker. The use of any specific form of word to state in express terms that the money was money deposited is not necessary if the course of business between the parties establishes that in fact it was so: *Case law referred.* [P 540 C 1; P 541 C 1]

Hence where the course of business between the parties is of the nature of current account between a customer and his banker, the suit for money comes within Art. 60 and not Art. 59 or Art. 57 even though it is not stated expressly that money has been deposited. [P 541 C 1]

(b) Limitation Act (1908), Art. 60—Absence of notice of dissolution of partnership to outsiders—Demand against one of partners gives cause of action against all.

Where there is no evidence that the dissolution of partnership is notified to customers of the firm, then on the customer's demanding payment from either of the partners his cause of action has arisen against them all. [P 541 C 2]

(c) Practice—Remand—Small discrepancy in finding of amount due—No remand.

For a small discrepancy in the finding of amount due, the Court should not in second appeal be justified in remanding the case for a precise finding. [P 542 C 1]

Khurshed Husnain and *N. N. Sen*—for Appellant.

G. S. Prasad and *Paras Nath* — for Respondents.

Rowland, J.—The appellant before us was defendant 2 in the original suit. The claim was for balance due to the plaintiffs on a hathchitha account in respect of money deposited with defendants 1 and 2 as bankers in an account opened in the name of Sheogobind Tewari, husband of plaintiff 3 and father of plaintiff 1 and grandfather of plaintiff 2. The plaintiffs impleaded not only these two defendants who had been partners in the firm, but also the receiver of the estate of Lachmi Narayan; but as against the receiver the suit was dismissed. The Munsif decreed the suit against defendants 1 and 2 and this decision was upheld by the Subordinate Judge on appeal. In this second appeal which is presented by defendant 2, Balabux Marwari, two points are taken. The first is that the claim against Balabux is barred by limitation. The other point is that the plaintiffs are debarred from getting a decree in the suit without having first taken a succession certificate authorizing them to realize debts due to the late Sheogobind Tewari. The Courts below have treated the transactions between the parties as being of the nature of a current account between a customer and his banker, the money standing to the credit of the customer being repayable on demand and have counted the period of limitation under Art. 60, Lim. Act, from the date when the demand is made. It is contended for the appellant that limitation should have been calculated under Art. 59 or Art. 57 from the time when the loan was made, subject to any

extension of time to which the plaintiffs might be entitled having regard to Ss. 19-21 of the Act.

Mr. Khurshed Husnain for the appellant invited our attention to the expressions used in some of the entries in the hathchitha which are substantially acknowledgments of receipt of money and acknowledgments of the amount standing at the time of the entries to the credit of Sheogobind Tewari. He points out that the entries do not refer specifically to deposit for which the usual Hindi word is "*amanat*" and contains expressions "*dena nikala*" and "*dena raha*," which he says should be translated as "debt owing" and "found owing." Mr. Khurshed Husnain relies on 73 I C 978 (1) for the proposition that when one person hands over money to another on the understanding that it is not a gift, but has to be repaid when demanded, that would be a transaction ordinarily of the nature of a loan and the onus lies on the person claiming repayment to prove the existence of circumstances which turned the loan into a deposit. When therefore the money had been left in the hands of a trader who was not a banker, the Bombay High Court found difficulty in accepting the contention that it should be treated as money deposited for the purposes of Art. 60. This view seems to be consonant with earlier decisions of the Bombay High Court, but a different view has been taken elsewhere.

In 16 Cal 25 (2) the question was considered with reference to Art. 60, Lim. Act of 1877. It was observed that probably the money of a customer in the hands of his banker is money lent; and that if Art. 60 were not present the matter might fall within one of the other articles. But it is also pointed out that assuming it to be money lent the loan is of a special kind. For the purposes of Art. 60 the learned Judges observed that in ordinary and popular language the money of a customer standing to his credit in the accounts of a banker is money deposited, although for certain other purposes the term 'deposit' is limited to goods which are placed in the custody of a person with a view to their being returned in specie.

In Art. 60, dealing with money it is equally clear that a return in specie is not contemplated. It is so first, because it would be contrary to the ordinary usage of the language to hold such a thing; deposits of money are made, for instance, under many Acts of the legislature with public officers and others, and no one ever heard of the idea of the return of the identical coins deposited.

Therefore as the learned Judges pointed out,

to give any meaning at all to Art. 60 we have to look for a case in which one man places his money in the hands of another on the terms that an equivalent sum has to be paid back on demand and a case to which according to the ordinary usage of the language the term 'deposit' is applicable;

and they said: "we think the case of the banker and his customer is exactly such a case." Art. 60 had been construed in the opposite sense by a Division Bench of the Bombay High Court in 13 Bom 338 (3). Sargent, C. J., acceding to the argument that in the case of a deposit in its technical sense there must be an express trust, and holding that Art. 60 could not apply to any transaction which the law regarded as a loan. This decision and the Calcutta decision to which I have referred were considered by the Madras High Court in 18 Mad 390 (4) and the Calcutta view was accepted as being the better law. In 29 All 773 (5) the above decisions were considered and following the Bombay authority it was held that a suit to recover money deposited with a banker on a current account was governed by Art. 59 and not Art. 60. Those are the decisions under the Limitation Act of 1877, the last being decided in the year 1907. In the very next year Art. 60 was amended in a sense which makes it clear that the legislature intended the Calcutta and Madras view to be the law. That concludes the matter so far as the relations between a banker and his customer are concerned. In 39 Mad 1081 (6) the same principle was held to be applicable to money left in the hands of a trader who is not a banker. Such money it was held will be money deposited provided the circumstances are such as would make it money of a customer if the depositee is a banker. The

1. Gobind Chintaman Bhat v. Kachubhai Gulabchand, 1924 Bom 28=73 I C 978=25 Bom L R 503.
2. Ishur Chander Bhaduri v. Jibun Kumari Bibi, (1889) 16 Cal 25.
3. Ichhadhanji v. Natha, (1889) 13 Bom 338.
4. Perundevitayar Amal v. Nammalvar Chetti, (1895) 18 Mad 390=5 M L J 203.
5. Dharam Das v. Ganga Devi, (1907) 29 All 773=4 A L J 628=1907 A W N 263.
6. Subrahmaniah Chettiar v. Kadiresan Chettiar, 1917 Mad 916=32 I C 965=39 Mad 1081=30 M L J 245.

decisions in 13 Bom 338 (3) and 29 All 773 (5) were considered but were not followed. Those in 16 Cal 25 (2) and 18 Mad 390 (4) were approved and with great respect I would say that the view taken is the correct view.

As was stated in one of the Bombay decisions the exact point which imposes on dealings between a creditor and debtor the characteristics of a deposit of money for the purposes of Art. 60 has never been precisely set forth by the legislature. I feel sure it is not the same characteristic which is necessary to constitute a deposit for certain other purposes such as a trust which would create priority over other debts in case of insolvency or liquidation. In the absence of a legal definition I think we may say, following the Calcutta and Madras High Courts, that regard will be had to the popular meaning attached to the expression "deposited" rather than to the technical meaning which the word "deposit" has for certain legal purposes; that is to say we ought to see whether what happened between the parties was of the nature of that sort of current account which a customer keeps with his banker. The Court of first instance in this connexion pointed out that the sums deposited though substantial were not sums which the defendants' firm would have been likely to want to borrow as a convenience for themselves they being traders in a large way of business. One may add that the withdrawals shown in the account do not appear to resemble payments on account by a distressed debtor unable to pay more. They are clearly amounts drawn by the creditor at his own wish, the debtor being apparently ready to pay any sums which the creditor wished to draw at a moment's notice. The use of any specific form of words in the hathchitha to state in express terms that the money was money deposited is not necessary if the course of business between the parties establishes that in fact it was so. I am of opinion that the course of business has been correctly understood by the Courts below and was of the nature of a current account between a customer and his banker. The first objection of the appellant on the ground of limitation therefore fails as on the view that Art. 60 is applicable, limitation did not begin to run until a date in May 1928 and the suit was instituted within three years of that date.

It was however faintly suggested by Mr. Khurshed Husnain that if the money is payable on demand, the suit is premature as against his client, as the plaintiff had not proved that he had made a demand from defendant 2, Balabux. The ordinary rule is however that on the plaintiff demanding payment from either of the partners his cause of action has arisen against them all. Mr. Khurshed Husnain desires to escape this conclusion by saying that the partnership between his client and Lachmi Narain was closed down in 1921. But this does not help him, for there is no evidence that the dissolution of partnership was notified to customers of the firm. The other point taken was that the decree should not have been made in the absence of a succession certificate, having regard to the provisions of S. 214, Succession Act. This is a point not taken in the pleadings; it was raised in the appellate Court below. The point taken in the pleadings was that the suit was bad for defect of parties, because some brothers of Sheogobind Tewari had not been joined as plaintiffs. One of these brothers was examined as a witness for the plaintiff and deposed that Sheogobind dealt with his own earnings. Out of them he opened this deposit account with which his brothers had nothing to do. It is said that if this is so, the deposit money must be regarded as self-acquired property of Sheogobind and must have passed to his heirs by succession and not by survivorship.

One difficulty in giving effect to this contention is that it was not raised in the pleadings, so that the plaintiff did not get a full opportunity of answering it. Then again the account is a running account on which the plaintiffs have drawn from time to time without objection on the part of the bankers; and it also appears on the face of the hathchitha book that deposits have been made from time to time on behalf of the plaintiffs since the death of Sheogobind Tewari which took place as far back as 1913. To give effect to the contention raised by the appellant it would be necessary for us to go into questions of fact as to whether the withdrawals made by the plaintiffs after the death of Sheogobind were not sufficient to account for the whole of the old deposits made by Sheogobind and to extinguish that part of the debt, leaving at present recoverable, debt not exceeding what had

been deposited by the plaintiffs after the death of Sheogobind with interest thereon. It appears on the face of the pleadings and the hathchitha that about thirteen hundred rupees principal was deposited after the death of Sheogobind and this amount with interest thereon is more than enough to come to the total of the present claim which was laid at about eighteen hundred rupees. In the plaint, it is true, of this, Rs. 1,500 is described as principal and Rs. 303 as interest; but I do not think that for such a small discrepancy we should in second appeal be justified in remanding the case for a precise finding as to how much of principal and interest respectively should on proper accounting be ascribed to the deposits made by the plaintiffs themselves and how much to the deposit of Sheogobind that may be still outstanding. In the result I would dismiss the appeal with costs.

James, J.—I agree.

R.W./R.K. *Appeal dismissed.*

A. I. R. 1936 Patna 542

WORT AND FAZL ALI, JJ.

S. M. DeSouza—Objector—Appellant.

v.

Secy. of State—Opposite Party—Respondent.

Appeal No. 3 of 1933, Decided on 28th July 1936, from original decree of Dist. Judge, Manbhum-Sambalpur, D/- 24th February 1932.

(a) C. P. Tenancy Act (11 of 1898), Ss. 46 and 47—Acquisition of land in possession of recorded tenant—His heir is not person interested within meaning of S. 18, Land Acquisition Act.

Section 46, C. P. Tenancy Act, is a general provision which prohibits the transfer by an occupancy tenant of his holding. And S. 47 being an exception to general rule in S. 46, gives the heir a bare right to be put into possession by the revenue officer but creates no interest in the heir under the general rule. Hence where land belonging to a woman who is a recorded tenant has been acquired under the Land Acquisition Act, her son cannot be said to have any interest in the land within the meaning of Land Acquisition Act and as such he cannot object to the award of compensation.

[P 542 C 2]

(b) Land Acquisition Act (1894), S. 11—Land should be valued upon basis of its present use.

A land which is sought to be acquired should be valued upon basis of its present use. Where certain land is used only for agricultural purposes, it cannot be valued as a building land.

[P 543 C 1]

Yunus—for Appellant.

Govt. Pleader—for Respondent.

Wort, J.—In my judgment this appeal fails both on the preliminary objection which Mr. Sinha raises on behalf of the Crown and also on merits. The objector before the learned Judge in the Court below was S. M. DeSouza. In his evidence he stated in cross-examination that the land which was the subject matter of the land acquisition proceedings, from which this is an appeal, belonged to his mother; that is to say, his mother was the recorded tenant. The land is governed by the Central Provinces Tenancy Act. Now it is quite clear that, if the land belonged to the mother of the present appellant, the present appellant had no locus standi, and it is somewhat difficult to understand why the Crown treated with the objector in those circumstances. Mr. Yunus contends on behalf of the appellant that he has an interest in the land within the meaning of the Land Acquisition Act, and bases his contention on the provisions of S. 47, Central Provinces Tenancy Act. Under that section as heir of his mother he would be entitled to be placed in possession of the holding in the event of his mother alienating the property against the provisions of S. 46 of the Act. S. 46 is a general provision which prohibits the transfer by an occupancy tenant of his holding. In my judgment the contention fails. S. 47 gives the heir a bare right to be put into possession by the Revenue Officer and is an exception to the general rule, but creates no interest in the heir under the general rule. It is clear therefore that the present appellant has no interest in the land within the meaning of the Land Acquisition Act.

Apart from the preliminary objection which, in my opinion, as I have already stated, succeeds, the appeal itself has no merits. The land is a part of a larger area of 1.45 acres. The mother of the appellant is interested in .77 acres being plot No. 1249/1. In this case the appellant's contention in the Court below as well as in this Court was that the land should be valued on the footing of it being a building land. Now to that end it would be necessary to value the land upon a purely speculative basis, namely, on the supposition that the landlord would give consent to the use of the land for building, as it is admitted by the appellant that he has no present right to use the land for building purposes; and, under the Tenancy Act, if it were used for that

purpose, the recorded tenant would be liable to ejectment at the instance of the landlord. A body of evidence was called to show that certain plots of land surrounding the land in dispute or nearby were sold at substantial prices for building purposes. But in cross-examination one of the witnesses Debendra Nath Bose (witness 2 for the objector) admitted that the land referred to was Nazool land, that is to say, land owned by Government. Now whatever the exact meaning to be placed upon the expression "Nazool" may be, it is admitted by Mr. Yunus on behalf of the appellant that this land is not Nazool land, that it is agricultural land, that it cannot be built upon as I have already stated and cannot be alienated. The compensation awarded by the Land Acquisition Deputy Collector was Rs. 11 to the objector and 11 annas to Rajendra Singh, the landlord. In my opinion there is no foundation for that argument. The land must be valued upon the basis of its present use; and it is not seriously contended in those circumstances that the valuation placed by the Land Acquisition Deputy Collector is not correct. For those reasons in my judgment the appeal fails and must be dismissed with costs.

Fazl Ali, J.—I agree.

R.W./R.K. *Appeal dismissed.*

A. I. R. 1936 Patna 543

AGARWALA AND VARMA, JJ.

Jyoti Prashad Singh Deo Bahadur — Plaintiff—Appellant.

v.

Bharat Shah Babu and *others*—Defendants—Respondents.

Appeal No. 885 of 1931, Decided on 5th November 1935, from appellate decree of Dist. Judge, Manbhum, D/- 18th April 1931.

(a) Evidence Act (1872), S. 13 (b)—Suit by zamindar for declaration that certain village is not rent-free nor debatter property — Defendants relying on patta and kabuliyat by their tenant in which village was described as lakheraj debatter — Documents held not admissible against zamindar.

The mere assertion of the right in a document, to which the person against whom the right is asserted, is not a party and of which he knows nothing is not to claim the right, and the mere statement in a patta or kabuliyat that the lessor is lakheraj debatter cannot be said to be an instance when the exercise of the right was asserted within the meaning of S. 13. [P. 544 C 2]

A zemindar brought a suit for a declaration that certain village was not a rent free nor debatter property and the defendants relied upon a patta and a kabuliyat executed in their favour by a tenant in which the village was described as lakheraj debattar property :

Held : that the documents were not admissible against zemindar : 1927 *Cal* 1, *Foll.* [P 544 C 1,2]

(b) Record of Rights—Presumption—Entry in record of rights that certain village is rent-free debatter property — Presumption of correctness will not be rebutted until landlord proves that land held to be rent-free lies within his regularly assessed estate or mahal and that revenue has been assessed on it.

Where a certain village has been entered in the Record of Rights as rent-free debattar property the entry will be presumed to be correct and it is not until the landlord proves that the land which is held to be rent-free lies within his regularly assessed estate or mahal and that revenue has been assessed on it, that the presumption will be rebutted ; and if he proves it, the onus will be shifted on those who claim to hold the land free from rent to show that they have been relieved of this obligation either by contract or by some old grant recognized by Government : 1922 *P C* 272, *Expl.* [P 545 C 1]

A. B. Mukharji and *S. C. Mazumdar* —for Appellant.

R. S. Chattarji—for Respondents.

Agarwala, J. — In the record of rights finally published in 1923 village Shampur was recorded as the rent-free debatter property of the defendant idols Damodarjiu and Shamsunderjiu and the other defendants were recorded as shebaits. In the present suit the plaintiff-appellant sued for a declaration that the village is a rent paying mauza within his zamindari, that it is not debatter property and that the defendants are ordinary tenure-holders and are liable to pay rent at Rs. 26 a year. The first Court decreed the plaintiff's suit. On appeal the lower appellate Court reversed this decision, holding that the village was rent-free debatter property. This decision is challenged in second appeal by the plaintiff-appellant, and by reference to the Badshahee Grants Regulation 37 of 1793, and the non-Badshahee Grants Regulation 19 of 1793, and the other Regulations intended for the purpose of ascertaining and registering rent-free grants, it is argued that village Shampur has not been shown to have been a rent-free grant before the time of the decennial settlement as alleged by the defendants.

It may be mentioned that the defendants were unable to produce the grant by which they say their ancestors acquired the mauza in dispute because it has been lost. The Court of appeal below has

referred to the documentary evidence adduced by the plaintiff, but has been unable to draw from it the inference which the plaintiff seeks to place upon that evidence. With regard to the documentary evidence of the defendants, the Court of appeal below has come to the conclusion that that evidence proves that the property was rent-free property granted to the ancestors of the defendants. That evidence consists, first, of an extract from a general register of records showing that in 1873 the plaintiff's predecessor in title sued the defendants for recovery of cess: a receipt for cess was also produced. The lower Court has inferred, from the fact that only cess was claimed, that the predecessor of the plaintiff did not assert the right to recover rent from the defendants. It appears, however, that the name of the mauza in dispute in the present litigation is not entered in the papers on which the Court of appeal below relies and there is nothing on the record to connect those papers with mauza Shampur. The documents referred to were documents put in by the defendants, and it was, therefore, the duty of the defendants to show the connexion between those documents and the property in dispute.

The next items of evidence on which the Court of appeal below relied were two pattas and a kabuliat. The pattas were executed by the predecessor in interest of the defendants and the kabuliat by a tenant to whom a certain right was granted by the defendants. In these documents the mauza is referred to as defendants' lakheraj debatter. The learned Advocate for the appellant contends that this description of the defendants in documents to which the plaintiff was not a party is not admissible against him. For the respondents, on the other hand, it is contended that the statements in the patta and kabuliat are admissible under S. 13, Evidence Act, Cl. (b). The relevant portion of S. 13 is as follows:

> Where the question is as to the existence of any right or custom, the following facts are relevant: (b) particular instances in which the right or custom was claimed, recognized or exercised, or in which its exercise was disputed, asserted or departed from.

In the present case the question is whether these statements in the pattas and kabuliat were instances in which the right was claimed or instances in which the exercise of the right was asserted. A similar contention was raised before a Bench of three Judges of the Calcutta High Court in 31 C W N 32 (1). In that case the plaintiff sued for assessment of fair rent on the land in suit in which he alleged that the defendants had a right of occupancy only. The defendants pleaded that the land was held rent-free and produced in evidence a kabala executed many years previously by which one of their predecessors purported to sell the plaint lands with other lands alleging that they were nishkar brahmattar and that his father was in possession of them in nishkar right. A question arose whether the statement in the kabala was admissible either under Cl. (a) or (b) of S. 13. In considering the meaning of the word "claimed" in Cl. (a) Cuming, J., one of the two Judges who first heard the case and whose decision was approved by three Judges before whom the case eventually came, held that the word "claim" in the section indicates that the right is asserted to the knowledge and in the presence of the person whose right will be derogated by the establishment of the claim. His Lordship went on to observe:

> The mere assertion of the right in a document, to which the person against whom the right is asserted is not a party and of which he knows nothing is not to claim the right.

With regard to the second part of para. (b) of S. 13, in considering the meaning of the words, "particular instances in which the exercise of the right was asserted," his Lordship observed:

> The mere statement in the deed of sale that the vendor had a nishkar right cannot be said to be an instance when the exercise of the right was asserted. It is difficult for me to conceive how a nishkar transaction right can be exercised except perhaps by the refusal to pay rent.

With these observations on the construction of S. 13 of the Act I respectfully agree, and would, therefore, hold that the statements in the patta and kabuliat are not admissible to prove the contention of the defendants in the present case. The next item of evidence on which the Court of appeal below relied for its finding was a certified copy of a statement made by an ancestor of the defendants in the course of filing a road-cess return in 1872. In that statement he described mauza Shampur as his rent-free debatter property. This statement also appears to me to be inadmissible under S. 13, Evidence Act,

1. Brojendra Kishore Roy Chaudhuri v. Mohim Chandra Bhattacharji, 1927 Cal 1=99 I C 189=31 C W N 32.

for the reasons already indicated. There remains in favour of the case for the defendants-respondents the statutory presumption arising from the entry in the Record of Rights. With regard to this the learned Advocate for the appellant contends that this statutory presumption is insufficient to rebut what may be called the common law of presumption that a zamindar is entitled to rent on lands lying within his zamindari unless the person in possession of any portion of it is able to prove that by contract or otherwise he is exempted from the payment of rent. For this, reliance was placed on the decision of the Privy Council in 2 Pat 38 (2). In that case the respondents had been entered during the settlement operations in the Record of Rights as rent-free tenure-holders of lands lying within the appellant's zamindari. The appellant sued for a declaration that the respondents were ordinary rent-paying tenants. The first Court found that the defendants were liable to pay rent for the holding and its decree was upheld on appeal by the District Judge. In second appeal the High Court reversed this finding of fact. The Privy Council, in view of the fact that the High Court had differed from the lower Courts not only in the estimate of the evidence but also with regard to the inferences derivable from the documents produced in the case, themselves dealt with the appeal on its merits and reversed the decision of the High Court. Referring to the statutory presumption in favour of the correctness of the entry in the Record of Rights their Lordships observed:

> Considerable stress has been laid on this presumption on behalf of the respondents. Once, however, the landlord has proved that the land which is sought to be held rent-free lies within his regularly assessed estate or mahal, the onus is shifted. In the present case, the lands in dispute lie within the ambit of the estate which admittedly belongs to the plaintiffs and the pro forma defendants, and for which they pay the revenue assessed in the mauza. In these circumstances it lies upon those who claim to hold the lands free of the obligation to pay rent to show by satisfactory evidence that they have been relieved of this obligation, either by contract or by some old grant recognized by Government.

It will be observed, therefore, that it is not until the landlord proves that the land which is to be held rent-free lies within his regularly assessed estate or mahal and that revenue has been assessed on it, that the onus is shifted to the defendants to prove that they were entitled to hold the land free of the obligation to pay rent for it. The decision in 2 Pat 38 (2) has been considered by Khaja Mohamad Noor, J. in Second Appeals 1584 to 1590 of 1930, decided on 28th April 1933. Those appeals arose out of seven suits instituted by a patnidar under the Raja of Pachet, who is the appellant in the present appeal, for a declaration that the entry in the Record of Rights, that the defendants were nishkar brahmottardars, was incorrect and that the lands in their possession were liable to rent. In the Courts below the suits had been dismissed on the ground that the presumption arising from the entry in the Record of Rights had not been rebutted. In second appeal to the High Court the plaintiff contended that having proved that the lands were situate within his zamindari the presumption of the Record of Rights was rebutted and the onus was shifted upon the defendants to establish that they had acquired a right to hold the lands free of rent. In that case, as in the present appeal, reliance was placed on the decision of the Privy Council, 2 Pat 38 (2). Khaja Mohamad Noor, J. observed:

> I am clearly of opinion therefore that the important words in the judgment of their Lordships of the Judicial Committee in 2 Pat 38 (2) are "the land which is sought to be held rent-free lies within his regularly assessed estate or mahal," "the land in dispute lies within the ambit of the estate for which they pay revenue assessed in the mauza."

The view that we take of the decision in 2 Pat 38 (2) therefore appears to be in accord with the view taken by Khaja Mohamad Noor, J. in the unreported second appeals. The decision of the Privy Council in 2 Pat 38 (2) has also been considered by Benches of this Court in 11 P L T 468 (3) and 12 P L T 891 (4). There is nothing in either of these decisions to support the contention of the learned advocate for the appellant. The onus of proving that the Government revenue fixed in 1793 is assessed on any particular lands as being included in the permanent settlement is on those who affirm

2. Jagdeo Narain Singh v. Baldeo Singh, 1922 P C 272=71 I C 984=49 I A 399=2 Pat 38 (P C).

3. Jodha Sahu v. Tirbena Sahu, 1929 Pat 748 =123 I C 386=11 P L T 468.

4. Lachuman Lal Pathak v. Kamakhya Narayan Singh, 1931 Pat 224=131 I C 788=12 P L T 891.

that such is the case, 30 Cal 291 (5). The onus, therefore, of proving in the present case that Shampur was included within the lands in respect of which the predecessor of the plaintiff was assessed lies on him and he has failed to discharge that onus to the satisfaction of the Court of fact below. The statutory presumption in favour of the defendants, therefore, remains unrebutted with the result that this appeal must be dismissed with costs.

Varma, J.—I agree.

D.S./R.K. *Appeal dismissed.*

5. Jagadindra Nath Roy v. Secretary of State, (1903) 30 Cal 291=30 I A 44=7 C W N 193 (P C).

A. I. R. 1936 Patna 546

MOHAMAD NOOR AND SAUNDERS, JJ.

Babui Dineshwari Kuer and *another*—Petitioners.

v.

Ram Narain Singh and *others*—Opposite Parties.

Civil Revn. No. 76 of 1936, Decided on 1st May 1936, from order of Sub-Judge, Gaya, D/- 30th November 1935.

Jurisdiction— Area under jurisdiction of one Court subsequently transferred by Government notification to jurisdiction of another Court—Cases pending in former Court in respect of such area are automatically transferred to latter Court—Former Court has no power to pass decrees in cases so transferred.

Once a new Court is established and the territorial limit of an existing Court is curtailed by notification of Government, the latter Court ceases to have jurisdiction over the area which is taken away from its jurisdiction and placed under the jurisdiction of the newly established Court. Similarly, if an area is taken out of the jurisdiction of one existing Court and placed under that of another, the former Court ceases to have jurisdiction over the cases of the area so taken out of its jurisdiction and the pending cases automatically placed under the jurisdiction of the latter Court. It is not enough that a Court should have jurisdiction over a suit at the time of its institution but that its jurisdiction must continue till the case is finally disposed of, subject of course to any order of transfer which may be passed by a competent authority. In order to enable a Court to pass a decree in a suit it must possess jurisdiction under four heads : (1) territorial, (2) pecuniary, (3) personal and (4) subject matter. It is essential (barring those cases in which there are doubts about the territorial limits) that the Court must possess all these jurisdictions at the time of passing of the decree, otherwise it is void. Therefore if a Court loses its territorial jurisdiction it cannot proceed to pass the decree, though it had such jurisdiction when the suit was instituted : 4 *A L J* 213 ; 28 *All* 93 and 1915 *Mad* 362, *Rel. on.* [P 547 C 1]

Sultan Ahmed and *Janak Kishore*—for Petitioners.

S. N. Ray and *G. P. Sinha*—for Opposite Parties.

Mohamad Noor, J.—This application, originally presented as an appeal from an order, is directed against an order of the Subordinate Judge of Gaya, directing that a petition for ascertainment of mesne profits presented before the Munsif of Jehanabad be transferred to the Munsif, second Court, Gaya. The petitioners in this Court instituted before the Munsif, second Court, Gaya, a suit for possession with mesne profits of properties situated within thana Arwal in the District of Gaya which was then within the territorial jurisdiction of that Court. The trial Court dismissed the suit, but it was decreed with mesne profits by the first appellate Court and this decree was upheld by this Court. In the meantime, that is since the decision of the suit by the trial Court and before its disposal by this Court, a new Munsif was established at Jehanabad having territorial jurisdiction over the thana of Arwal. After the termination of the suit in this Court the plaintiffs namely the petitioners before us, filed an application for the ascertainment of mesne profits before the Munsif of Jehanabad who after hearing the parties passed a decree for a certain amount in their favour. No objection as to the jurisdiction of the Munsif of Jehanabad to ascertain the mesne profits was raised before him by the defendants They however, being dissatisfied with this decree, preferred an appeal to the District Court of Gaya which was heard by the Subordinate Judge who held that a proceeding for ascertainment of mesne profits was a proceeding in the suit, that the suit itself continued to be pending before the Munsif, second Court, Gaya, that the Munsif of Jehanabad had no jurisdiction to ascertain the mesne profits and pass a decree and that his decree was null and void for want of jurisdiction. He gave decisions on the merits of the plaintiffs' claim favourable to them, but in the end, on the basis of his decision on the point of jurisdiction, allowed the appeal and directed that the application for ascertainment of mesne profits be transferred from the Munsif of Jehanabad to the Munsif second Court of Gaya. The plaintiffs being dissatisfied

with this order presented an appeal to this Court which purported to be an appeal against an order returning the plaint for presentation to the proper Court. In view however of the decision of this Court in 2 P L J 394 (1), in which it was held that no appeal lay against an order returning petitions not being plaints, as O. 7, R. 10 refers to the return of plaints only and not petitions, the petitioners sought the leave of this Court to treat their appeal against the order as a petition in revision. This was allowed on 13th February 1936.

I am clearly of opinion that the view taken by the learned Subordinate Judge on the question of jurisdiction is wrong. Once a new Court is established and the territorial limit of an existing Court is curtailed by notification of Government, the latter Court ceases to have jurisdiction over the area which is taken away from its jurisdiction and placed under the jurisdiction of the newly established Court. Similarly, if an area is taken out of the jurisdiction of one existing Court and placed under that of another, the former Court ceases to have jurisdiction over the cases of the area so taken out of its jurisdiction and the pending cases automatically placed under the jurisdiction of the latter Court. It is not enough that a Court should have jurisdiction over a suit at the time of its institution but that its jurisdiction must continue till the case is finally disposed of, subject of course to any order of transfer which may be passed by a competent authority.

In order to enable a Court to pass a decree in a suit it must possess the basic jurisdiction which comes under four heads: (1) Territorial, (2) pecuniary, (3) personal and (4) subject matter. It is essential (barring those cases in which there are doubts about the territorial limits) that the Court must possess all these jurisdictions at the time of the passing of the decree, otherwise it is void. Therefore, if a Court loses the territorial jurisdiction it cannot proceed to pass the decree, though it had such jurisdiction when the suit was instituted. In this particular case it is true, as the learned Subordinate Judge has held, that the suit must be treated as pending for the purposes of ascertainment of mesne profits, as the decree in respect of it was preliminary, and for certain purposes a suit remains pending between the preliminary and the final decrees; but the question is in which Court did it remain pending. The simple answer is that it remained pending in the second Court of the Munsif of Gaya up to the time when the Court at Jehanabad was not established and then automatically became pending in the Court of the Munsif of Jehanabad since that Court was established. S. 17, Bengal, Agra and Assam Civil Courts Act of 1887, runs thus:

> Where any civil Court under this Act has from any cause ceased to have jurisdiction with respect to any case, any proceeding in relation to that case which, if that Court had not ceased to have jurisdiction, might have been had therein may be had in the Court to which the business of the former Court has been transferred.

It is obvious that the business of the second Court Munsif of Gaya in respect of thana Arwal which on the establishment of the Court at Jehanabad was transferred to that Court by the operation of the notification of the Local Government. Therefore, further proceeding in respect of the cases of that thana must be taken in the newly established Court. This seems to me to be the view taken by the Allahabad High Court in 1907 A W N 53 (2) where during the pendency of an appeal before the District Judge of Saharanpur the Munsif of Kairana in Muzaffarnagar from where the appeal came was transferred from the Judgeship of Saharanpur to that of Meerut. The District Judge of Saharanpur transferred the appeal to the District Judge of Meerut. It was held that the procedure adopted was correct, and that the Government notification transferring Muzaffarnagar from Saharanpur to Meerut was sufficient authority for the action of the District Judge of Saharanpur. The same principle may be deduced from the decision in 28 All 93 (3) which was followed in *Jhandu Mal's* case (2), I have just referred to, and in 37 Mad 477 (4). The finding of the learned Subordinate Judge is, therefore, erroneous and I would set it aside and also the order of transfer of the petition which is based upon it.

1. Sheikh Mohammad Abdul Ghafoor v. Mahtab Choudhury, 1917 Pat 334=41 I C 231=2 Pat L J 394.

2. Jhandu Mal v. Pirthi, (1907) 4 A L J 213=1907 A W N 53.
3. Allah Dei Begam v. Kesri Mal, (1906) 28 All 93=2 A L J 576=1905 A W N 199.
4. M. Subbayya v. Rachayya, 1915 Mad 362=26 I C 519=37 Mad 477.

The next question is what consequential order should be passed in this case. In my opinion, the position after setting aside the order is that the appeal of the defendant remains undisposed of though a judgment up to a certain stage has been written. The position is as if the appeal is still sub judice. I would accordingly remand the case to the lower appellate Court. If practicable, the Subordinate Judge (Mr. R. N. Ghosh) who heard the appeal will finally dispose of it according to law, after giving the parties such further hearing (if any) as he may think fit. If, however, that learned Subordinate Judge be not available within a reasonable time, the appeal will be reheard either by the learned District Judge himself or by some other competent Court subordinate to him, as he directs. The application is allowed as stated above with costs: hearing fee five gold mohurs.

Saunders, J.—I agree.

D.S./R.K. *Application allowed.*

---

* A. I. R. 1936 Patna 548

MACPHERSON AND MOHAMAD NOOR, JJ.

Sankru Mahto and *others* — Plaintiffs —Appellants.

v.

Bhoju Mahato and *others*—Defendants —Respondents.

Appeal No. 1553 of 1930, Decided on 12th November 1935, from appellate decree of Sub-Judge, Purulia, D/- 28th August 1930.

(a) Civil P. C. (1908), O. 22, Rr. 2, 3 and 4 —Right to sue survives—Test mentioned.

The test whether a right to sue survives in the surviving plaintiffs or against the surviving defendants is whether the surviving plaintiffs can alone sue or the surviving defendants could alone be sued in the absence of the deceased plaintiff or defendant respectively.

[P 549 C 2]

*** (b) Civil P. C. (1908), O. 22, Rr. 2, 3 and 4—Representatives of deceased party already on record and the right to sue or to be sued surviving to them—No application for substitution is necessary.**

When the representatives of the deceased party are already on record and the right to sue and to be sued survives in the remaining plaintiffs or the remaining defendants, the case comes within R. 2 and not within Rr. 3 and 4 of O. 22, and no application for substitution is necessary : 1931 *Pat* 164, *Doubted* ; 1928 *Pat* 250, *Expl.* and *Disting.* ; 1934 *Pat* 427 and 1933 *Pat* 464, *Foll.* ; 1925 *Pat* 123 and 1925 *Pat* 590, *Expl.*

[P 550 C 2]

A. K. Roy and *Pulin Bihari Ganguli*—for Appellants.

R. S. Chatterji—for Respondents.

Mohamad Noor, J. — This appeal has arisen out of a suit instituted by the plaintiffs, seven in number, all being Kurmi Mahtons of Chota Nagpur, for recovery of possession of some plots of land on the allegation that they were part of their joint occupancy holdings and that the defendants wrongfully got their names recorded in respect of them in the settlement records and that from a portion they were dispossessed in consequence of a proceeding under S. 145, Criminal P. C., and from the rest the defendants forcibly dispossessed them. The defendants disputed the plaintiffs' title to the lands in question and pleaded limitation. The trial Court dismissed the suit. The plaintiffs preferred an appeal to the District Court. During the pendency of the appeal plaintiff (appellant) 2 died in Jaith 1336 B. S., and defendant (respondent) 8 died in Kartik 1335 B. S. No application was made for substitution of the names of the representatives of the deceased appellant and the deceased respondent. When the appeal came up for hearing before the learned Subordinate Judge, applications were made on behalf of the remaining plaintiff-appellants to the effect that the heirs of the deceased appellant and the respondent were already on the record. It was alleged that under the tribal custom which governs the parties appellant 2 was succeeded by his brother appellant 1, and that respondent 8 also was succeeded by his brothers already on the record.

A preliminary objection was raised on behalf of the respondents that the appeal of appellant 2 and the entire appeal against respondent 8 had abated on account of no application for substitution of their representatives having been made within the period allowed by law and that according to the nature of the suit the whole appeal had abated. The learned Subordinate Judge allowed this preliminary objection and dismissed the appeal. The surviving plaintiffs have preferred this second appeal. The only question for our consideration is whether, in the circumstances stated by the surviving plaintiffs in their applications, dated 26th August 1930, the appeal before the learned Subordinate Judge had abated. The relevant provisions of law in this connexion are contained in Rr. 2, 3 and 4, O. 22. These rules are as follows :

2. Where there are more plaintiffs or defendants than one, and any of them dies, and where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.

3. (1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit. (2) Where within the time limited by law no application is made under sub-r. (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.

4. (1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit; (2) any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant; (3) where within the time limited by law no application is made under sub-r. (1), the suit shall abate as against the deceased defendant.

Under O. 22, R. 11, these rules apply *mutatis mutandis* to appeals. It is obvious that in case R. 2 applies, no application for substitution is necessary. The Court (of course, on being informed) shall cause an entry to be made in the record that a particular plaintiff or defendant is dead and that the right to sue survives in favour of the surviving plaintiffs or against the surviving defendants. Rr. 3 and 4 apply where one or more of the several plaintiffs or defendants dies and the right to sue does not survive in favour of the remaining plaintiffs or against the remaining defendants, and in that case if no application is made for substitution of the representatives of the deceased plaintiffs or defendants the appeal shall abate so far as the deceased plaintiff or deceased defendant is concerned. The question is whether the present case is governed by R. 2 or by Rr. 3 and 4. It is contended on behalf of the appellants that in the present case on the death of plaintiff 2 the right to sue survived in the remaining plaintiffs and on the death of respondent 8 the right to sue of the remaining plaintiffs survived against the remaining defendants and therefore R. 2 applies and no application was necessary. The test whether a right to sue survives in the surviving plaintiffs or against the surviving defendants is whether the surviving plaintiffs can alone sue or the surviving defendants could alone be sued in the absence of the deceased plaintiff or defendant respectively.

Now if the allegation of the appellants is correct that appellant 1 is the only representative of appellant 2, there can be no question that the surviving plaintiffs alone can institute the present suit on the allegations in the plaint. Similarly, the surviving defendants alone can be sued. There are no others who can join as plaintiffs and no others who can be joined as defendants. The learned Subordinate Judge seems to have held on the authority in 7 Pat 285 (1), that even if the heirs of a deceased appellant be on the record it is still necessary that an application for substitution be made so that the appellants already on the record may be shown also in their capacity as the representatives of the deceased appellant. No doubt, at first sight this may appear to be the view taken in that case, but a closer examination of the facts of that case and the judgment of the Court will show that such is not the case. In that case two of the respondents had died. One of the heirs of the deceased respondents was already on the record, but their other heirs were not. Kulwant Sahay, J. after referring to the two earlier decisions of this Court in 3 Pat 853 (2) and 6 P L T 451 (3) observed:

> These two cases are clear authority for holding that the fact of Narain Singh being on the record did not prevent the abatement of the appeal when admittedly the other two respondents died leaving other members of the family as their legal representatives and those members were not brought on the record.

It is clear, therefore, that this case was decided upon the fact that all the heirs of the deceased respondent were not on the record. It is no authority for the proposition that if all the heirs

1. Basist Narayan Singh v Modnath Das, 1928 Pat 250 = 108 I C 552 = 7 Pat 285 = 9 P L T 153.
2. Lilo Sonar v. Jhagru Sahu, 1925 Pat 123 = 85 I C 25=3 Pat 853=6 P L T 313.
3. Daroga Singh v. Raghunandan Singh, 1925 Pat 590=88 I C 669=6 P L T 451.

of a deceased appellant or respondent are already on the record any application for substitution under R. 3 or R. 4 is necessary. So far as this Court is concerned there is no case, except that in 10 Pat 341 (4), which lays down that an application for substitution is necessary even when all the heirs of a deceased appellant or respondent are already on the record. I shall come to this case in a moment. At present I wish to examine the two cases which were followed in 7 Pat 285 (1). The first is that in 3 Pat 853 (2). In that case also, as it appears from the judgment, all the representatives of the deceased respondent, were not on the record. Only one member of the family was there and it was held that under the circumstances of the case an application was necessary. The second case in 6 P L T 451 (3) is rather an authority against the view taken by the learned Subordinate Judge. In that case there were two deaths, first of the father and then of one of the sons. Sir Dawson Miller in giving the judgment of the Bench of which my brother Macpherson was a member definitely held that no application having been made for substitution of the heirs of the father would not be fatal if his sons were already there, but an application was necessary as one of the plaintiff's sons had predeceased him and his sons were not on the record and no application having been made within the time allowed by law the appeal in the mortgage suit was held to have abated. It is clear, therefore, that neither the case relied upon by the learned Subordinate Judge nor the cases on which that case is based lays down that where all the representatives of a deceased party are already on the record an application under R. 3 or R. 4 is necessary.

I now come to the case in 10 Pat 341 (4). It is true that it was laid down in that case that even if all the heirs of a deceased party are already on the record the case comes under O. 22, Rr. 3 and 4 and that an application for substitution is necessary. I was a party to that decision, but since then I have had occasion to reconsider the position and have come to entertain doubts about its correctness. The question came up before another Bench of this Court consisting of Wort, J. and myself where all the above decisions of this Court were considered. That was the case in 12 Pat 778 (5). Agreeing with my brother Wort, J., I held that at least in the case of a Hindu joint family if all the members of the family were already on the record the case came under R. 2. It was not necessary for me in that case to express any definite opinion about the correctness of the decision in 10 Pat 341 (4). The case was distinguishable on the ground that it was a case of a Mohammadan family where the heirs took by succession and not by survivorship. The view which my learned brother Wort, J. and I took in that case has been accepted to be the correct law by another Division Bench of this Court [Courtney-Terrell, C. J. and Varma, J., in 1934 Pat 427 (6)]. Therefore, the consensus of opinion in this Court is that when the representatives of a deceased party are already on the record and the right to sue and be sued survives in the remaining plaintiffs or the remaining defendants, the case comes within R. 2 and not within Rr. 3 and 4, O. 22. Almost all the High Courts are practically of the same view, and it is needless to refer to the cases in detail. I do not think it is necessary for the purposes of this case to refer the question to a Full Bench for an authoritative decision whether the case in 10 Pat 341 (4) was correctly decided. First of all the consensus of opinion is against the view taken in that case and secondly it was a case governed by the Mahomedan law where it may be said that survivorship does not exist. In my opinion, therefore, if under the law which governs the plaintiffs' family, appellant 1 represents the interest of the deceased appellant 2, the appeal of appellant 2 has not abated. There is again no question that respondent 8 has been succeeded by his brothers who are already on the record, and the appeal against that respondent has also not abated and continues against his representatives.

Assuming, however, that appellant 1, is not the legal representative of appellant 2 and that the widow or daughter of the deceased appellant has succeeded him, then the appeal of appellant 2 has

4. Mt. Waleyatunissa Begum v. Mt. Chalakhi, 1931 Pat 164=132 I C 100=10 Pat 341=12 P L T 28.

5. Jainarayan Ojha v. Hira Ojha, 1933 Pat 464 =146 I C 322=12 Pat 778=14 P L T 702.

6. Punyabrata Das v. Manmohan Ray, 1934 Pat 427=153 I C 520=15 P L T 380.

certainly abated. But there is no reason to hold that even in that case the whole appeal has abated. The shares of the plaintiffs must be separate and the remaining plaintiffs if successful will get a decree only to the extent of their shares. In a similar case in 56 Cal 622 (7) the Calcutta High Court allowed the surviving plaintiffs to amend the plaint by asking for joint possession to the extent of their shares. I do not, however, think that an amendment of the plaint is essential. If the plaintiffs ask for more than is due to them the Court can always pass a modified decree.

The order which I would pass in this case is that the case be remanded to the learned Subordinate Judge. He will allow the surviving appellants to adduce evidence to show that appellant 1 represents the deceased appellant 2 so that the right to sue, which appellant 2 had, survives to appellant 1. That they may do by establishing that the tribal law excluding females governs the family of appellants 1 and 2, or failing that that they are governed by the Hindu law according to the Mitakshara and were a joint family. If he finds in the affirmative on either of these points he will cause an entry to be made in the memorandum of appeal that right to sue survives to the surviving appellants and proceed to hear the appeal on the merits. If, on the other hand, he finds that the widow or the daughter of appellant 2 has succeeded him, he will declare that the appeal of appellant 2 has abated, and then proceed to determine whether the remaining appellants are entitled to any decree and if so to what extent. In order to determine the share of the remaining appellants he will take additional evidence himself or direct it to be taken by the trial Court and if the remaining plaintiffs succeed he will pass a decree for joint possession in their favour to the extent of their share. The costs of this appeal will abide the ultimate result of the suit.

Macpherson, J.—I agree. I desire to add with reference to the decision in 6 P L T 451 (3) that my view has always been that where, in spite of a death among plaintiffs (or defendants) the whole interest is represented by the surviving plaintiffs (or defendants) the provision applicable is R. 2 of O. 22 and not the subsequent rules and there is no question of abatement, but in the decision mentioned it appeared that the whole interest in the mortgage was not represented by the surviving plaintiffs-respondents in which case R. 2 would not apply.

As to the ground given by the learned Subordinate Judge for failing to go into "the question whether according to tribal custom among the Mahto Kurmis the brother of a deceased person inherits his property to the exclusion of the deceased's widow and daughters," it has been found to be unsound. It is observed that the Courts in Manbhum appear to be apprehensive of tackling the point, and indeed the answer may vary in accordance with circumstances. In the present instance the question is whether the right to sue of appellant 2 survived to his brother, appellant 1. The appellant's claim was that they were governed by the tribal law of the Kurmi Mahtos of Manbhum and the neighbouring districts which, as in the case of all aboriginal races, excludes inheritance by females (except perhaps occasionally in the way of temporary indulgence to a widow or unmarried daughter if that can be termed inheritance). The Kurmi Mahtos have in Manbhum in many cases become somewhat Hinduised. The question is whether in any particular instance they have abandoned their tribal rules of inheritance and adopted Hindu law in that regard. There are observations on the point in 6 P L T 604 (8). In Manbhum or at least in parts of it the further question will arise and is relevant on the present occasion whether if they have not only become Hindus but have also adopted Hindu law, it is the Mitakshara form of it (which certainly governs the great land-holding families of the district and which may be the indigenous law), or whether members of this pre-eminently Manbhum tribe have adopted the Dayabhaga law from Bengali immigrants of the higher castes. In the present instance if the appellants' family is governed by the Mitakshara rules it will further be necessary to consider whether the appellant 1 and appellant 2 constituted a joint family. If they did, appellant 1 took by survivorship and represented the whole interest. If they did

7. Hari Charan Moulik v. Kalipada Chakravarti, 1929 Cal 519=119 I C 814=56 Cal 622=33 C W N 359.

8. Kritibas Mahton v. Budhan Mahtani, 1925 Pat 733=89 I C 796=6 P L T 604.

not, the widow and daughter of appellant 2 would represent his interest, as of course they also would if the Dayabhaga law applies.

R.W./R.K. *Case remanded.*

A. I. R. 1936 Patna 552

JAMES AND ROWLAND, JJ.

Sonu Lal and *others*—Appellants.

v.

Ramnandan Singh — Decree-holder—Respondent.

Appeal No. 215 of 1935, Decided on 28th July 1936, from original order of Addl. Sub-Judge, Gaya, D/- 10th April 1935.

Execution—Prior mortgagee's suit impleading mortgagors and puisne mortgagee — Claim against latter abandoned and suit dismissed against him—Objection by puisne mortgagee that property put up for sale by prior mortgagee was his—Prior mortgagee contending that puisne mortgagee was no party and objection was invalid since not covered by S. 47, Civil P. C.—Puisne mortgagee held party, but S. 47, Civil P. C., did not apply—Puisne mortgagee's encumbrance must however be mentioned in sale proclamation of prior mortgage.

The prior mortgagee instituted a suit impleading his mortgagors and the puisne mortgagee. The latter resisted the suit. The prior mortgagee abandoned his claim and suffered it to be dismissed so far as the puisne mortgagee was concerned. He obtained a compromise decree against the mortgagors for sale. Later on he sought to put up the property for sale without any reference to any right or claim of the puisne mortgagee. The latter objected that the property put up for sale was his property and could not be sold in execution of prior mortgagee's decree. It was contended on behalf of the prior mortgagee that the puisne mortgagee not being a judgment-debtor had no locus standi to contest the application; and secondly that the application was not maintainable as it was not an application relating to the execution, discharge or satisfaction of the decree, but one going to the root of the decree itself :

Held : that the puisne mortgagee was still a party to the suit notwithstanding that it was formerly dismissed against him.

[P 552 C 2; P 553 C 1]

Held also : that the puisne mortgagee's objection was to the whole decree and did not come within S. 47, Civil P. C. [P 553 C 1]

Held further : that when the prior mortgagee put his decree into execution, the puisne mortgagee's encumbrance was a matter which ought to be mentioned in the sale proclamation.

[P 553 C 2]

Manohar Lal and *Rajkishore Prasad* —for Appellants.

S. N. Sahay and *S. S. Bose*—for Respondent.

Rowland, J.—The appellants are sons and successors in interest of the holder of a mortgage dated 23rd October 1916, on which he brought a suit on 7th February 1930, and obtained a preliminary decree dated 14th July 1930, and final decree dated 18th January 1932. He put the property to sale on 9th February 1932, and got delivery of possession on 19th June in the same year. The principal respondent had taken two mortgages, one dated 3rd February 1914, and another dated 18th April 1915, secured on a number of properties including that in respect of which the appellants are interested. He brought his suit on 5th June 1922, impleading his mortgagors and the present appellants' father in the capacity of a puisne mortgagee. The latter resisted the suit, and on 10th March 1927, the respondent abandoned his claim and suffered it to be dismissed so far as the appellants' father was concerned, but obtained a compromise decree against the mortgagors for sale not of all the properties comprised in the mortgage, but of certain of these properties only others being exempted. Later he moved the Court to review the decision in so far as its effect was to dismiss the suit against the appellants, but the application was not granted. The respondent took his final decree on 10th January 1931, and requested the Court to expunge the name of the present appellants from the record. This was refused and the name of the appellants, therefore, remains as the name of a party against whom the suit has been dismissed.

In 1932 the respondent put his decree into execution. At that time he asked the Court to notify in the sale proclamation the appellants' encumbrance, but at a later stage of the proceedings this was withdrawn, and he is now seeking to put the property up for sale without any reference to any right or claim of the appellants. The latter objected that the property which it was sought to be put up for sale was their property and could not be sold in execution of the respondent's decree. The respondent opposed this objection contending, first, that the appellants not being judgment-debtors had no locus standi to contest the application ; secondly, that the application was not maintainable as it was not an application relating to the execution, discharge or satisfaction of the decree,

but one going to the root of the decree itself; and, thirdly, claiming that the mortgage of the respondent and decree passed thereon had priority over the mortgage decree and auction-purchase of the appellants and that the property should be sold free from any encumbrance in favour of the appellants.

The Subordinate Judge has held, first, that the appellants are still parties to the suit notwithstanding that it has been dismissed as against Basant, and, therefore, the first objection of the decree-holder against the maintainability of the objection failed. The Subordinate Judge next held that the application of the objector was an objection to the whole decree and, therefore, did not come within S. 47, as a question relating to the execution, discharge and satisfaction of it.

On the first point the finding of the Subordinate Judge is well supported by authority. On the second point the proposition is clear that the objection must relate to the execution, discharge or satisfaction of a decree, and, therefore, the appellants' contention that the decree, which is for sale of the mortgage property, cannot be given effect to at all, is out of Court; but there still remains a question as to the manner of the execution of the decree, that is to say, whether it can be executed by selling the property unconditionally so as to conclude the rights of the appellants by a sale in this execution. To this extent the objection was cognizable by the executing Court. In considering the rights of the parties and to what extent they can be given effect to in this execution proceeding, it is to be noticed that the appellants are not only the holders of a mortgage, and of a mortgage decree, but are actually purchasers who have taken delivery of possession of the property. They are, therefore, in a position analogous to that of mortgagees in possession and holders of an encumbrance which it seems to be the duty of the Court to notify in the sale proclamation. The claim of the respondent that his mortgage has priority over the rights of the appellants so as to enable him if he purchases the property to eject the appellants, and the appellants' counter-claim that as between the respondent and themselves the respondent's rights do not amount to a valid mortgage prior to that of the appellants, are matters which do not fall to be decided in this litigation at its present stage.

Substantially then the order of the Subordinate Judge is affirmed subject to the observation that the encumbrance of the appellants is a matter which ought to be mentioned in the sale proclamation. There will be no costs of this appeal.

James, J.—I agree.

R.W./R.K. *Order accordingly.*

A. I. R. 1936 Patna 553

WORT, AG. C. J. AND DHAVLE, J.

Mahabir Prasad — Defendant — Petitioner.

v.

Brij Mohan Prasad—Plaintiff and *another*—Defendant—Opposite Parties.

Privy Council Appln. No. 26 of 1935, Decided on 21st April 1936, for leave to appeal to His Majesty in Council.

Civil P. C. (1908), S. 110—Judgment of affirmance—Suit for possession—Trial Court holding that plaintiff was entitled to recover possession and defendant's payment of certain sum was forfeited—High Court, on appeal, affirmed judgment as regards main question but reversed it as regards sum—Judgment held, was judgment of affirmance and applicant must show substantial question of law.

When the appellate Court modifies the original decree upon a single point and that completely in the applicant's favour so that he has no further grievance in that matter, he cannot because of that modification, have a right to an appeal on other points on which the Courts have concurred, without showing a substantial question of law. So where in a suit for possession the trial Court held that the title had not passed to the defendant and that the plaintiff was entitled to recover possession; but held in addition that the defendant had forfeited Rs. 3,000 paid by him; and the High Court on appeal affirmed trial Court's judgment as regards the main question but reversed so far as the question of Rs. 3,000 by holding that the sum was not forfeited:

Held: that High Court's decision was in substance a judgment of affirmance and therefore it was necessary for the petitioner to show that there was some substantial question of law: *Case law discussed.* [P 554 C 1; P 555 C 1]

Brij Kishore Prasad—for Petitioner.

Ishwarinanda Prasad — for Opposite Parties.

Wort, Ag C. J.—This is an application for a certificate that the case is a fit one to be taken on appeal to His Majesty in Council. The applicant was the defendant in the action in which the plaintiff claimed possession of certain property in the following circumstances.

There was a contract of sale by the plaintiff to the defendant under which the defendant had paid Rs. 75 as earnest money and there was a further payment by him of Rs. 3,000. The case of the plaintiff was that the defendant, after the plaintiff had executed the sale-deed, had tampered with it and interpolated or changed certain pages in the agreement and turned what was according to the plaintiff's description a conditional sale into an absolute sale. As Agarwala, J. pointed out in the course of his judgment what the plaintiff meant by conditional sale was that the title in the property should not pass until the defendant had paid the whole of the consideration. With regard to the fact that the defendant had not paid the whole of the consideration within the time stipulated, there appears to have been no dispute. In those circumstances the trial Judge held that title had not passed to the defendant and that the plaintiff was entitled to recover possession; but he held in addition that the defendant had forfeited the Rs. 3,000 which as I have stated, had been paid by him.

On appeal to this Court the judgment of the trial Court was affirmed as regards the main question but reversed so far as the question of Rs. 3,000 and it was held that the Rs. 3,000 was not forfeited. It will be seen therefore that so far as that matter is concerned, the defendant has no grievance. The substantial question in this case is whether the judgment of this Court was a judgment of affirmance, if so it would be necessary for the applicant to show that there was some substantial question of law within the meaning of S. 110, Civil P. C. Dealing with the latter question, it is clear that there is no substantial question of law. The question which was in dispute in this Court and in the trial Court was substantially a question of fact. Once having decided that the document, the sale deed, had been tampered with, that the document as originally drawn up and executed by the plaintiff was what the plaintiff was pleased to call a conditional sale, it necessarily followed that the property did not pass to the defendant in the circumstances of the case, the balance not having been paid. I fail to see any question of law at all and there being no substantial question of law, it remains therefore to consider whether this was a judgment of affirmance. The contention of the applicant necessarily is that it was not a judgment of affirmance as the High Court has varied the judgment or decree of the trial Court by holding that the sum of Rs. 3,000 was not forfeited.

The leading case with regard to this matter is a case upon which many judgments of the High Courts in India are based : at least the case which has been discussed by many of the High Courts in India with regard to this question. It is the case in 51 I A 319 (1), where their Lordships of the Privy Council gave special leave to appeal in these circumstances. The suit was a suit in which the plaintiff claimed certain property basing his claim on an adoption which was denied by the defendant. The defendant, a widow, claimed to be entitled to a sum of Rs. 3,000 per annum as maintenance. The trial Court as did the appellate High Court decided in favour of the plaintiff on the question of adoption. The trial Court however allowed the widow Rs. 800 per annum as maintenance instead of her claim for Rs. 3,000. This was varied by the High Court by increasing the maintenance allowance to Rs. 1,200 per annum. It will be seen therefore that the amount allowed was still short of the original claim which she had made. In those circumstances their Lordships of the Privy Council in a very short opinion gave special leave to appeal but limited the appeal to the question as to the maintenance allowance. The case in 51 I A 319 (1) was discussed by the Calcutta High Court in 38 C W N 1174 (2), in which the learned Judges made this observation, which I should like to adopt, "This Court" said the learned Judges,

however has refused on the strength of *Annapurnabai's Case* (1) to break away from a long course of decisions of Courts in India which firmly laid down the principle that when the appellate Court modifies the original decree upon a single point and that completely in the applicant's favour so that he has no further grievance in that matter, he cannot, because of that modification, have a right to an appeal on other points on which the Courts have concurred, without showing a substantial question of law.

The learned Judges went on to say :

The enormity of the opposite view is so very great that a far more clear and express pro-

1. Annapurnabai v. Ruprao, 1925 P C 60=86 I C 504=51 I A 319=51 Cal 969.
2. Bibhuti Bhusan Dutta v. Sreepati Dutta, 1935 Cal 146=154 I C 1072=62 Cal 257=38 C W N 1174.

nouncement of the Judicial Committee would be necessary to uphold it.

The learned Judges then later in their judgment referred to a decision of Rankin, C. J., and Ghose, J. in 31 C W N 572 (3). The learned Chief Justice in the latter case referring to a previous case reported in 8 C W N 294 (4) and to 51 I A 319 (1), said that he did not think that the latter showed that it was an erroneous view; but in construing S. 110, Civil P. C., what they had to look at was the substance and to see what was the subject matter of the appeal to His Majesty in Council. Now there is no decision of this Court which is to the contrary effect. The learned Advocate relies upon a case in 144 I C 320 (5), but as will be seen it differs from the case in hand as did the case before their Lordships of the Judicial Committee inasmuch as there was still a substantial point from which by way of appeal the appellant might benefit. It was a case on a mortgage in which the plaintiff had succeeded in the trial Court in getting a mortgage decree. That decree had been varied in the High Court by giving the plaintiff not a mortgage decree but a money decree for a less amount. Again in 11 P L T 727 (6), the trial Court had granted a decree to the plaintiff in a mortgage suit but disallowed the plaintiff's claim for interest pendente lite. There was an appeal both by the defendant and a cross-appeal by the plaintiff. The High Court dismissed the defendant's appeal but allowed the plaintiff's cross-appeal, thus modifying the decree of the trial Court. That again is substantially on the same footing as the case before their Lordships of the Privy Council but from the facts which I have stated it is clear that the case is clearly different from the one before us. In my judgment I would adopt the view taken by the learned Judges of the Calcutta High Court with regard to this matter and would hold that this is in substance a judgment of affirmance and that therefore it is necessary for the petitioner to show that there is some substantial question of law. Upon that point, as I have already stated, he has failed, and in my opinion therefore the application for leave to appeal should be dismissed with costs. We assess the hearing fee at five gold mohurs.

Dhavle, J.—I agree. As regards the passing of title under the sale deed in question, both the Courts were in agreement and have held against the applicant for leave to appeal to His Majesty in Council. In the circumstances of the case that was a substantial finding of fact and the decree of this Court one of affirmance. The only other disputed matter in the case was the question of forfeiture of the sum of Rs. 3,400. The trial Court held that the plaintiff was entitled to keep the money. This Court on appeal held in favour of the applicant that the plaintiff was not entitled to keep the money. In respect of this sum of money the applicant can have no further grievance. He is anxious to appeal as regards the passing or non-passing of title under the sale deed; but that is a matter on which both the Courts have, as already stated, been in agreement. Many cases have been cited before us; but the one that comes nearest to the matter before us is 31 C W N 572 (3). The decisions cited from this Court are clearly distinguishable on the facts, though there are undoubtedly observations in them that are in favour of the applicant. In the second of those decisions, I mean the one from 144 I C 320 (5), no reference was made to 31 C W N 572 (3) and in the other there was apparently an inclination to doubt the correctness of what was said by Rankin, C. J., in 31 C W N 572 (3), but as I have already indicated, the decision in this case from 11 P L T 727 (6), is easily distinguishable on the facts. In *Narendra Lal's case* (3), the only modification made by the Court of appeal was in favour of the applicant for leave to appeal to His Majesty in Council, and it was a modification of such a character as to leave the applicant without any further grievance so far as that particular matter was concerned. In these circumstances and after discussing the decision of the Privy Council in *Annapurnabai's case*(1), Rankin,C.J. observed :

We may take it, I think, that where the amount is a question in dispute the fact that the Courts differ and that the higher Court differs

---

3. Narendra Lal v. Gopendra Lal, 1927 Cal 543=103 I C 65=31 C W N 572=45 C L J 426.
4. Sreenath Ray Bahadur v. Secretary of State, (1904) 8 C W N 294.
5. Homeswar Singh v. Kameshwar Singh, 1933 Pat 262=144 I C 320.
6. Jamuna Prasad Singh v. Jagarnath Prasad Bhagat, 1929 Pat 561=117 I C 193=11 P L T 727.

in favour of the applicant does not mean that the decision is one of affirmance, but I am not in a case of this kind prepared to say that because on a totally different point, namely. a point about the share, the applicant has succeeded and succeeded altogether so that he has no further grievance in that matter, he can without showing a substantial question of law have a right to litigate upon other points upon which both the Courts have been in agreement.

In my opinion that really concludes the matter, though the decision in that case is not directly binding on us.

D.S./R.K. *Application dismissed.*

A. I. R. 1936 Patna 556

JAMES AND ROWLAND, JJ.

Pirthi Singh—Appellant.

v.

Ramsaran Mahto and *others*—Respondents.

Appeals Nos. 170 and 220 to 225 of 1934, Decided on 29th July 1936, from appellate decrees of Dist. Judge, Shahabad, D/- 5th December 1933.

Res judicata—Rent suit—Ex parte decree—Relationship of landlord and tenant must be presumed to be determined—Subsequent rent suit between same parties—Question of relationship of landlord and tenant is barred by res judicata.

The relationship of landlord and tenant is the very foundation of a decree in a suit for rent and therefore when such a suit has been decreed the Courts must proceed on the footing that it was a matter necessary to be determined and in fact determined in the earlier rent suit. It cannot be relegated to the category of matters only indirectly, collaterally and incidentally decided. This principle is true even if the decree passed is an ex parte one. Hence in a subsequent suit between the same parties the question of relationship of landlord and tenant is barred by the principle of res judicata: *Case law referred.* [P 557 C 2; P 558 C 1]

D. N. Varma—for Appellant.

Harians Kumar and *J. N. Sahai* (in No. 170) and *Harians Kumar* (in 220 to 225)—for Respondents.

Rowland, J.—The plaintiff-appellant brought a batch of rent suits alleging himself to be a two-annas proprietor in the tauzi entered as such in the Collectorate Register D and entitled to realise two annas of the recorded rents from the respective tenants of the holdings in suit. He impleaded the recorded co-sharer landlords as pro forma defendants framing the suits in accordance with S. 148-A, Bengal Tenancy Act. The tenant defendants in all the suits except one and the pro forma defendants in all the suits objected that the entire rent was payable by the tenants to the pro forma defendants and nothing was payable to the plaintiff.

The Munsif rejected this contention, holding that it was concluded against the defendants by the principle of res judicata in consequence of the judgments and decrees in a similar batch of rent suits instituted in the year 1926-27 between the same parties. He held that in consequence of the principle of res judicata the defendants were precluded on the face of these decisions from raising in the present litigation the contention that the plaintiff was not entitled to the two annas share of rent for which he sued. The Munsif also held on the merits that the case set up by the defendants was not true. The allegation was that the proprietors of the village had long ago effected an arrangement by way of private partition under which the entire rent of some tenants was payable to the plaintiff; the entire rent of other tenants was payable to the pro forma defendants and that as a part of this arrangement the entire rent of the seven holdings in suit fell to be paid to the pro forma defendants.

On appeal to the District Judge that Court reversed the findings of the Munsif on both points. The District Judge thought that the alleged "division of the rents of tenants between the proprietors was correct and it was satisfactorily proved." This, he said, was the effect of a judgment on appeal of his predecessor, Mr. A. C. Davies, who, in dealing with a batch of rent suits instituted by the present plaintiff against certain other tenants in the same village, had to consider a similar defence to that raised in the present suits. The learned District Judge was of opinion that if any question of res judicata could arise at all this decision must operate to conclude the contention of the plaintiff. The District Judge unfortunately does not appear to have directed his mind to the precise questions which were for determination in those appeals and in these. In the present litigation the existence of an arrangement by which some tenants paid rent exclusively to the pro forma defendants and others to the plaintiffs was admitted; but it was said there remained a third class of tenants whose rents had not fallen to be collected exclusively by either party but remained payable to the several proprietors according to their shares; and the question was, whether the holdings

in suit were of this third class. The question before Mr. Davies was not whether the present tenant-respondents were liable to pay rent to the present plaintiff-appellant in respect of the holdings now in suit but whether some other tenants were liable to pay rent to him in respect of some other holdings. Therefore the pronouncement of Mr. Davies was quite irrelevant to the question now under consideration and the District Judge's criticism on the judgment of the learned Munsif for having omitted to deal with that decision of Mr. Davies was uncalled for. The learned District Judge has used that judgment of Mr. Davies as an important piece of evidence in favour of the defendants which he was not entitled to do. It is not, however, necessary to go into the question whether his findings of fact are vitiated by this because his decision cannot be supported for another reason. He was in error in holding that the question between the plaintiff and the tenant-defendants was open to him for decision as a question of fact in face of the adjudication on the same question which was arrived at in the 1927 litigation. Of the batch of suits in that year one, namely, that against Ramsaran, the tenant of khata No. 328 the defendant in suit No. 1647 of the present year, was decided on contest, and the question whether the plaintiff was entitled to two annas share of the rent was directly put in issue in the trial Court and was the subject matter of an appeal to the District Judge. The issue was decided in favour of the plaintiff on contest and it is hardly necessary to say anything further regarding this second appeal No. 170 in which the plaintiff is obviously entitled to succeed, on the literal reading of S. 11, Civil P. C., the issue in question having been directly and substantially decided on contest. In the other suits of the 1927 litigation the decisions were ex parte, the plaintiff in each case getting a decree for the two annas share of rent claimed by him.

I am of opinion that the principle of S. 11 applies by reason of the explanation which extends it to cases in which a matter which ought to have been raised as an issue will be treated as if it had been raised and decided against the party who ought to have raised it. The question whether this principle applies to rent suits decided ex parte has been considered in a number of decisions of the Calcutta High Court, and it must be taken as settled that as between a landlord and his tenant the question of the relationship of landlord and tenant is a matter that necessarily arises in a rent suit and must be considered to have been decided in favour of the landlord whenever an ex parte decree is obtained by him against his tenant. There are no doubt cases in which it has been held that an ex parte rent decree does not conclude questions as to the rate of rent, but we have not been shown any case in which it has been doubted that as regards the relation of landlord and tenant a decision in an ex parte rent suit is to be treated as a matter finally determined between the parties. In 43 C L J 146 (1), Mukharji, J. sums up the effect of the decisions in 2 I A 283 (2), 1 Cal 202 (3), 26 Bom 25 (4), 30 Mad 510 (5) and 30 All 470 (6) :

> The essence of the doctrine of res judicata is that where a material issue has been tried and determined between the same parties in a proper suit and in a proper Court as to the status of one of them in relation to the other or as to the right or title claimed by one of them against the other the same question cannot be agitated by them again in another suit .... In the case of suits for rent or other recurring liability, the causes of action for suits for successive periods are different. In the case of such suits, for the doctrine to apply, it will have to be shown that the question of right or liability not merely for the period in the previous suit, but that for all times or once for all was directly and substantially in issue and was tried and determined. If a direct issue on the point was raised and decided the decision would be res judicata in respect of any such suit for a subsequent period.

Now the relationship of landlord and tenant is the very foundation of a decree in a suit for rent and, therefore, when such a suit has been decreed the Courts must proceed on the footing that it was a matter necessary to be determined and in fact determined in the earlier rent suit. It cannot be relegated to the category of matters only indirectly, collaterally and incidentally decided. This being so, I am

1. Gnanado Gobinda Choudhury v. Nalini Bala Debi, 1926 Cal 650=94 I C 837=30 C W N 593=43 C L J 146.
2. Krishna Behari Roy v. Brajeswari Chowdrani, (1874-75) 1 Cal 144=2 I A 283 (P C).
3. Nubo Durga Dasi v. Fyzbux Chowdhury, (1875-76) 1 Cal 202=24 W R 403 (P C).
4. Vishnu v. Ramling, (1902) 26 Bom 25=3 Bom L R 450.
5. Natesa v. Venkatarama, (1907) 30 Mad 510=17 M L J 518.
6. Dwarka Das v. Akhay Singh, (1908) 30 All 470=5 A L J 407=1908 A W N 192.

of opinion that the decision in the 1927 litigation operated as res judicata between the plaintiff and the tenant-defendants concluding their contention that the 16 annas rent was payable by them to the co-sharer proprietors and nothing to the plaintiff. That being so, the decision of the Munsif was correct. The appeal should be allowed and the docision of the Munsif restored with costs throughout.

James, J.—I agree.

P.R./R.K. *Appeal allowed.*

A. I. R. 1936 Patna 558

MOHAMAD NOOR, J.

Chuni Lal and *another*—Petitioners.

v.

Ram Ranvijoy Prasad Singh—Opposite Party.

Civil Revns. Nos. 11 and 53 to 55 of 1936, Decided on 30th July 1936.

(a) Revision — Power of interference is much more limited than in case of second appeal—Concurrent finding of fact based on evidence cannot be interfered with.

The power of interference in revision is much more limited than that in case of second appeals. Hence a concurrent finding of fact of the lower Court based on evidence cannot be interfered with. [P 559 C 2]

(b) Execution Sale—Setting aside—Sale set aside after one month on application of one of judgment debtors — Appeal thereon dismissed but sale confirmed on revision by High Court—Subsequent application by other persons having knowledge of sale to set it aside—Limitation held ran from date of sale and not from date of confirmation by High Court.

An execution sale was set aside after a month from date of sale on the application of a judgment-debtor. An appeal therefrom was dismissed but on revision the sale was confirmed by the High Court. Subsequently another judgment debtor and other persons having interest in the property who had knowledge of the sale filed application to set aside the sale:

Held: that the right of the petitioners to set aside the sale was barred before it was set aside and did not revive on account of the subsequent proceedings. And hence limitation ran from the date of confirmation of the sale by the High Court: 1920 *Mad* 1 and 23 *Cal* 775 (*P C*), *Disting.* [P 559 C 2; P 560 C 1]

Mahabir Prasad and *J. N. Sahai*—for Petitioners.

S. M. Mullick and *Ramnandan Prasad*—for Opposite Party No. 1.

K. P. Jayaswal and *M. N. Pal*—for Opposite Party No. 2.

Order. — These four applications in revision are directed against a decision of the District Judge of Shahabad whereby that officer dismissed four appeals of the four petitioners from the orders of the Munsif of Buxar, refusing to set aside the sale of a certain holding in execution of a decree of the Maharaja of Dumraon. It appears that the holding in question was sold on 7th May 1932. On the 23rd of that month one of the judgment debtors applied for setting aside the sale under O. 21, R. 89 and deposited a certain amount of money on the 25th. The sale was set aside on 7th June 1932. On 1st July the opposite party in this case, namely, the auction-purchaser, Lakhan Ojha, filed an application objecting to the setting aside of the sale on the ground that the entire amount required to be deposited under the law was not deposited and therefore the sale could not be set aside. The learned Munsif overruled this objection and rejected the application of the auction purchaser. This order was upheld in appeal by the District Judge of Shahabad, but on an application for revision filed by the auction-purchaser in this Court the order of the lower Court was set aside on 7th April 1934, and the sale was confirmed. Thereafter four applications for setting aside the sale were filed on behalf of the four petitioners under O. 21, R. 90. One of the petitioners is a judgment-debtor and the other three claim to have interest in the holding sold. The cases were heard by two Munsifs.

The cases of Chuni (petitioner in Civil Revision No. 11 of 1936) and Chandrika Ahir (petitioner in Civil Revision No. 55) were heard by Babu Bhagwan Prasad, the Munsif of Buxar, and the other two cases, namely, those of Ram Asharfi Ojha (petitioner in Civil Revision No 53) and Lal Mohan Ojha (petitioner in Civil Revision No. 54) were heard by his successor Babu Jugal Kishore Prasad. Both the learned Munsifs dismissed the applications. The petitions were obviously filed long after the expiry of the period of limitation and it seems that the petitioners relied apparently upon S. 14, Lim. Act, and contended that on account of the fraudulent suppression of the various processes the knowledge of the sale was kept back from them and that the applications were within thirty days of the date of knowledge. Babu Bhagwan Prasad held that there was proper service of the processes and that the two petitioners whose cases he decided had knowledge of the sale. Babu Jugal Kishore Prasad, on the other hand, held that the processes were not

served but nevertheless he held that the petitioners before him had knowledge of the execution proceedings and of the sale. All the petitioners preferred appeals to the District Judge who dismissed them by one single judgment against which these four applications for revision have been filed.

The learned District Judge agreed with Babu Jugal Kishore Prasad and held that the processes were not served, but he also agreed with him in holding that the petitioners had full knowledge of the execution proceedings and, therefore, the applications were barred by limitation. It was contended before him that the period of limitation commenced to run from the date when this Court confirmed the sale. He overruled this contention. A preliminary objection was taken on behalf of the opposite party to the effect that under the circumstances stated above no revision lies. It has been contended on his behalf by Mr. Jayaswal that assuming that the learned District Judge has come to wrong conclusions about the applications being barred by limitation, that erroneous decision is not open to revision by this Court. The argument of Mr. Mahabir Prasad on behalf of the applicants is this. He has, first of all, contended that the learned District Judge has wrongly used the findings of Babu Jugal Kishore Prasad also in the two cases which were decided by Babu Bhagwan Prasad and this he had no jurisdiction to do, or at any rate this was a material irregularity in the exercise of jurisdiction and therefore a revision lies. There is, in my opinion, no force in this contention. What seems to me on a careful reading of the judgment of the learned District Judge is that he has adopted the reasons given by Babu Jugal Kishore Prasad as his own reasons for holding that all the applicants had knowledge of the sale. After referring to the views of Babu Jugal Kishore Prasad he says :

> On the evidence therefore coupled with the circumstances, I have no hesitation in holding that the allegation of the applicants regarding their ignorance of the date of sale is not correct. They knew from before that the date of sale was 7th May 1932. Limitation therefore would run from that date in respect of the applications for setting aside the sale.

This is a finding of fact based upon evidence. Though the two learned Munsifs differed about the service or otherwise of the process so far as the knowledge of the petitioners was concerned, both of them were unanimous in holding that the petitioners who were before each of them had knowledge of the sale. The judgment of the learned District Judge being of affirmance it was not necessary for him to enter into the facts in details. The finding is of such a nature that it would have been impossible for this Court to interfere even in second appeal, much less it can be interfered with under S. 115, Civil P. C., where the power of this Court is much more limited. There is no question in this case of either refusal to exercise a jurisdiction or exercising a jurisdiction not vested in the Court or of material irregularity in the exercise of jurisdiction. Here there were proper appeals before the learned District Judge and on the basis of the evidence before him he came to certain findings of fact which may or may not be justified on the evidence on record, but there is no ground for interference in revision.

Mr. Mahabir Prasad next contended as was contended before the learned District Judge that the learned District Judge has refused to exercise jurisdiction inasmuch as he did not calculate the period of limitation from the date when the sale was confirmed by the High Court on 7th April 1934. The argument of the learned advocate is that the sale having been set aside under O. 21, R. 89, on deposit made, there was no sale left for the setting aside of which any application could have been filed. Therefore a fresh cause of action accrued to the petitioners when the High Court confirmed the sale on the date stated above. The fallacy in this argument is that it ignores the fact that the cause of action for filing an application for setting aside a sale is not the confirmation of sale but the sale and the period is to be counted not from the date of confirmation of sale but from the date of sale. In this particular case, as I have said, the sale was held on 7th May 1932. The application for setting it aside had already become barred on 7th June 1932, when, as I have said, the sale was set aside. Therefore the right of the petitioners of making an application for setting aside the sale became barred before the sale was set aside by the Court, and I know of no law under which this right can be revived on account of subsequent wrong order of the Court setting aside

the sale passed on 7th June which order was ultimately reversed on 7th April 1934. I am aware of a decision of the Calcutta High Court affirmed by the Privy Council where, apart from the statute of limitation, the Courts have applied the principle that nobody should be deprived of his right on account of the actions of the Court, vide 35 Cal 209 (1) which was affirmed by the Privy Council in 43 Cal 660 (2). I can well imagine a case in which before the expiry of the time for making an application for setting aside the sale it is set aside by the Court erroneously and thereby the party who is entitled to apply for setting it aside is unable to do so.

If afterwards the sale which was erroneously set aside is affirmed the party whose right was taken away by the Court may well claim that the period during which on account of the sale being non-existent he was prevented from making an application for setting it aside should be excluded, but here as I have said the entire period expired before the sale was actually set aside. Mr. Mahabir Prasad has however urged that his contention was not that the running of the period of limitation became suspended but that a fresh period of limitation commenced to run from the date of the confirmation of sale by the High Court on 7th April 1934. I have already pointed out that under Art. 166, Lim. Act, the starting point of the period of limitation for setting aside a sale is not the date of the confirmation of sale but the date of sale, and in this case there is only one date of sale, that is 7th May 1932. The learned advocate has relied upon the decision in 43 Mad 185 (3) and the decision of the Privy Council in 23 Cal 775 (4). In my opinion, none of these decisions is of any avail to the petitioners. In the Madras case the facts were that there was a sale which was confirmed. After the expiry of the period prescribed for making an application for setting aside the sale there was an application for setting it aside which was entertained and partly allowed, that is, the sale in respect of certain portion of the property sold was set aside. The decree-holder auction purchaser applied for delivery of possession after three years from the date of the first order of confirmation of sale but within three years of the second order by which the sale of a portion of the property was set aside. The question was whether the period commenced to run from the first date or from the second date. The majority of the Full Bench held that the period commenced to run from the second date and that the second order gave a fresh cause of action to the decree-holder to make an application for delivery of possession. The difference between that case and the present one is that in this case, as I have said more than once, the cause of action is the sale and in that case the cause of action was the confirmation of sale under Art. 180, Lim. Act. Similarly, the decision of the Privy Council has got no application. In that case the suit was for setting aside a revenue sale for which the period of limitation commences to run from the date of confirmation of sale. The sale was confirmed by the Commissioner but was set aside by the Board of Revenue, which on review again confirmed the sale.

The question was from what date the period began to run. It was held that it began to run from the date of the second order when the sale was ultimately confirmed. There also, as in the Madras case, the starting point of limitation was the confirmation of the sale and the question which their Lordships decided was that the date when the Board of Revenue ultimately confirmed the sale was the date from which the period commenced to run. I have discussed this point in detail because it was argued with some emphasis by the learned advocate who has appeared on behalf of the applicants. In my opinion, even if there had been any force in this contention, and my opinion would have been otherwise, the learned District Judge having considered and decided it against the petitioners it would not have been open to me to interfere in revision. The result is that all these applications fail. They are rejected with costs. There will be one hearing fee : two gold mohurs to be equally divided in all the four cases.

R.W./R.K. *Application rejected.*

---

1. Lakhan Chunder Sen v. Madhusudan Sen, (1908) 35 Cal 209=7 C L J 59=12 C W N 326.
2. Nrityamoni Dasi v. Lakhan Chandra Sen, 1916 P C 96=33 I C 452=43 Cal 660 (P C).
3. Muthu Korakkai Chetty v. Madar Ammal, 1920 Mad 1=54 I C 66=43 Mad 185=38 M L J 1 (F B).
4. Baijnath Sahai v. Ramgut Singh, (1896) 23 Cal 775=23 I A 45=7 Sar 1 (P C).

A. I. R. 1936 Patna 561

MACPHERSON AND FAZL ALI, JJ.

Mt. Jamuni—Claimant—Appellant.

v.

Bholaram and *another*—Decree-holders—Respondents.

Appeal No. 173 of 1935, Decided on 10th January 1936, from appellate order of Judicial Commissioner, Chota Nagpur, D/- 14th March 1935.

(a) Civil P. C. (1908), S. 47 — Mortgage decree on portion of holding — Holding sold for arrears of rent under Public Demands and Recovery Act—Purchaser is not representative of judgment-debtor in mortgage decree.

A purchaser of an entire holding at the sale for arrears of rent under the Public Demands and Recovery Act is not a representative of the judgment-debtor under a mortgage decree in respect of a plot forming part of the entire holdings within S. 47. [P 561 C 2; P 562 C 1]

(b) Chota Nagpur Tenancy Act (6 of 1908), Ss. 46 and 47—Whether judgment-debtor takes objection or not, holding cannot be sold although it can be mortgaged.

Although a tenant can mortgage a holding or a portion of a holding under S. 46 for a period not exceeding five years yet by reason of the plain provisions of S. 47, that holding cannot be sold in execution of the mortgage decree. Once it is found that the lands sought to be sold form a raiyati holding whether the judgment-debtor took the objection or not, the sale of such a holding cannot take place in the face of the clear provisions of S. 47: 1928 *Pat* 227, *Rel. on.* [P 562 C 1]

B. C. De—for Appellant.

K. Mukharji—for Respondents.

Fazl Ali, J.—This is a second appeal arising out of an execution proceeding which was started by the respondents who are admittedly mortgagee decree-holders. It appears that the respondents obtained a mortgage in respect of plot 1042 and subsequently having obtained a decree upon the basis of the mortgage, proceeded to sell it. Meanwhile the entire holding consisting of some 13 or 14 plots, including the plot in question, had been sold by the landlord, who had obtained a certificate, for arrears of rent under the Public Demands and Recovery Act and purchased by the appellant. When, therefore, the landlord attempted to sell the plot in question the appellant appeared and preferred an objection which she purported to do under O. 21, R. 58. The main ground of objection was that the plot in question could not be sold under S. 47 Chota Nagpur Tenancy Act, as it was part of a raiyati holding. When these objections came to be heard two questions arose before the executing Court, first, whether the appellant had the locus standi to object; and, secondly, whether the plot in question was in fact part of a raiyati holding or not. On the first point the learned Munsif came to the conclusion that although the appellant could not prefer an objection under O. 21, R. 58 in a proceeding which was taken in execution of a mortgage decree yet she could object to the sale as a representative of the judgment-debtor and the objection should be taken to have been preferred under S. 47, Civil P. C. On the second point he came to the conclusion that the plot in question, though by itself, was a piece of homestead land, was nevertheless governed by the prohibition contained in S. 47, Chota Nagpur Tenancy Act, inasmuch as this plot was part of a raiyati holding.

From the decision of the learned Munsif the mortgagee decree-holders appealed to the Judicial Commissioner of Chota Nagpur who disposed of the appeal on the preliminary ground that the appellant was not a representative of the judgment-debtor under the mortgage decree and, therefore, she had no locus standi to prefer any objection in the course of the execution proceedings. The learned Judicial Commissioner however, did not devote his attention to the other question namely whether the Court was competent to sell the land in question in view of the provisions of S. 47, Chota Nagpur Tenancy Act. The appellant has now preferred this second appeal and it is urged by the learned advocate appearing for her that the learned Judicial Commissioner was in error in holding that she was not a representative of the judgment-debtor. It appears from the judgment of the learned Judicial Commissioner that it was conceded before him by the pleader who appeared for the present appellant in his Court that she was not a representative of the judgment-debtor, and, in my opinion, the learned pleader was quite right in making this concession. The question as to whether a purchaser of the judgment-debtor's property is his representative or not, has been the subject of conflicting decisions, but without referring to all those decisions, it is enough to point out that in this case the appellant cannot be held to be a representative of the judgment-

debtor, because she would not be bound by the mortgage decree which has been passed as between the decree-holders and the mortgagor. If, therefore, she is not bound and not affected by the decree, it is obvious that she cannot be deemed to be a representative of the judment-debtor merely because she purchased the entire holding, a portion of which had been mortgaged. That being so, the learned Judicial Commissioner was correct in his view that the appellant could not intervene in the execution proceedings. The fact, however, remains that apart from whether the appellant objected to the sale or not, it was the duty of the Court, in which the execution proceeding was started, to decide whether the property sought to be sold could be sold or not. S. 47, Chota Nagpur Tenancy Act, provides in plain terms:

> No decree or order shall be passed by any Court for the sale of the right of a raiyat in his holding, nor shall any such right be sold in execution of any decree or order.

The provisions of this section have been elaborately explained in several decisions of my learned brother; but in the present case it will be necessary to refer to one of these only, that being the decision in 9 P L T 228 (1), in which it was pointed out that once it is found that the lands sought to be sold form a raiyati holding, whether the judgment-debtor took the objection or not, the sale of such a holding cannot take place in the face of the clear provisions of S. 47, Chota Nagpur Tenancy Act. In the present case, although under S. 46 the tenant could mortgage the holding or a portion of the holding for a period not exceeding five years, yet by reason of the plain provision of S. 47 that holding could not be sold in execution of the mortgage decree. That being so, in order to satisfy ourselves as to whether the land in question forms a part of the raiyati holding, we have examined the record and we are of opinion that it did form part of such a holding and so it cannot be sold. That being so, in my opinion the view taken by the Munsif is correct and should be upheld. The appeal is therefore allowed and the order of the learned Judicial Commissioner is set aside. As both the parties have partially succeeded in their respective contentions each party will bear his own costs in this Court and the Court below.

Macpherson, J.—I agree.

V.B./R.K. *Appeal allowed.*

1. Rupnath Mandal v. Jagannath Mandal, 1928 Pat 227=107 I C 145=9 P L T 228=7 Pat 178.

A. I. R. 1936 Patna 562

MACPHERSON AND MOHAMAD NOOR, JJ.

Brijnath Dutt and *others*—Defendants—Appellants.

v.

Barda Kanta Ray and *others*—Plaintiffs and *others*—Defendants—Respondents.

Appeal No. 1114 of 1932, Decided on 8th April 1936, from decision of Dist. Judge, Manbhum-Sambalpur, D/- 5th February 1932.

Provincial Small Cause Courts Act (1887), S. 25—Suit of Small Cause nature—Appellate Court dismissing appeal but allowing cross-appeal by plaintiff though no appeal nor cross-appeal could lie—Patna High Court when exercising revisional powers under S. 25 will not interfere with lower appellate Court's decision if it is sound on merits.

Where in an appeal by the defendant from the decision in a suit of a Small Cause nature, the appellate Court dismissed the appeal but decreed plaintiff's cross-appeal:

Held: that though no appeal and consequently no cross-appeal lay from the decision of the trial Judge, the High Court could consider the matter in the light of powers under S. 25. But in exercising the revisional powers the Patna High Court would not, it being its practice, interfere if it arrived at a conclusion that the decision of the appellate Court before it was sound on merits. [P 563 C 2]

A. B. Mukharji and *B. B. Mukharji*—for Appellants.

L. K. Chaudhuri—for Respondents.

Macpherson, J.—The suit out of which this litigation has arisen was filed as a money suit in the Court of the Munsif at Dhanbad. It was then transferred to the Court of the Subordinate Judge and tried in the ordinary form. It is of value under Rs. 500 and being a suit for reimbursement, is of the nature of a Small Cause Court suit. The Subordinate Judge had small cause powers up to Rs. 500. Accordingly no appeal lay from his decision. Nevertheless an appeal was preferred to the District Judge of Manbhum. The appeal failed, but the cross-appeal by the plaintiffs was decreed with the result that defendants 10 to 12 who were the appellants in the Court below have preferred the present second appeal. The facts are briefly as follows: The Bakshis

were brahmottardars under the Jharia Raj of a chak called Banskanali in mauza Jealgora at a rent of Rs. 8-8-0 and they were also liable to a cess of Rs. 49-0-6. In 1891 they granted a lease of the underground rights as well as of some surface rights to the plaintiff-respondents who may be called the Roys for an annual payment of Rs. 200. It was stipulated that the Roys should pay the rent and cesses to the Jharia Raj, the superior landlord, and should pay the balance to their own lessors, the Bakshis. In 1907 the Bakshis settled 261 bighas of the surface with the East India Coal Company for a payment of Rs. 1,300 and a reserved rent of Rs. 325, but this point is not of much importance in this litigation. In 1919 the Bakshis sold to defendants 10 to 12, who may be called the Dutts, the right to the annual payment of Rs. 200 from the Roys reserved under the lease of 1891.

The Roys realised the whole sum of Rs. 200 up to the Magh kist of 1332 B. S. The rent to the superior landlord payable by the Roys under the deed of 1891 not having been paid by them, the Jharia Raj brought a rent suit against the Bakshis for the period 1329 to 1332 B. S. and obtained a decree, and when the tenure was about to be sold, the Roys paid up the decretal amount to the superior landlord to save the tenure, and then initiated the present litigation making parties the Bakshis and the Dutts as well as the Chakravartis who however do not concern us. The learned Subordinate Judge, who evidently thought that the suit was a contribution suit, found that the Bakshis were liable to the Roys for the original amount of rent due but not for the whole amount sued for and decreed the suit accordingly against the Bakshis. As regards the Dutts, he held that they were not liable. As has already been stated, the Dutts nevertheless appealed, but when the appeal came to trial failed to press it. The plaintiffs however took the opportunity to file a cross-objection against the exclusion of the Dutts from the category of judgment-debtors and the learned District Judge of Manbhum sustained the objection and held that the Dutts also were liable. He pointed out that the learned Subordinate Judge was of opinion that if the plaintiffs paid rent amicably to the superior landlord, they would not be liable to pay to others the whole Rs. 200 reserved (which is certainly correct) but that they were not entitled to be reimbursed in this case by the Dutt defendants because they only paid in execution of a decree, and he negatived this latter view and included the Dutts also among the judgment-debtors from whom the plaintiffs could realise.

In second appeal there is a preliminary objection that no appeal lay to the District Judge and consequently no cross-appeal. This objection cannot be gainsaid. No appeal lay from the decision of the Subordinate Judge in a suit of a Small Cause nature within the pecuniary limits of his jurisdiction and that was the character of the plaintiffs' suit and if no appeal lay, neither did the cross-objection in the appeal lie. That is however not an end of the matter since the whole litigation is before this Court and may well be considered in the light of our powers under S. 25, Small Cause Courts Act. Now it is not the practice of this Court to exercise such powers or revisional powers when it has arrived at the conclusion that the decision which is before it is sound on the merits. Manifestly the plaintiffs have been made to pay twice over money representing the rent to the superior landlord. One amount has gone to the landlord and another amount has gone to the Dutts who are only entitled to recover the balance of Rs. 200 payable by the plaintiffs after deduction of the rent to the superior landlord. The two sets of defendants may be left to decide the point inter se. Accordingly the decision of the District Judge is such as we would ourselves have been inclined to pass if the matter had come before us on the merits, and in the circumstances I should not be prepared to exercise any revisional or similar discretion in favour of the appellants. I would dismiss this appeal with costs: hearing fee one gold mohur.

Mohamad Noor, J.—I agree.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1936 Patna 563

MOHAMAD NOOR AND SAUNDERS, JJ.

Debnath Mahata and *others*—Applts.

v.

Jagadish Chandra Deo Dhabal Deb—Respondent.

Appeals Nos. 48, 75, 76 and 83 of 1935, Decided on 29th April 1936, from appellate orders of Judicial Commissioner, Manbhum, D/- 29th September 1934.

(a) Chota Nagpur Tenancy Act (1908 as amended in 1920), Ss. 208 and 74-A—Pradhani tenancies as recorded in Satwalipis are not liable to be sold in execution of decree for rent.

Though the pradhans recorded in satwalipis are tenure-holders in their relations to the superior landlord, they are also his permanent agents for certain purposes, as for instance, for the supply of rasad, etc. They are landlords of the raiyats of the village and also their headmen and holders of an office and are in this capacity their representatives. The raiyats are vitally interested in having a pradhan who should be their headman according to the prevailing custom. This right of the raiyats to have a pradhan intervening between them and the superior landlord was recognized by the legislature in S. 74-A. This section authorises any three or more tenants of the village to have a pradhan appointed by the Deputy Commissioner in case there is a vacancy and this they can do even if there is a pradhan appointed by the landlord. Hence according to this right of the raiyats the pradhans cannot be changed at the instance of the landlord only and a right in which third persons are interested cannot, therefore, be sold behind their back. Hence pradhan rights are not saleable in execution of rent decree.

[P 567 C 1, 2]

(b) Chota Nagpur Tenancy Act (1908 as amended in 1920), S. 74-A—Pradhani is custom of locality and when new pradhani is formed and treated as ancient pradhani it will be governed by same custom.

Pradhani is the custom of the locality and when a new pradhani is formed and treated as the ancient pradhani it will be governed by the same custom. So where even though certain newly formed pradhani were not in existence in 1788, yet these pradhanis will be governed by the same custom if they are treated as the ancient pradhani. [P 568 C 1]

(c) Chota Nagpur Tenancy Act (1908 as amended in 1920), S. 74-A—Saleability of pradhani tenancy is inconsistent with Section 74-A—Custom of such sale cannot be given effect to.

A custom recognizing saleability of pradhani tenancy cannot be given effect to as such custom is by necessary implication inconsistent with S. 74-A of the Act. [P 568 C 1]

Sultan Ahmed and *P. K. Banerjee*—for Appellants.

P. R. Das, *S. M. Mullick* and *G. C. Mukherjee*—for Respondent.

Mohamad Noor, J.—These four miscellaneous appeals arise out of four proceedings for execution of rent decrees obtained by the respondent against the appellants. The question involved in all these cases is the same, namely whether the pradhani tenancy of the appellant in each case is liable to be sold in execution of the decree against him. The respondent, who is the Raja of Dhalbhum, started ten execution cases to enforce his ten rent decrees against the pradhans and wanted to bring their pradhani tenancies to sale. The learned Deputy Collector of Singhbhum, before whom the executions were started, of his own motion and without any objection on the part of the judgment-debtors summarily held that the pradhanis were not saleable. The respondent appealed. The Judicial Commissioner of Manbhum (Mr. Najabat Hossain) by his order, dated 29th September 1934, reversed the orders of the Deputy Collector, holding that the pradhani tenancies were saleable. All the ten judgment-debtors preferred second appeals to this Court. When the cases came up before us for hearing, we found that the decisions of the Courts below were based entirely upon general grounds, and not upon any examination of the incidents of the particular tenancies involved in these cases.

While the learned Deputy Collector held as I have said that the pradhanis were not saleable, the learned Judicial Commissioner held that the pradhanis were tenures and tenures were saleable in execution of rent decrees. There were no materials on the record to enable us to determine the incidents of the tenancies of the appellants. We, therefore, allowed the parties to produce necessary documents, and the same were produced. But the number of documents intended to be produced was large, and examination of witnesses appeared necessary. Accordingly, we decided to remand the cases under O. 41, R. 25, Civil P. C., with a direction to the Judicial Commissioner to receive such evidence as may be adduced by the parties and then to determine whether the pradhani in each of the ten cases is liable to be sold in execution of a rent decree either under the custom prevailing in the locality or under the law in force in the district. Mr. Dalziel, who had succeeded Mr. Najabat Hossain, received the evidence adduced by the parties and also considered the documents which were filed in this Court and taken in evidence by us and has remitted his finding to this Court. It is this finding of Mr. Dalziel which is now under consideration and will be referred to as the judgment of the Judicial Commissioner. He has held that the pardhanis in six out of the ten cases were liable to be sold. This finding was not questioned by the appellants of those cases and, therefore, those six appeals (M. A. Nos. 77 to 82 of 1935) were dismissed by our order, dated

20th April 1936. In the four cases which are now before us, the finding of the learned Judicial Commissioner is that they are not saleable. The respondent has filed objections against this finding, and we have to determine whether the view taken by the learned Judicial Commissioner is correct.

'Pradhan' under the Chota Nagpur Tenancy Act comes within the definition of 'village-headman' which means the headman of a village or of a group of villages, whether known as manki, or pradhan, or manjhi or otherwise or by an equivocal designation, such as thicadar or ijaradar. S. 127 (1) of the Act authorizes the local Government to make an order directing that a record be prepared by a Revenue Officer of the rights and obligations in any specified local area of . . . (b) village-headmen . . . Then there is an explanation to this section which runs thus :

> The word 'rights' as used in this sub-section includes the right of a village headman to hold his office, as well as his right to hold land.

In Cl. (b) the words "village headmen" were substituted for the words "headmen of villages or groups of villages," whether known as mankis, or pradhans or manjhis or otherwise" by S. 35, of Act 6 of 1920 (B. & O.) in consequence of the amendment of the definition of 'village headman' by which all the words, which were substituted by the words 'village headman' were included in the definition itself. In all these cases records of rights of the village headman have been prepared under the orders of the local Government and are known as satwalipis and are on the records of these appeals. These records are conclusive evidence under S. 132, Chota Nagpur Tenancy Act. We have, therefore, to ascertain from the satwalipis the rights of the appellants in their tenancies to which an office is attached and then to decide whether these rights can be sold consistently with the Chota Nagpur Tenancy Act and if not, whether they are saleable under any established custom.

The arguments of Mr. Das, who has appeared on behalf of the respondent in support of the decision of Mr. Najabat Hossain and to contest the findings of Mr. Dalziel may be summarized thus. The decrees obtained by the respondent are decrees for rents against the tenure holders. By their position in the Act and under the decrees themselves, which are for rent, the pradhans are tenure holders, as they are persons who have acquired from the proprietor a right to hold land for the purposes of cultivating it or bringing it under cultivation by establishing tenants thereon. Under S. 60, Chota Nagpur Tenancy Act, the rent of a tenancy is a first charge on the tenancy. Under S. 208 of the Act :

> When a decree is passed by the Deputy Commissioner for arrears of rent in respect of a tenure or holding, the decree-holder may apply for the sale of such tenure or holding, and the tenure or holding may thereupon be brought to sale, in execution of the decree, according to the provisions for the sale of under-tenures contained in the Bengal Rent Recovery Act of 1865, etc. etc.

Therefore, the landlord has a statutory right to bring the tenures of the tenure holders to sale in execution of a rent decree and there being no provision in the Act restricting this right in the case of a pradhani the statutory provisions must prevail. There is no such restriction in the Act. It is, therefore, for the appellants to show that by any local custom or by any other provision of law the pradhanis are not saleable. This argument has its force and seems to have appealed to the learned Judicial Commissioner Mr. Najabat Hossain, but it ignores the fact that though the pradhans are a sort of tenure-holders and come within that class under some provisions of the Chota Nagpur Tenancy Act, their treatment in the Act and their rights as recorded in the satwalipis show that they are not tenure holders pure and simple but are something more and form a distinct class by themselves. A separate record of rights is to be prepared for them under Ch. 15, Chota Nagpur Tenancy Act. These records unlike other records of rights prepared under Ch. 12, Chota Nagpur Tenancy Act, (which are presumed to be correct), are conclusive evidence. In Ss. 9-A, 51-A, and 74 and some other sections of the Act the village headman is separately mentioned. In 45 I C 72 (1) a Bench of this Court held that the interest of a village headman does not come strictly within the definition of the tenure-holder as given in the Chota Nagpur Tenancy Act. All this leads me to the conclusion that we cannot decide about the saleability of the inte-

1. The Tata Iron and Steel Co. Ltd. v. Raghunath Mahto, 1918 Pat 392=45 I C 72.

rest of the village headman purely on the a *a priori* reasons advanced by the learned advocates for the respondent.

The satwalipis of the four appellants are almost similar. I take the typical one, that is, of Debendra Nath Mahton, the appellant in appeal No. 48 of 1935. The record has been prepared in the name of his predecessor Hriday Nath Mahton. A separate khewat No. 3 has been prepared for him with an area of 365 bighas. All this is cultivated. The remaining area of the village, which is jungle and uncultivated, has been recorded in the names of the landlords and the intermediate tenure-holders. This appellant, as is the case with the other appellants, has been holding under the pattas granted by the proprietor. These pattas will however under the provisions of S. 74 of the Act make no change in the status of the appellants, that is to say, their status will remain the same which was before the grant of the pattas. S. 74 runs thus:

> When a tenure-holder, village headman or raiyat has been in occupation of a tenure or holding, and a lease is executed with a view to the continuance of such occupation, he shall not be deemed to be admitted to occupation by that lease, notwithstanding that the lease may purport to admit him to occupation.

The Record of Rights, which I have said is conclusive, says that on the expiry of the term at the time of the fresh settlement the rate of rent would be fixed either amicably by panchayat or in accordance with law, showing that the fixing of rent is not in the discretion of the landlord. There is a provision that if a pradhan refuses to take settlement it can be made with others. There is no provision for the landlord to hold the village khas as is the provision in some other satwalipis on the record. This indicates that though an individual pradhan may cease to hold the tenancy, the tenancy itself cannot be brought to an end. There are in the satwalipi rights recorded in favour of the raiyats of the village, who have been recorded to be entitled to bring into cultivation the jungle lands of the village without the permission of the landlord or of the pradhan. This entry shows that the raiyats' rights are not confined to the cultivated area recorded in the name of the pradhan, but extend beyond that area. When the tenants do bring the new lands under cultivation they are not to pay any rent for five years and then at half the rate till fresh settlement. This rent is to be paid not to the proprietor but to the pradhan who is to enjoy it till then. This shows that the right of a pradhan is not confined to his tenure only but extends beyond it, that is his pradhani right goes on extending as the villagers extend the cultivation. The next right recorded is that a pradhan has no right to transfer, nor is the pradhani liable to be divided. These are the incidents of the tenancies which are involved in the present appeals. It has been contended on behalf of the respondent that all these rights are the creation of a contract, but the rights are peculiar and, though they are embodied in the pattas which had been granted to the pradhans from time to time, the nature of the rights clearly indicates that the pattas simply embodied the rights of the pradhans which have been coming from a long time. Other satwalipis are, as I have said, similar. In none of them there is any mention of the right of the landlord to sell the pradhani on non-payment of rent; rather it is clearly mentioned that a pradhan is liable to be ejected for default in payment of rent. Mr. Reid in his Settlement Report of Dhalbhum, from where these cases come, while dealing with the origin and development of village-headmanship, gives an account of the system of reclamation in that locality and describes the position of a village-headman. He says:

> Headmen are locally known as pradhans, manjhis, mandals, ijaradars and thiccadars. . . . The original pioneers and their descendants through the male line are the khuntkattidars of the village. The later comers, the members of their families, and the descendants of the khuntkattidars in the female line, are the ordinary raiyats.

Then he proceeds :

> The headman is the representative of the village community in all its external relations; but he is also a chief resident raiyat. He is in fact a tenure-holder or landlord, a village official, and a raiyat . . . . . as a village official, he is responsible for the supply of rasad and transport to troops and officials on tour; he is bound to prevent bad characters from settling in the village, to report offences at the thana, and to see to the repair of the tanks and bandhs, the preservation of the jungle, and to guard against waste . . . . . The jama (rent) payable by the headman is ordinarily not enhanceable during the period of his lease. He has generally a preferential right to a re-settlement on the expiry of the term. The rents of the tenants may be increased or enhanced according to law, and, if the headman refuses to take settlement after the expiry of the term of his lease at fair and equitable rates, the settlement

may be made with a third person, or the village may be held khas by the landlord. The latter however can only eject the headman through the Courts, etc., etc. The Deputy Commissioner will, of course, decide whether the rates demanded are fair and equitable or not.

The option of the landlord, on the refusal of a pradhan to take a settlement, to make a settlement with another man or to hold khas is not, in my opinion, in every case. I find from the satwalipis of these four cases that the right to hold khas has not been mentioned in them; while, as I have said, in some other cases, which we have disposed of, the satwalipis do record the right to hold khas; for instance, the satwalipi of village Nekradungri which was the subject matter of Miscellaneous Appeal No. 77 of 1935, where the pradhan had no right of re-settlement. According to Mr. Reid, the pradhans are of three classes: (1) khuntkatti pradhans, (2) non-khuntkatti pradhans with heritable rights and (3) non-khuntkatti pradhans with non-heritable rights. Unfortunately the satwalipis do not mention the class to which the pradhans in these cases belong. There is no doubt that they do not belong to the third class, as the Record of Rights clearly shows the pradhanis to be heritable. They are more probably of the second class, the original pradhans having been substituted by new comers. Be that as it may, the right is independent of the pradhan being a khuntkattidar as long as the incidents of the tenancy are the same. Cases may happen in which a pradhan is removed, and in his place another man is appointed, but the new man will be clothed with all the rights and liabilities of his predecessor and will hold the tenancy with all the incidents appertaining to it. He will not become a tenant of a different class altogether. My conclusions therefore are that though the pradhans are tenure-holders in their relations to the superior landlord, they are also his permanent agents for certain purposes, as for instance, for the supply of rasad, etc.

They are landlords of the raiyats of the village and also their headmen and holders of an office and are in this capacity their representatives. The raiyats are vitally interested in having a pradhan who should be their headman according to the prevailing custom. This right of the raiyats to have a pradhan intervening between them and the superior landlord was recognized by the legislature in S. 74-A, Chota Nagpur Tenancy Act, a section which was added in 1920. This section authorizes any three or more tenants of the village to have a pradhan appointed by the Deputy Commissioner in case there is a vacancy and this they can do even if there is a pradhan appointed by the landlord. This right of the raiyats clearly shows that the pradhans cannot be changed at the instance of the landlord only. A right in which third persons are interested cannot therefore be sold behind their back. The position will become anomalous. For instance, if the landlord brings a pradhani to sale and purchases it himself he will be holding the village khas and thereby destroying the rights of the raiyats to have a pradhan, and in that case I see no reason why under the express provisions of S. 74-A the tenants cannot have a pradhan appointed. The sale will, therefore, become infructuous. If, on the other hand, the pradhani is purchased by a third party, an absolute stranger, it will impose upon the tenants a headman who is not suited to be their headman according to the custom. In my opinion, therefore, S. 74-A makes it impossible for me to hold that pradhani rights are saleable. At one time Mr. Das contended that the effect of the sale of pradhanis in execution of rent decrees will be to bring the customary pradhani to an end and, therefore, S. 74-A will have no application. If this be the consequence, the result will be that the customary rights of the raiyats will be destroyed for no fault of theirs.

Mr. Mullick, who followed Mr. Das, contended that S. 74-A is applicable only to customary pradhanis, and not to the cases which are before us, as they are not customary pradhanis. He went to the length of contending that this section applies only to mundari khuntkattidars. It is enough to point out in answer to the last part of the contention that the mundari khuntkattidars are a class by themselves, and have been separately dealt with in Ch. 18, Chhota Nagpur Tenancy Act. The learned Judicial Commissioner (Mr. Dalziel) has found in each of these four cases that the pradhanis are old and I see no reason to differ from the views which he has taken. It was contended that according to the quinquennial register, a copy of which was produced by the respondent, there were only 145

villages in Dhalbhum in 1788 and these villages were not then in existence and, therefore, the pradhans cannot be said to be customary pradhans. Now, it may be that these pradhanis were not in existence in 1788, but pradhani is the custom of the locality, and when a new pradhani is formed, and treated as the ancient pradhani, it will be governed by the same custom. The pattas granted by the respondent in these cases are in usual and customary terms.

The next question is whether the pradhanis are saleable by custom. No such custom has been established, and the learned Judicial Commissioner has pointed out that though there have been cases of sale, they are of recent dates. The practice of sale started when a commercial concern came in the estate and dates from 1906. These sales cannot establish a custom. Then, custom can only be given effect to if it is not inconsistent with the provisions of the Act. In my opinion, saleability is by necessary implication inconsistent with S. 74-A of the Act.

I have come to this conclusion not without much hesitation, as in my opinion our decision will certainly place a great impediment in the realisation of the rent by the landlord. There may be cases, and in fact I believe there are cases, in which a pradhan has no property of his own from which the rent can be realized. He may have collected rent from the raiyats and appropriated it to himself for three or four years, and then the landlord is practically without any adequate means to realize that rent. It has been suggested that the landlord can eject the pradhan under S. 59, Chota Nagpur Tenancy Act. The satwalipi makes him liable for ejectment if he does not pay his rent regularly. But I think ejectment is not an adequate remedy in this case. If the pradhan is ejected, there will be a vacancy. There is no guarantee that some member of his family will not be appointed by the Deputy Commissioner and the same trouble repeated. Apart from this, a pradhan may be ejected, but the rent of the landlord is lost in case the pradhan has no property from which it can be realized. I would, therefore, invite the attention of the Government, and the legislature to the situation which is likely to arise in consequence of our holding that genuine pradhanis are not saleable, in the hope that more effective means may be devised for recovery of rent payable by the pradhans to the landlord. So far as the merits of the cases are concerned, I think the conclusion which I have reached is the only possible conclusion on a consideration of the different provisions of the Act and of the satwalipis which are conclusive.

I would, therefore, allow these four appeals, set aside the order of the learned Judicial Commissioner (Mr. Najabat Hussain) in these cases, and restore that of the learned Deputy Collector, and hold that the pradhanis in these cases are not saleable. The appellants will be entitled to their costs in this Court as well as in the Court of the Judicial Commissioner. The costs, which have been incurred in all the ten appeals jointly, will be apportioned according to the value of the appeals in each case.

Saunders, J.—I agree entirely.

D.S./R.K. *Appeals allowed.*

A. I. R. 1936 Patna 568

MACPHERSON AND MOHAMAD NOOR, JJ.

Sheobalak Prasad Awasthi—Judgment-debtor—Appellant.

v.

Jugal Kishore Narain and *another*—Decree-holders—Respondents.

Appeal No. 294 of 1934, Decided on 2nd December 1935, from original order of Sub-Judge, Chapra, D/- 5th October 1934.

(a) Civil P. C. (1908), O. 34, R. 6—Compromise decree in mortgage suit—No mention of personal remedy in preliminary decree itself but reference made to petition of compromise which provided it—Execution cannot be questioned on ground of absence of decree under O. 34, R. 6.

Order 34, R. 6 gives plaintiff a right to apply for personal decree after the sale of the mortgaged property. But this need not be done when the personal decree had already been passed. Hence where a compromise decree is passed in a mortgage suit and a preliminary decree does not expressly mention about the personal remedy but refers to the petition of compromise which provides for it, absence of a decree under O. 34, R. 6 is no bar to the execution of the decree: 1918 *Pat* 262, *Expl.*; 1930 *Bom* 208; 1928 *Cal* 668 and 1921 *Pat* 49, *Rel. on.* [P 569 C 2]

(b) Waiver—Sale proclamation—Judgment-debtor not raising objection to decree but taking time for raising money—He cannot turn round and question execution on ground that there was no decree.

Decree-holders proceeded to execute the decree against the mortgaged properties and also against the personal properties at one and the same time. After the sale of mortgaged proper-

ties the judgment-debtor applied for time to raise money when his personal properties were put up for sale and waived his right to a fresh sale proclamation. But subsequently he contested that there was no decree :

Held: that judgment-debtor on a previous occasion never took an objection to the execution on the ground that there was no decree. He could not now turn round and question the execution on the same ground. [P 570 C 1]

Bhuvaneshwar Prasad Sinha — for Appellant.

Rai Gurusaran Prasad, D. N. Varma and *G. P. Singh*—for Respondents.

Mohamad Noor, J.—This is an appeal against an order of the Subordinate Judge of Saran, dated 5th October 1934, disallowing the appellant's objection to the execution of a compromise decree passed in a mortgage suit. After the sale of the mortgaged properties the decree-holders under the terms of the compromise proceeded against the other properties of the judgment-debtor. There was an objection to the effect that the execution against the person and other properties of the judgment-debtor could not proceed as there was no decree under O. 34, R. 6, Civil P. C. The learned Subordinate Judge has disallowed this objection and the judgment-debtor has preferred this appeal. The learned Advocate for the appellants has referred us to the preliminary and final decrees passed in the suit, dated 25th March 1931 and 26th June 1933 respectively. The final decree refers to the preliminary decree and makes it final. The preliminary decree is in the usual form and there is no mention of any personal remedy, but it refers to the petition of compromise which has been attached to it in which a clear provision is made that if the sale proceeds of the mortgaged properties be not sufficient, other properties of the judgment-debtor will be liable to be sold.

The learned Advocate for the appellant has contended that in spite of there being a provision in the petition of compromise, which was attached to the preliminary decree, the personal properties of the judgment-debtor could not be proceeded against without there being a fresh decree under O. 34, R. 6. He relied upon a decision of this Court in 3 P L J 649 (1), where it was held that a formal order under O. 34, R. 6 is necessary before the decree-holder can pursue properties not covered by the mortgage even where the original decree is a compromise decree declaring the judgment-debtor's other properties liable in the event of the mortgaged properties not fetching a sufficient amount to cover the decretal debt and the judgment-debtor is entitled to know for how much money he is liable after the mortgaged properties have been sold. But in that case the learned Judges did not dismiss the execution proceeding. They directed that a proper order under R. 6 be made by stating the amount of the liability of the judgment-debtor and formally authorizing the decree-holder to proceed against the properties not covered by the mortgage. This clearly indicates that the learned Judges were of opinion that, in such a case, the passing of an order under O. 34, R. 6 was a mere formality and an order to that effect can be passed in the course of the execution proceeding also. Later on however in 2 P L T 736 (2) another Bench of this Court of which Jwala Prasad, J., who was a member of the Bench which decided the previous case, was also a member, held that a decree-holder need not apply under O. 34, R. 6 for a personal decree where the decree drawn up is not merely a mortgage decree but is also a personal decree against the mortgagor.

In the present case, as I have already stated, the final decree, which is under execution, makes the preliminary decree final which in its turn refers to the petition of compromise in which the judgment-debtor's personal liability for sums found due after the sale of the mortgaged properties has been clearly stated. I do not find anything in O. 34, Civil P. C., which debars a Court from determining the personal liability of the mortgagor at the time when the preliminary decree is passed in a mortgage suit. O. 34, R. 6 gives the plaintiff a right to apply for a personal decree after the sale of the mortgaged property. But this need not be done in a case where a personal decree has already been passed at the time of the passing of the mortgage decree. The same view seems to have been taken in 54 Bom 352 (3). In that case the mortgage decree was based on an award

1. Karimulla Shah v. Muhammad Raza, 1918 Pat 262=48 I C 608=3 P L J 649.

2. Samanta Jagannath Mahapatra v. Lokenath Sukul, 1921 Pat 49=61 I C 635=6 P L J 106=2 P L T 736.

3. Usafali Ibrahim v. Faizullabhai Sheikh Mohamedbhai, 1930 Bom 208=125 I C 903=54 Bom 352=32 Bom L R 439.

which made no mention of any personal remedy against the mortgagor. It was held that when the personal relief against the mortgagor was not expressly excluded by the terms of the mortgage or of the decree or both, the mortgagee after exhausting his remedy against the mortgage security had a right to recover the balance personally from the mortgagor. In 1928 Cal 668 (4) it was held that a fresh decree is not necessary when the personal remedy is provided for in the mortgage decree itself; and that O. 34, R. 6 does not apply in the case of a sulehnama decree.

The decree in that case was held to be incapable of execution as more than twelve years had expired after the sulehnama decree, and the personal decree which was obtained in the meantime was held to be ineffective. In this case the objection of the judgment-debtor, apart from the question that it has no foundation, seems to me to be frivolous. The order sheet of the execution case shows that the decree-holders proceeded to execute the decree against the mortgaged properties and also against the personal properties at one and the same time. The Court first proceeded against the mortgaged properties which were sold on 14th July 1934, and the sale was confirmed on 15th August 1934. It was then that the sale proclamation against the other properties of the judgment-debtor was issued. On 4th September 1934, the judgment-debtor applied for time in order to enable him to raise money and waived his rights for the issue of a fresh sale proclamation. The sale was adjourned till 2nd October 1934. Then the judgment-debtor filed the present objection which was disallowed on 5th October. We are informed that the properties have been sold. It is clear that the judgment-debtor on a previous occasion never took exception to the execution on the ground that there was no decree. He waived his right to a fresh sale proclamation and on that understanding took time from the Court. He cannot now turn round and question the execution on the ground that there was no decree. I see no merit in this appeal and would dismiss it with costs.

Macpherson, J.—I agree.

P.R./R.K. *Appeal dismissed.*

4. Haripada Dutta v. Sashi Bhusan Basu, 1928 Cal 668=114 I C 792=48 C L J 102.

A. I. R. 1936 Patna 570

JAMES AND ROWLAND, JJ.

Yakub Christian and *others* — Plaintiffs—Appellants.

v.

Patras Munda and *others* — Defendants and *another*—Plaintiff—Respondents.

Appeal No. 1174 of 1933, Decided on 3rd August 1936, from appellate decree of Judicial Commissioner, Chota Nagpur, D/- 5th July 1933.

Civil P. C. (1908), O. 32, R. 11 — Appeal—Guardian for minor respondents dying during pendency of appeal—Court not appointing guardian-ad-litem under O. 32, R. 11 — Appeal does not abate—Decree passed by such Court must be set aside and case remanded to it for re-trial—But respondents held not liable for costs of appellants in second appeal.

Where during the pendency of the appeal, the guardian for the minor respondents dies and no effort is made by the Court, under O. 32, R. 11 to appoint a guardian-ad-litem for them, the appeal does not abate, but the decree passed must be set aside as made during the absence of a guardian-ad-litem and the suit must be remanded to the same lower appellate Court: 1928 *Pat* 168, *Rel. on.* [P 571 C 1]

The appellants in the lower appellate Court who are respondents in the second appeal, not being under a duty to appoint guardian-ad-litem for the minor respondents in the lower Court, should not be made responsible for costs of the appellants in second appeal. [P 571 C 1]

L. K. Choudhuri—for Appellants.

S. K. Mazumdar—for Respondents.

James, J.—The suit out of which this appeal arises was instituted for partition by three plaintiffs, Soma Munda, who apparently for this purpose represented his own sons together with two minors, grand-nephews of Soma Munda, represented by Soma Munda as their next friend. The suit was decreed by the Subordinate Judge and the defendants appealed to the Judicial Commissioner of Chota Nagpur. During the pendency of the appeal Soma Munda died, and the appellants obtained substitution in his place of the names of his sons. These sons of Soma Munda were cousins of the fathers of the minor respondents; but no step was taken to appoint a guardian-ad-litem for the minor respondents for the appeal. This ought to have been done by the Court under O. 32, R. 11, Civil P. C. The Judicial Commissioner in due course heard the appeal in the absence of a guardian-ad-litem for the minor respondents with the result that the decision of the Subordinate Judge was reversed and the appeal was decreed.

Plaintiffs now come up in second appeal from that decision.

It is argued that the absence of a guardian-ad-litem for the minor respondents at the time of the hearing of the appeal in the Court of the Judicial Commissioner renders the appeal of no effect against these respondents; and as the suit is one for partition, the result would be to render the decree altogether ineffectual. It is suggested on behalf of the defendant-respondents to this appeal that it has not been proved that Dayal Munda and Johan Munda were minors at the time of the hearing of the appeal in the Court of the Judicial Commissioner; but they were so described in the defendants' memorandum of appeal in that Court; and it has never at any time been suggested that they were then other than minors. The order which must be made in this appeal is an order similar to that which was made in 9 P L T 547 (1). The decree of the lower appellate Court must be set aside and the appeal must be remanded to that Court for rehearing according to law. It was not strictly speaking the duty of the appellants in that Court to appoint a guardian ad litem for the minors, and so they should not properly be made responsible for the costs of the appellants in the second appeal in this Court. The result is that the appeal is allowed, the decree of the Judicial Commissioner is set aside and the appeal is remanded to him for disposal according to law. Each party will bear his own costs in the second appeal in this Court. Costs of the suit and costs of the lower appellate Court will abide the final result.

Rowland, J.—I agree.

R.W./R.K. *Appeal allowed.*

1. Jagarnath v. E. I. Ry. Co., 1928 Pat 168 = 106 I C 540=9 P L T 547.

A. I. R. 1936 Patna 571

MOHAMAD NOOR, J.

Bhagwan Das—Defendant—Appellant.

v.

Akbar Hussain Khan—Plaintiff—Respondent.

Appeal No. 1043 of 1933, Decided on 3rd August 1936, from appellate decree of Sub-Judge, Gaya, D/- 29th July 1933.

(a) Lis Pendens—Applicability — Purchase of another's property during pendency of contribution suit against such person in which simple money decree passed— Such purchase is not affected by doctrine of lis pendens nor is it subject to decree in contribution suit.

Where a person purchases another's property by private sale during the pendency of a contribution suit against such person in which a simple money decree without reference to any charge was passed, the purchase is not affected by the doctrine of lis pendens and is not subject to the decree passed in suit. [P 572 C 1]

(b) Plaint—Simple money suit—Prayer in plaint for making decree charge upon shares of defendants—Such plaint is not one involving claim against immoveable property — (*Obiter*).

Obiter.—A plaint in a simple money suit with a prayer added to it that the decree which may be passed be declared to be a charge upon the shares of the defendants of that suit cannot be said to be a plaint involving a claim against immoveable property. [P 572 C 1]

(c) Bengal Tenancy Act (8 of 1885), S. 171 —Suit for arrears of rent—One of co-tenants paying entire decretal amount and then filing contribution suit against other co-tenants—It is doubtful if such person is entitled to claim charge.

Where in a suit for arrears of rent by the proprietors one of the co-tenants pays the entire decretal amount and then sues other co-tenants for contribution it is doubtful whether such person is entitled to claim a charge under S. 171 : 11 *I C* 501, *Ref.* [P 572 C 2]

Mahabir Prasad and *Anand Prasad*—for Appellant.

Khurshaid Husnain and *H. R. Kazimi*—for Respondent.

Judgment.—This is an appeal by the defendant of a suit for recovery of possession of certain immoveable property which the defendant had purchased in execution of a decree, and the plaintiff had purchased at a private sale, the question involved being which of the two sales should prevail. The facts are these: One Mahant Krishna Dayal Gir and defendants 2 to 7 were co-tenants of a certain mukarrari property the proprietors of which were Mt. Mujibunnisa and others. The proprietors instituted a suit for arrears of mukarrari rent against the Mahant and defendants 2 to 7, and in execution of the decree, brought the mukarrari tenure to sale. The Mahant paid up the entire decretal amount and, thereafter sued defendants 2 to 7 for contribution, praying that the decretal amount be declared a charge upon the shares of the defendants in the mukarrari. The suit was decreed ex parte on 10th December 1926. The order runs thus :

This is a claim for contribution in mokarrari rent paid by the plaintiff for the defendants.

Claim proved. Suit decreed modifiedly ex parte with proportionate costs against defendants 2 to 7 so far as their shares are concerned.

In execution of this decree the Mahant brought the mukarrari share in dispute in the present suit to sale which was purchased by defendant 1, the appellant in this Court. It appears, however, that in the meantime, during the pendency of the contribution suit of the Mahant, the plaintiff of this suit had purchased the disputed property at a private sale from defendants 5 and 6. When defendant 1 purchased the property including the shares of defendants 5 and 6 in execution of the decree of the Mahant, he dispossessed the plaintiff of the present suit who was in possession by virtue of the private sale in his favour. The plaintiff, therefore, brought the present suit for recovery of possession of the property from defendant 1. Both the Courts have decreed the suit of the plaintiff and the only point raised in this second appeal on behalf of the appellant, defendant 1, is that the purchase of the plaintiff having been made during the pendency of the contribution suit is governed by the doctrine of lis pendens and is, therefore, subject to the decree passed in that suit. This contention has been overruled by both the Courts below and in my opinion rightly.

At the time when the suit was instituted the unamended S. 52, Transfer of Property Act, was in force which, in order to make the doctrine of lis pendens applicable, required that the sale should be during the active prosecution of a contentious suit. It is needless for me to examine in detail the various decisions in which the word "contentious" has been interpreted. It is enough to say that taking the view most favourable to the appellant it means that at least the plaint must disclose some claim in an immoveable property. I have examined the plaint of the contribution suit. It was a simple money suit with a prayer added to it that the decree which may be passed be declared to be a charge upon the shares of the defendants of that suit of which the description was given at the end of the plaint. I have grave doubts whether such a plaint can be said to be a plaint involving a claim against immoveable property. A distinction has always been drawn between a charge and a mortgage, though the latter for certain purposes of enforcing it has got the incidents of a mortgage. A charge does not create an interest in the property while the mortgage does.

However, the plaintiff is entitled to succeed on a much higher ground. The learned Subordinate Judge, in my opinion, has rightly relied upon the fact that even assuming that the plaintiff of the previous suit, namely, the Mahant, did seek to enforce any right in an immoveable property, it must be taken that the Court refused to grant him that relief. The suit was registered as a simple money suit. The terms of the order which I have quoted above show that the Court passed a simple money decree for contribution without any reference to any charge. The decree which was prepared was a simple money decree. Under these circumstances, in my opinion, the Courts below were right in holding that the plaintiff's purchase was not affected by the doctrine of lis pendens. The only effect of the application of that doctrine is that the private purchase is subject to the result of the suit; but in this suit no decree affecting the property was in fact passed. Apart from this I am doubtful whether the Mahant was entitled to claim a charge under S. 171, Ben. Ten. Act. There are decisions of the Calcutta High Court to the effect that the benefit of that section cannot be availed of by a co-tenant whose interest is not voidable but becomes void when a sale takes place in execution of a rent decree: see 15 C W N 782 (1). I dismiss this appeal with costs.

R.W./R.K. *Appeal dismissed.*

1. Ashutosh Ghose v. Abinash Chandra Chowdhuri, (1911) 11 I C 501=15 C W N 782.

A. I. R. 1936 Patna 572

MOHAMAD NOOR AND ROWLAND, JJ.

Mangtulal Bagaria—Appellant.

v.

Daya Shanker Gobardhan Das Bhata and *others*—Respondents.

Appeal No. 921 of 1932, Decided on 16th March 1936, from appellate decree of Dist. Judge, Manbhum-Sambalpur, D/- 8th March 1932.

(a) Specific Relief Act (1877), S. 42—Suit for declaration that certain facts existed and therefore sale is void is not barred.

There is nothing in S. 42 which bars a suit for a declaration that a certain sale is void. The

question whether a particular sale is void is a mixed question of law and fact, but whether under the given circumstances a sale is void is a question of law only. A plaintiff is entitled to sue for a declaration that certain facts existed and therefore the sale in that case is void. [P 575 C 1, 2]

(b) Specific Relief Act (1877), S. 42—Sub-lessee liable to pay commission and royalty purchasing in son's name but in reality for himself right to recover same in certificate sale—Suit purely for declaration that sale is void held maintainable.

Where a sub-lessee who is liable to pay his lessor commission and royalty, purchases in his son's name but in reality for himself the lessor's right to realize commission and royalty in a certificate sale, formal delivery to him does not change his position if the sale is void or fraudulent, nor can it be said that the purchaser obtained possession by realizing the royalty from himself and a suit purely for a declaration that sale is void is maintainable. [P 575 C 2]

(c) Bihar and Orissa Public Demands Recovery Act (4 of 1914), S. 46—Scope of—Suit for declaration that sale does not affect plaintiff does not come under S. 46.

There is wide difference between setting aside a sale and deciding that the plaintiff's right was not affected by it: 25 *Cal* 179 (*P C*), *Rel. on.* [P 575 C 2]

Section 46 refers to a suit for setting aside a sale. It has got no reference to a case in which the plaintiff alleges that the sale though good has not in fact affected him, as there was no decree against him. [P 575 C 2]

(d) Practice — Suit — Maintainability of—Allegations of plaintiff must be assumed to be correct.

The question of maintainability of a suit is to be dealt with on the footing of the case as presented by the plaintiff and on the assumption that his allegations are correct. If afterwards they are found to be incorrect the suit is liable to be dismissed not on the ground that it is not maintainable but on its merits. [P 575 C 2]

(e) Bihar and Orissa Public Demands Recovery Act (4 of 1914), S. 26—Certificate has no greater force than that of simple money decree.

A certificate has no greater force than that of a simple money decree and nothing is sold in execution of it except the right, title and interest of the certificate-debtor mentioned therein. If a property which has devolved upon another person be sold as belonging to the certificate-debtor mentioned in the certificate, nothing passes to the auction-purchaser. [P 576 C 1]

(f) Administration — Receiver in administrative suit—His appointment does not divest estate from owner.

The receiver appointed in an administration suit has no better status than that of a receiver appointed by Court under O. 40, Civil P. C. He is not on the same footing as a receiver appointed in an insolvency proceeding in whom the estate of the insolvent vests and the insolvent is divested of it. When a Court appoints a receiver the property comes in the custody of the Court. The possession of the receiver is the possession of the Court. The property passes into legal custody (*custodia legis*) and such custody is for the benefit of the true owner. The receiver thus holds the property for the benefit of the true owners. By the appointment of a receiver the Court takes upon itself the management of the property during the continuance of the litigation, but the proprietary right or interest in the property is not transferred from the rightful owner either to the Court or to the receiver appointed. [P 576 C 1, 2]

So where a receiver is appointed to the estate of a certificate-debtor, the sale cannot be inoperative against the estate simply because the receiver is not substituted as certificate debtor: 1926 *Cal* 385, *Ref.* [P 575 C 1]

(g) Execution Sale — Property in possession of receiver—Sale in execution of decree without leave of Court is irregular and not void.

When the property is in the possession of a receiver it cannot be sold in execution of a decree without the leave of the Court which appointed the receiver. But the person who brings about the attachment and sale of a property in the possession of a receiver appointed by a Court is guilty of contempt of Court and the sale is irregular but not void: 14 *C W N* 560; 1919 *Cal* 269 and 1923 *Cal* 121, *Disting.* [P 576 C 2]

(h) Execution — Attachment and sale of right to receive royalty—Right to money actually due on date of sale is only sold.

Where a right to receive royalty is attached and sold, only the right to the money which has already become due on date of sale is sold, as money which has not become due is not an existing debt: 28 *Cal* 483 and 1928 *All* 193, *Rel. on.* [P 577 C 1, 2]

S. M. Mullick and *S. M. Gupta*—for Appellant.

G. C. Mukherjee and *N. N. Ray*—for Respondents.

Mohamad Noor, J.—The facts of the case out of which this second appeal has arisen are these: One Popat Velji had obtained from the Raja of Jharia a mining lease of village Parbad in the District of Manbhum. He then gave a mining sublease of 100 bighas of land of that village to defendant 1 on commission at a certain rate subject to a minimum royalty of Rs. 3,000 per annum. The plot of land so subleased is described as plot B in the schedule annexed to the plaint. This defendant, along with one Jethabhai Nira, also took from Popat Velji a sublease of another plot of land which is known as plot A, but we are not concerned with it in the present litigation. Popat Velji died on 9th November 1923. A dispute arose between his two widows on the one hand and his father Velji Mulji Rajdeo on the other. The former claimed that Popat Velji was separate from his father

and consequently his properties devolved upon them, while the latter claimed that the deceased was joint with him and therefore he succeeded him by survivorship. In a certain suit (No. 1282 of 1923) pending in the original side of the Calcutta High Court in which Popat Velji was plaintiff, his widows were substituted in his place on 15th May 1924. Thereupon Velji Mulji Rajdeo, father of Popat Velji, filed a declaratory suit in the original side of the Calcutta High Court (suit No. 1307 of 1924) and in that suit, on 28th July 1924, Mr. N. N. Bose, Bar-at-law, was appointed receiver by the Court. Thereafter the two widows of Popat Velji (defendants 3 and 4 in the present suit) instituted an administration suit in the original side of the Calcutta High Court (suit No. 2156 of 1924). In that suit two creditors of Popat Velji, namely the plaintiff and one Sheochand Rai Khemka were appointed administrators on 23rd September 1924. On 24th November 1924, a preliminary decree was passed in the administration suit and the Court ordered certain enquiries and ascertainment of the assets and liabilities of the deceased. On or about 15th May 1925, the administrators were discharged and the Official Receiver was appointed manager of the estate of the deceased. He also was discharged on 11th March 1927, and the plaintiff was appointed manager of the estate and has been continuing as such since then.

Under the Jharia Water Supply Act Popat Velji was liable to pay certain cess to the Water Board in respect of the royalties which he was to receive from defendant 1. A certificate, No. 33 J. W. B of 1924-25, was filed on 25th July 1924, against the two widows of Popat Velji and his father. It was just three days before the appointment of Mr. N. N. Bose as receiver of the estate in the suit of the father. Notices under S. 7, Bihar and Orissa Public Demands Recovery Act, seem to have been served on the judgment-debtors on 14th August 1924. In March 1925, while the plaintiff and Sheochand Rai Khemka were in charge of the estate, they remitted a sum of Rs. 443-12-0 to Jharia Water Board for cess for the period subsequent to that for which the certificate had been issued. The Secretary of the Board informed the solicitors of the plaintiff and Sheochand Rai Khemka that a further sum of Rs. 920 on account of cess for the period of 1923 and 1924 was payable by the estate of the deceased. On receipt of this information the solicitors of the managers, the plaintiff and Sheochand Rai Khemka sent a cheque for Rs. 920 to the Certificate Officer of Dhanbad, requesting him that the costs and interest be remitted. On this the solicitors were informed that the interest was remitted but that the costs could not be remitted, and they were called upon to pay it. In the meantime, as already stated, the plaintiff and Sheochand Rai Khemka were discharged and the Official Receiver was appointed instead. The solicitors informed the Certificate Officer that the management of the estate had been transferred to the Official Receiver and requested him to communicate with him. Nothing seems to have been done and the balance of the certificate dues was left unsatisfied. The right of the judgment-debtors to realise commission and royalty in respect of Plot B of the land from Gobardhan Das Manishanker was attached on 19th December 1924, and sold on 2nd November 1925, for a sum of Rs. 160 and was purchased by defendant 2 who is the son of defendant 1. It is to be noted that at that time admittedly a sum of at least Rs. 6,000 in respect of royalty was payable by defendant 1 to the estate of the deceased Popat Velji.

The plaintiff after having obtained the sanction of the Calcutta High Court has instituted the present suit: (a) for a declaration that the sale of plot B described in Sch. 2 to the plaint in Certificate Case No. 33 J. W. B of 1924-25 is void and that defendants 1 and 2 acquired no title to the property by purchase in that sale; or (b) if the sale be held to be valid for declaration that the purchaser bought the property for and on behalf of the estate of the late Popat Velji; (c) for costs; and (d) for such relief as the plaintiff may be found to be entitled to. The plaintiff alleged that defendant 2, who purchased the property at the certificate sale, was in fact a benamidar of his father, defendant 1. The defendants denied the allegations of the plaintiff and urged that defendant 2 was the real purchaser of the property and that the sale was valid and legal. I will mention here in passing that in the plaint there is an allegation that on 4th August 1934 the Official Assignee of Bengal was

appointed administrator of the estate of Popat Velji by the Calcutta High Court under S. 108, Presidency Towns Insolvency Act, and that the appointment of Mr. N. N. Bose as receiver referred to above was revoked on 19th August 1924, and that it was later on that the plaintiff and Shewchand Rai Khemka were appointed administrators on 23rd September 1924 as already stated. This allegation of the plaintiff about the appointment of the Official Assignee was not admitted by the defendants and I do not find anything on the record to support it. Had there been any evidence that the official assignee was in charge of the estate by virtue of an appointment in insolvency proceeding the position would have been different and a number of questions which arise in this case would have been of no importance.

The learned Subordinate Judge held that defendant 2 was not an independent purchaser of the property and was in fact a benamidar of defendant 1. He decided the other issues involved in the suit in favour of the defendants but decreed it on the simple ground that the estate of Popat Velji, which was in the hands of the official receiver and administrators continuously since 28th July 1924, was not properly represented in the certificate proceedings and therefore the sale was not binding on the estate and was void against it. The learned District Judge however on appeal by the defendants has reversed the decree of the learned Subordinate Judge and has dismissed the suit. The plaintiff has preferred this second appeal. In my opinion on some points the decision of the learned District Judge is wrong. First of all he has held that the suit was not maintainable under S. 42, Specific Relief Act. He is of opinion that as according to the plaintiff the sale was void and a nullity against the estate of Popat Velji, no suit for a declaration lay as the declaration would be only of a proposition of law. He is clearly in error. There is nothing in S. 42, Specific Relief Act, which bars a suit for a declaration that a certain sale is void. The question whether a particular sale is void is a mixed question of law and fact, but whether under the given circumstances a sale is void is a question of law only. A plaintiff is entitled to sue for a declaration that certain facts existed and therefore the sale in that case is void.

The next ground of the learned District Judge for holding that the suit was not maintainable is that the plaintiff being entitled to consequential relief of recovery of possession could not sue for a declaration only, as the possession of the purchased property was delivered to defendant 2 on 14th February 1926, and according to him he had actually realized the minimum royalty from defendant 1 by virtue of his purchase. Here again the learned District Judge is wrong. The finding of both the Courts is that the real purchaser of the property was defendant 1 himself, who was liable to pay the royalty. The formal delivery of possession to him has not changed his position if the sale was void or fraudulent. It cannot be said that he obtained possession by realizing the royalty from himself. In my opinion therefore, on the findings of fact, the plaintiff is entitled to maintain a suit purely for a declaration, the only thing which is needed under the circumstances of the case. The third ground of the learned District Judge for holding the suit to be not maintainable is that it is barred under S. 46, Public Demands Recovery Act, as there was no fraud in bringing about the sale. S. 46, Public Demands Recovery Act, refers to a suit for setting aside a sale. It has got no reference to a case in which the plaintiff alleges that the sale though good has not in fact affected him, as there was no decree against him.

The question of maintainability of a suit is to be dealt with on the footing of the case as presented by the plaintiff and on the assumption that his allegations are correct. If afterwards they are found to be incorrect the suit is liable to be dismissed not on the ground that it is not maintainable but on its merits. In the present case the plaintiff alleged fraud by defendant 1 and that allegation brought the case within the exception to S. 46, Public Demands Recovery Act. Then the plaintiff wanted a declaration that the sale was void against the estate of Popat Velji as it was not properly represented. There is wide difference between setting aside a sale and deciding that the plaintiff's right was not affected by it : 25 Cal 179 (1). On the allegations in the plaint

1. Moti Lal v. Karrabuldin, (1898) 25 Cal 179=24 I A 170=7 Sar 222 (P C).

the suit was maintainable. If however these allegations have not been established the suit fails on the merits, and not on the ground that it is not maintainable. The learned District Judge has next dealt with the question whether the estate of Popat Velji was or was not properly represented in the certificate proceeding. He has held that it is not mandatory upon a Certificate Officer to substitute in the certificate proceedings the names of all persons on whom the estate may devolve. He observes :

> The Certificate Officer cannot be expected to know the persons on whom the estate devolves and specially in a case like the present one where, according to plaintiff's own case, it devolved from time to time upon different persons.

As a proposition of law the view of the learned District Judge is wrong. It may be that the Certificate Officer is not bound to substitute the name of the person on whom an estate is devolved, but if in execution of a certificate a property is sold which does not belong to the certificate debtor nothing passes to the auction-purchaser. It is well settled law that a certificate has no greater force than that of a simple money decree and nothing is sold in execution of it except the right, title and interest of the certificate debtor mentioned therein. If a property which has devolved upon another person be sold as belonging to the certificate debtor mentioned in the certificate, nothing passes to the auction-purchaser. However, in this case, though the view of law taken by the learned District Judge is in my opinion not correct, the certificate sale cannot be held to be inoperative against the estate of Popat Velji. The receiver appointed in an administration suit has no better status than that of a receiver appointed by Court under O. 40, Civil P. C. He is not on the same footing as a receiver appointed in an insolvency proceeding in whom the estate of the insolvent vests and the insolvent is divested of it.

The position of a receiver in a suit has been elaborately dealt with by Mookerjee, J. in 52 Cal 914 (2), at p. 931. When a Court appoints a receiver the property comes in the custody of the Court. The possession of the receiver is the possession of the Court. The property passes into legal custody (*custodia legis*) and such custody is for the benefit of the true owner. The receiver thus holds the property for the benefit of the true owners. By the appointment of a receiver the Court takes upon itself the management of the property during the continuance of the litigation, but the proprietary right or interest in the property is not transferred from the rightful owner either to the Court or to the receiver appointed. Therefore the certificate debtors in this case, namely, the two widows and the father of Popat Velji (whoever may have title to the property) were not by the appointment of a receiver or manager divested of their interest therein.

Mr. Mullick has contended that when the property is in the possession of a receiver it cannot be sold in execution of a decree without the leave of the Court which appointed the receiver. This proposition is correct, but the person who brings about the attachment and sale of a property in the possession of a receiver appointed by a Court is guilty of contempt of Court and the sale is irregular but not void. The decision of the case in 14 C W N 560 (3), relied upon by the learned advocate for the appellant, merely lays down that the sale of a property in the hands of a receiver without the leave of the Court which appointed him is illegal and can be set aside even after it was confirmed, but it does not lay down that the sale is ab initio void. It was held in the Calcutta High Court in 1919 Cal 269 (4) and 1923 Cal 121 (5) that the sale in execution of a decree of a property in the custody of a receiver without the leave of the Court which appointed him is not void but it can be set aside in a proper proceeding. The present case however is not one for setting aside the sale, and S. 46, Public Demands Recovery Act, confines the jurisdiction of a civil Court to cases where there is a fraud which according to the finding of both the Courts below is absent in this case.

The next branch of the argument of Mr. Mullick was that the defendants were liable to re-convey the property to the

2. Eastern Mortgage and Agency Co., Ltd. v. Muhammad Fazlul Karim, 1926 Cal 385=90 I C 851=52 Cal 914.

3. Mrs. Lavinia Ashton v. Madhobmoni Dasi, (1910) 14 C W N 560=5 I C 390=11 C L J 489.

4. Kanailal Jalan v. Manoo Bibi, 1919 Cal 269 51 I C 394=23 C W N 952=29 C L J 424.

5. Raja Jagadish Chandra Deo Dhabal Deb v. Bhubaneswar Mitra, 1923 Cal 121=76 I C 241=27 C W N 38=37 C L J 265.

plaintiffs. He relied upon a decision of the Privy Council in 44 I A 30=44 Cal 573 (6). But that decision does not help the appellant, as in this case there was no obligation on the defendants to pay up the certificate dues. No doubt the plaintiff's case was that the defendants were liable to pay the water rate, but on reading the lease I agree with the Courts below that there was no such obligation on him. To support the plaintiff's claim in equity there must be something unfair, something amounting to at least sharp practice in the conduct of the purchaser: see 29 C L J 492 (7). There is no such thing in this case. So far the result arrived at by the learned District Judge is correct.

There is however one aspect of the case which has not been considered by either of the Courts below, nor does it seem to have been raised before them by the plaintiff, but as it is a question of law it can be looked into in second appeal. I have stated that plaintiff wants a declaration that the sale of plot B described in Sch. 2 is void and that the defendants acquired no title to the property by purchase in that sale. It seems to have been assumed in the Courts below that the land of plot B described in the schedule was in fact sold and purchased by the defendants. As a matter of fact it is not so. The certificate of sale (Ex. E-2) describes the property sold in these terms:

> The certificate debtors' right to receive royalty and commission from Babu Gobardhan Das Manishanker Das Manishanker in 100 bighas coal land known as Basudih Colliery B plot situated at Mauza Parbad, etc., etc.

Now there is a good deal of difference between the sale of a plot of land and a right to receive royalty from the lessee of that land. What was attached and sold was the "right to receive the royalty," and not the land itself. A right to receive money can only be attached and sold as a debt and the debt must be existing, and not the money which is to come into existence at some future date. Sir Dinshaw Mulla in his commentary on the Civil Procedure Code under S. 60 says:

> The word 'debt' in this section means an actually existing debt, that is a perfect and absolute debt. Rent which has not become due is not a debt and cannot be attached.

In this case it is obvious that though the minimum royalty was a fixed sum, the commission depended upon the happening of circumstances which was entirely contingent. This seems to have been held in the Calcutta High Court in 28 Cal 483 (8) and in the Allahabad High Court in 50 All 507 (9). In this view of the matter and considering the description of the property sold, in my opinion what was actually sold was the money which had already become due on the date of the sale, that is on 25th July 1925. I would give the plaintiff a modified decree for a declaration that the certificate sale has not affected the plaintiff's right in the land of plot B described in Sch. 2 of the plaint, and that the defendant has only purchased the royalty and commission which had already become due on 25th July 1925. In the circumstances of the case I would direct that the parties bear their own costs throughout.

Rowland, J.—I agree.

D.S./R.K. *Decree modified.*

6. Deo Nandan Prasad v. Janki Singh, 1916 P C 227=39 I C 346=44 I A 30=44 Cal 573 (P C).
7. Khurshed Ali v. Dina Nath Surma, 1919 Cal 431=49 I C 802=29 C L J 492.
8. Uday Kumari Ghatwalin v. Hari Ram Shaha, (1901) 28 Cal 483.
9. Lachhman v. Jarbandhan, 1928 All 193=108 I C 229=50 All 507=26 A L J 253.

A. I. R. 1936 Patna 577

VARMA, J.

Kalyan Mul Mathur—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Nos. 369 and 370 of 1936, Decided on 14th August 1936, from order of Sess. Judge, Muzaffarpur, D/- 13th July 1936.

(a) Criminal P. C. (1898), Ss. 133, 137 (3)—Order under S. 137 (3) not good by reason of nuisance having already abated—It should not be allowed to remain in force but should be set aside by appellate Court.

An order under S. 137 (3) is not like an order under S. 144 which spends itself in 60 days. An order under S. 137, which is not good by reason of the nuisance having already abated should not be allowed to remain in force but should be set aside by the appellate Court, because, if allowed to remain in force, it is apt to be used in case of future proceedings against the party, against whom it is passed. [P 578 C 2]

(b) Criminal P. C. (1898), Ss. 133, 137 (3)—Magistrate is not justified in making order absolute without taking evidence produced by party.

A Magistrate is not justified in making an order under S. 133 absolute without taking the evidence of witnesses produced by the party against whom it is passed. [P 578 C 2]

(c) Criminal P. C. (1898), Ss. 133, 137—S. 133 applies only to existing nuisances—Nuisance ceasing to exist—Order should not be made absolute.

Section 133 applies to existing nuisance and not to nuisance which is likely to rise in future. Where the nuisance complained against has ceased to exist, an order under S. 133 should not be made absolute: 1935 *All* 926 and 1920 *Lah* 258, *Rel. on.* [P 579 C 1]

(d) Criminal P. C. (1898), S. 133—Whether Magistrate can continue with two proceedings under S. 133 side by side with regard practically to same subject matter (*Quaere*).

Quaere.—It is doubtful if a Magistrate can continue with two proceedings under S. 133 side by side with regard to practically the same subject matter because the danger is that by this procedure a Magistrate may get a chance of reviewing an order which he has already passed. Such procedure is not contemplated by the Criminal Procedure Code. [P 579 C 1]

Hareshwar Prasad Sinha and *P. Jha* —for Petitioner.

S. M. Gupta for *Asst. Govt. Advocate*—for the Crown.

Criminal Revision No. 370 *of* 1936.

Order.—This is an application against an order passed by the Subdivisional Officer of Bettiah under S. 137 (3), Criminal P. C. As this matter is to a very great extent connected with the subject matter of Cri. Rev. No. 369 of 1936, it is necessary to mention a few facts. Cri. Rev. No. 370 arises out of Misc. Case No. 14 of 1936 and Cri. Rev. No. 369 arises out of Misc. Case No. 16 of 1936.

It appears that the Subdivisional Officer of Bettiah on a report received on 27th March 1936 from the Sub-Inspector of Police issued notice under S. 133, Criminal P. C., to the petitioner to abate the nuisance caused by his depositing waste water near the Majhaulia police station. As it appears from the notice itself it was with regard to some bad water in a ditch within the compound of a mill. Cause was shown on 8th April 1936 and on that date the learned Magistrate expressed an opinion that evidence should be gone into and called upon both the parties (the Sub-Inspector on the one hand and the present petitioner on the other) to produce witnesses on the next date. On 9th April 1936 four witnesses were examined on behalf of the first party and two witnesses were examined on behalf of the second party. A petition was filed by the second party for time to produce further witnesses. The learned Magistrate ordered then to file a list that very day and he adjourned the case for argument and evidence, if any, to 21st April 1936. It appears that on 21st April 1936 a list of four witnesses who were present in Court was filed on behalf of the second party but, without examining them, on hearing from the second party through a petition of the foul water in the ditch having disappeared, the learned Magistrate asked for a report from the Sub-Inspector of Police who supported the allegation of the second party. After this the learned Magistrate goes on to add:

In that case there is no object in prolonging these S. 133, Criminal P. C., proceedings as the nuisance in respect of which they were started has apparently been caused to cease. Since I have not been satisfied that the original order was not reasonable and proper it is hereby made absolute under S. 137 (3). Since the nuisance is admitted to have been abated there is no object in proceeding further under S. 149, Criminal P. C. The second party are discharged from their P. R. and the case disposed of.

The petitioners went to the learned Sessions Judge of Muzaffarpur who, although he was of opinion that the learned Subdivisional Officer was not justified in making the rule absolute, did not think it necessary to refer the matter to this Court as no further proceeding under S. 140 was contemplated. Therefore, no question of prejudice arose to the petitioner. I agree with the first part of the observation made by the learned Sessions Judge but not with the second because an order under S. 137 (3) is not like an order under S. 144 which spends itself in 60 days; and if the order under S. 137 (3) was not good and is allowed to remain in force then in case of future proceedings it is apt to be used against the petitioner, because the learned Magistrate has made his preliminary order absolute. There are other grounds upon which this order has been attacked by the learned Advocate appearing on behalf of the petitioner and they are that when the Magistrate decided to go into evidence and fixed the 21st of April for argument and evidence, if any, and when the petitioner had four other witnesses ready, he was not justified in making the order absolute without examining those witnesses. This contention, I think, must prevail. S. 137 (1) says that the evidence shall be taken as in summons cases. Under these circumstances I think this rule should be made absolute and the order of the learned Magistrate, dated 21st April 1936, is set aside.

Criminal Revision No. 369 *of* 1936.

We now come to the revision which arises out of Misc. Case No. 16 of 1936. Now, before the previous case just now disposed of was finished, a report was submitted by the health officer of Champaran District Board, on receipt of which on 14th April 1936 with regard to the same nuisance which was ultimately dealt with by his order dated 21st April 1936, the learned Subdivisional Officer ordered in the following terms:

> Issue notice to Manager Majhaulia Mill under S. 133, Criminal P. C., to filter and chlorinate his waste water. Cause if any to be shown on 21/5.

But from the evidence it is clear that all the time they were pointing to the same tank which was the subject matter of a proceeding in Misc. Case No. 14 of 1936. The learned Magistrate made his order absolute on 4th July 1936. We know from the records of Misc. Case No. 14 of 1936 that there was no water in the tank and therefore the learned Magistrate had dropped the proceedings, although he made the rule absolute. Still he continued with this proceeding for a time. Throughout the period after 21st April 1936 there was no water to be filtered or to chlorinate on the evidence in Misc. Case No. 14. Then the result of the present order is not with regard to any existing nuisance but of a nuisance which is likely to come into existence during the season. The section applies to existing nuisance and not to nuisance that is likely to arise in future. If any authority is wanted I may refer to the cases in 1935 All 926 (1) and 1 Lah 163 (2). The learned Sessions Judge was of opinion that this order too should not have been made absolute, but he refrained from referring the case to this Court. In view of the authorities that I have cited, if the nuisance does not exist now I do not think the order should have been made absolute. It is doubtful if a Magistrate can continue with two proceedings under S. 133, Criminal P. C., side by side with regard to practically the same subject matter, because the danger is that by this procedure a Magistrate may get a chance of reviewing an order which he had already passed. This is a procedure which is not contemplated by the Criminal Procedure Code. I would therefore set aside this order as well and make the rule absolute.

R.M./R.K. *Rule made absolute.*

1. Shri Ram v. Emperor, 1935 All 926=1935 Cr C 1140=159 I C 198.
2. Gokal Chand v. Emperor, 1920 Lah 258=56 I C 446=21 Cr L J 462=1 Lah 163.

A. I. R. 1936 Patna 579

MOHAMAD NOOR, J.

Giridharilal Marwari—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 318 of 1936, Decided on 12th August 1936, from order of Judicial Commissioner, Chota Nagpur, D/- 11th June 1936.

(a) Trade mark—Infringement of — Court deciding whether one trade mark is colourable imitation of another must place itself in position of unwary customer—It is sufficient if there is such similarity between the two that unwary or illiterate customer will not be able to distinguish between them.

The question whether the trade mark, which is the subject of prosecution under S. 482, I. P. C., is a colourable imitation of another trade mark is one of fact, and the Court must come to its own conclusion after having placed itself in the position of an unwary customer. It is sufficient that there should be such similarity between the two trade marks that an unwary or illiterate customer may not be able to distinguish the one from the other, especially when he sees the one without having the other before him. The question is not whether anybody has been deceived in fact, but whether an average customer can be deceived and for this the Court must form its own opinion : *Payton & Co. Ltd.*, v. *Snelling Lampard & Co. Ltd.*, (1901) *A C* 308 and 1934 *Mad* 211, *Foll.*

[P 580 C 2; P 581 C 1]

(b) Penal Code (1860), S. 482—Sentence—Measure of punishment should be damage caused to complainant.

In case of an offence under S. 482 the measure of punishment should be the damage caused to the complainant. [P 581 C 2]

M. Yunus and *R. S. Chatterjee*—for Petitioner.

S. N. Sahay and *K. K. Banerjee*—for Opposite Party.

Order. — The petitioner Girdharilal Marwari, who is a partner of the firm of Shew Bhagwan Girdhari Lal, biri manufacturers of Jhalda in Manbhum, was convicted by a Magistrate of Ranchi under S. 482, I. P. C., and sentenced to pay a fine of Rs. 1,000 and in default to suffer six months' rigorous imprisonment for using on the packets of biris manufactured in his firm a false trade mark being colourable imitation of the registered trade mark of the firms Maliram Mahabir Prasad and Bansidhar Anantram, also biri manufacturers at Jhalda and masters of the complainant. Out of the fine if realized Rs. 500 was awarded as compen-

sation to the complainant under S. 545, Criminal P. C. His appeal has been summarily dismissed by the Judicial Commissioner of Chota Nagpur. It is not disputed that the petitioner used the trade mark in question, nor is it contended, if the label used by the petitioner is false, that he used it without any intention to defraud. In fact it has been established beyond doubt by the evidence of the manufacturers of the disputed label and the letters of the petitioner that the latter wanted that the label should be as much similar to the one used by the firms of the complainant's masters as possible.

Only two points have been urged on behalf of the petitioner : (1) that there is no evidence that the petitioner used the label at Ranchi and therefore the Magistrate at Ranchi had no jurisdiction to try the case and (2) that the disputed label is not a colourable imitation of the label of the complainant's masters. About the first point, it is true that there is no clear statement by any of the witnesses examined that the petitioner himself sold the packets of biris bearing the false trade mark at Ranchi, but there is clear evidence that the biris bearing that mark are stocked by shop-keepers at Ranchi and that they have been selling them there, and a reading of the evidence of the witnesses as a whole leaves no room for doubt that the petitioner did use the false trade mark at Ranchi. Hira Lal (P. W. 2) says :

> I stock both brands of biris. . . . . .I commenced stocking the horse brand (complainant's masters' brand) biris five years ago and the biris bearing the sheep brand (the accused's brand) three months ago. I have been purchasing the sheep brand as the packets are cheaper. The brands seen together appear similar.

M. K. Das Gupta (P. W. 3) says :

> I purchase the sheep brand mostly as the sale of horse brand biri has declined The horse and, the sheep brands appear similar except for the animals. An illiterate cannot differentiate between the two brands.

Balu Ram Kahar (P. W. 7) says :

> I am now purchasing the sheep brand biris as it is cheaper. Seen from a distance the two brands appear similar. The illiterate villagers cannot detect the difference in the two brands. I have often sold a sheep brand biri for a horse brand demanded.

Though these witnesses do not depose where they purchased the sheep brand, it is clear that they were speaking of purchases at Ranchi. As it is not denied that the petitioner has sold the biris with the disputed label the witnesses must have purchased them from him at Ranchi. However, the question now is not of any importance. S. 531, Criminal P. C., says:

> No finding, sentence, or order of any criminal Court shall be set aside merely on the ground that the inquiry, trial, or other proceeding in the course of which it was arrived at or passed took place in a wrong Sessions Division, District, Subdivision, or other local area unless it appears that such error has in fact occasioned a failure of justice.

Jhalda is midway between Ranchi and Purulia. If, as contended on behalf of the petitioner, the user was at Jhalda only, the accused could have been tried at Purulia in Manbhum. It has not been shown how the petitioner has suffered on account of the trial being held at Ranchi. The important question is whether the trade mark used by the petitioner is the colourable imitation of the trade mark of the complainant's masters. The two labels are exactly of the same size. The colour and the design are almost similar. The name of the brands which is written in Bengali is "Double Ghora" (two horses) on the label of the complainant's masters and "Double Bhera" (two rams) on the label of the petitioner. In both the cases the two animals, namely, the horses on the one and the rams on the other, are white on green ground. In one case the two horses are facing one another as if fighting with their fore legs raised and similarly in the disputed label the two rams are also in white on green ground facing one another as if about to fight with their fore legs raised. The various colours on the two labels are almost exactly the same, though the green colour in one case is deeper than in the other. Similarly, the blue colour where there are heads of the animals is deeper in one case than in the other. The space where the name of the brand is written in Bengali is yellow in one case and yellow and white in the other. No doubt, the two paintings are not identical, but it is not necessary that they should be so. It is enough that there should be such similarity that an unwary customer may not be able to distinguish the one from the other, especially when he sees the one without having the other before him. The names of the brands "Double Ghora" and "Double Bhera" sound similar. The only difference is that there is "Gho" in the one and "Bhe" in the other. In short, the resemblance is too close to be noticed by

illiterate customers. The biri smokers mostly belong to this class and it cannot be expected that they will be able to distinguish between the two.

I do not propose to discuss the various decisions placed before me. In my opinion the question whether the trade mark, the subject matter of the prosecution, is a colourable imitation of another trademark is one of fact and the Court must come to its own conclusion after having placed itself in the position of an unwary customer. The learned advocate for the petitioner has contended that there is no evidence to show that anybody was in fact deceived. First of all, there is the evidence of Baluram Kahar (P. W. 7) to the effect that he often sold a "sheep brand biri" when "horse brand" was demanded. But the question is not whether anyone has been deceived in fact, but whether an average customer can be deceived and for this, as I have said, the Court must form its own opinion. In (1901) A C 308 (1), Lord Macnaughten in the House of Lords referring to the evidence of witnesses said:

> But that is not a matter for the witness; it is for the Judge. The Judge, looking at the exhibits before him and also paying due attention to the evidence adduced, must not surrender his independent judgment to any witness.

In that case the Court of appeal treated the question as one entirely of fact and that was upheld by the House of Lords. The same view has been taken in 1934 Mad 211 (2). It was contended in that case that the Court cannot act simply on its own comparison of the two papers. This contention was overruled and the decision of the House of Lords in the case referred to above was relied upon. In this case the two Courts below on a comparison of the two labels have held that the one in dispute is a colourable imitation of the other and I agree with them. The only appreciable difference to a man who can read is the difference of one word in the name and that the printed figures in the two are different, though in exactly the same relative position. Where there are figures and words in the one there are also figures and words in the other. Where there are Bengali words in the one there are Bengali words in the other. Where there are English words and figures in the one there are also these in the other. The only difference is in the heads and tails of the two animals. In the one it is of horses and in the other of rams. No doubt, if the two labels are placed side by side an observer will mark the difference, but for a man who has not carefully noticed the features too closely it will be difficult to distinguish the one from the other. There is therefore in my opinion no merit in either of the two contentions raised before me.

Coming to the question of sentence, first of all the imprisonment awarded in default of payment of fine is illegal. The maximum punishment of imprisonment which can be inflicted under S. 482 is one year. Therefore under S. 65 of the Code the imprisonment in default of payment of fine cannot exceed three months. The fine itself is somewhat excessive. The measure of punishment should be the damage caused to the complainant's masters of which there is very little evidence in the case. No doubt, as the learned Magistrate has remarked the user was deliberate in order to steal the trade of the complainant's masters, but all such cases are cases in which there is a deliberate attempt of this nature. If the user is without intent to defraud it is not criminal. I would therefore reduce the sentence to a fine of Rs. 400 and in default of payment of the fine the petitioner will suffer three months' rigorous imprisonment. Out of the fine if realized Rs. 300 will be paid to the complainant.

R.M./R.K. *Order accordingly.*

1. Payton & Co., Ltd. v. Snelling, Lampard & Co., Ltd., (1901) A C 308=70 L J Ch 644=85 L T 287.
2. Jamal Noor Mohamed Sait & Co. v. Abdul Kareem & Co., 1934 Mad 211=151 I C 869=57 Mad 600=66 M L J 440.

A. I. R. 1936 Patna 581

ROWLAND, J.

Sanmon Tiwari—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 403 of 1936, Decided on 25th August 1936, from order of Sub-Divl. Officer, Patna, D/- 24th June 1936.

Criminal P. C. (1898), Ss. 162 and 537—Prosecution witness—To corroborate his evidence Magistrate cannot use police diary containing statements made by such witness to police officer during investigation—But even in case of improper admission superior Court will not intervene unless there is substantial injustice to accused.

A Magistrate is not entitled to use police notes of what the prosecution witness said to the police officer during investigation of an

offence to corroborate the evidence of such witness during trial. But even improper admission of such evidence will not in all cases compel interference by a superior Court unless the error has led to substantial injustice or has prejudiced the accused: 1931 *Pat* 96, *Ref.*; 1917 *P C* 25, *Rel. on.* [P 582 C 1, 2]

D. L. Nandkeolyar—for Petitioner.

K. K. Banerji for *Asst. Govt. Advocate*—for the Crown.

Order. — It is stated in para. 1 of the petition that the petitioner has been convicted under S. 323, I. P. C., and sentenced to rigorous imprisonment for three months. But a reference to the record shows that the conviction is under S. 223 and the sentence is simple imprisonment. The offence alleged consists of negligently permitting the escape of two prisoners whom the petitioner as a public servant was legally bound to keep in confinement. He was a warder in the Patna City sub-jail who came on duty at 6 a.m. on 15th December 1935. The number of prisoners in the sub-jail according to the books was 19. At about 6-22 a.m., the petitioner raised an alarm that two prisoners had escaped. It is the prosecution case that these two prisoners were permitted by the petitioner to go to the latrine, and from there by scaling the wall they got away. His defence was a denial and the suggestion that the prisoners had in fact escaped before 6 a. m. and before he took over charge. Against this is the fact that his signature appears on tha charge sheet acknowledging receipt of the custody of the 19 prisoners according to the books. Seven witnesses were examined for the prosecution and none for the defence, The majority of the witnesses are Government officers, but one was an under-trial prisoner, a gentleman of some education, who supports the prosecution case and was regarded by the Magistrate as an independent and reliable witness. Comment was made on behalf of the petitioner that this witness had not been examined by the Deputy Superintendent who came to the scene within a few minutes and questioned the jail staff. With reference to this the learned appellate Court has said in the judgment:

> I find from the police diaries in the case that what this witness stated in Court was stated by him to the Sub-Inspector (P. W. No. 6) at the time of his investigation at 7-20 a.m. on the morning of the occurrence.

The Magistrate was not entitled to use the police notes of what the witness said to the Sub-Inspector in this manner to corroborate the evidence given by the witness in Court. S. 162, Criminal P. C., is perfectly clear. Subject to exceptions which do not apply here, it is said:

> Any such statement or any record thereof, whether in a police diary or otherwise, shall not be used for any purpose.

The utmost that the Magistrate was entitled to say was that the witness had been examined by the Sub-Inspector at 7-20 that morning, that the accused had or could have had a copy of the statement and that no contradiction between that statement and his evidence in Court had been brought on the record. I may invite the Magistrate's attention to 11 P L T 837 (1). On the other hand, such improper admission of evidence will not in all cases compel interference by a superior Court. The question will be whether the error has led to substantial injustice or has materially prejudiced the accused: 44 Cal 876 (2). In the present case I do not really feel that any doubt could arise on the materials on record that the two prisoners were in the Jail when the accused took charge and escaped shortly after. Mr. Nandkeolyar appearing for the petitioner pressed me to hold that there might have been a miscarriage of justice having regard to a statement appearing in the evidence of the Sub-Inspector that he was told the prisoners had been seen at a certain eating-house some distance from the sub-jail before 6 a.m. But that statement of the Sub-Inspector is no evidence. To begin with it is hearsay. It refers to statements of persons who were not called as witnesses, and it is inadmissible under S. 162 of the Code. If it had been a fact that the prisoners had been seen at that place and that there was no error in the time the accused could have obtained from the Sub-Inspector the names of those persons and moved the Court for an adjournment to enable him to obtain their evidence: but this was not done.

I find no reason to interfere with the conviction. Finally Mr. Nandkeolyar has asked me to revise the sentence pleading that the Head warder who ought to have held latrine parade of all the prisoners before leaving them in charge of

---

1. Sakal Ahir v. Palakdhari Ahir, 1931 Pat 96 =1931 Cr C 192=131 I C 535=32 Cr L J 735=11 P L T 837.
2. Dal Singh v. Emperor, 1917 P C 25=39 I C 311=18 Cr L J 471=44 I A 137=44 Cal 876 =13 N L R 100 (P C).

petitioner is at least as much to blame as the petitioner, whereas the latter has been made the scapegoat and criminally prosecuted, while the former has been merely proceeded against departmentally. I do not think it is for me to say what ought to be done to the Head warder; but I do not think the punishment imposed on the petitioner is unduly severe. The rule is discharged.

D.S./R.K. *Rule discharged.*

---

* A. I. R. 1936 Patna 583

COURTNEY-TERRELL, C. J. AND DHAVLE, J.

M. Sh. Muhammad Sadiq and *others*—Plaintiffs—Appellants.

v.

Harakh Narain and *others*—Defendants—Respondents.

Appeal No. 177 of 1932, Decided on 5th August 1936, from original decree of Addl. Sub-Judge, Saran, D/- 27th January 1932.

(a) Mortgage — Deed—"Fixed and consolidated jama"—Inclusion of such expression has no legal significance — Expression only meant to avoid religious sin.

The mention of the "fixed and consolidated jama" in instruments of mortgage is merely a relic of the device by which the sin of usury might be avoided, for it is curious that most religions provide means for satisfying the deity with forms while withholding substance. The phrase in general has no legal significance.

[P 584 C 1]

(b) Mortgage — Usufructuary — Mortgage executed before Transfer of Property Act came into force — Liability of mortgagees to account—Ss. 76 and 77, T. P. Act, are applicable.

In the case of a usufructuary mortgage although it was executed before the Transfer of Property Act came into operation yet the principles of Ss. 76 and 77 of that Act with regard to the liability of the mortgagee to account are applicable since they are a mere codification of the law in existence before the Act.

[P 584 C 1]

*** (c) Mortgage—Usufructuary — Liability of mortgagee to account—Liability depends upon contract — Mortgagee liable to account appropriating profits — Mortgagor's money retained by mortgagee must be applied towards reduction of capital—Equitable right has precedence over right to refuse piecemeal redemption—Liability of mortgagee to pay certain sums to mortgagor independent of his rights in realizing profits — Non-discharge of such liability will not make mortgagee liable to account at annual rests.**

The liability to account of a mortgagee in possession depends entirely upon whether under the contract he has to hand over from time to time anything of the rents and profits to the mortgagor, for of such money, he is a trustee for the mortgagor until it is paid over. In cases where only a portion fixed or proportion of such rents and profits is to be retained by way of interest, the liability to account is clear. Similarly where the whole of the rents and profits are to be retained in reduction of a fixed rate of interest and the mortgagor must pay the balance of the fixed rate from some other source it is clearly necessary to account because the mortgagee is in possession and the mortgagor cannot otherwise know how much excess he may have from time to time to pay. And by virtue of his liability to account from time to time he must, if on any particular occasion he retains some of the mortgagor's money, apply it to the reduction of the capital. This equitable liability takes precedence of his right under the contract to refuse piecemeal payment of the capital sum lent. Where however he is entitled to retain the whole of the rents and profits and where his liability to make the stipulated payments to or on behalf of the mortgagor is independent of the amount of such rents and profits as he may in fact receive from the property, there can be no reason to call upon him to account. The failure to pay over the stipulated amounts to the mortgagor is the failure of a debtor and not the failure of a trustee to account satisfactorily for the property of another, and there is no reason to hold him liable to account with yearly rests or to apply the sums which he annually fails to pay in reduction of the capital of the loan.

[P 584 C 2 ; P 585 C 1]

*** (d) Usufructuary Mortgage—Stipulation to pay certain sums to mortgagor annually—Money not paid — Suit for redemption by mortgagor — Deductions of money not paid claimed—Debt treated on equitable principle—Limitation not applicable—Simple interest can be granted on such debt.**

A condition in the usufructuary mortgage was that the mortgagee should pay the mortgagor a certain stipulated sum annually. The mortgagee did not pay accordingly. In a suit for redemption by the mortgagor he claimed deduction of the amounts not so paid by the mortgagee :

Held : that the debt which the mortgagee had incurred to the mortgagor in respect of the stipulated payments was not to be regarded as a mere series of debts arising out of failure to pay agreed sums. It arose out of a single contract of which the principal ingredient was a mortgage and must be treated on equitable principles. Overdue payments from the earliest period of the contract could not, in taking accounts in a redemption suit, be treated as statute barred. The Court had in such circumstances the right in equity to allow simple interest on such overdue amounts : 6 *All* 303 and 1917 *Cal* 853, *Disting.*; 11 *I C* 713, *Ref.*

[P 585 C 1]

K. Husnain—for Appellants.

S. M. Mullick—for Respondents.

Courtney-Terrell, C. J. — This is a redemption suit in which the mortgagor plaintiffs are a Mahomedan family and the mortgage is in the form of a zurpeshgi. It is dated in the year 1880. The amount secured thereby is Rs. 10,500. The mort-

gagees covenant to pay certain specified sums annually to the proper authorities in respect of taxes and cesses subject to the condition that if such taxes or cesses are remitted or reduced the amount by which the provided fixed payments shall exceed the new and reduced amount shall be paid to the mortgagors. A fixed annual sum of Rs. 82 is also to be paid to the mortgagors ; the mortgagees are to enter into possession and are to appropriate the whole of the rents and profits of the mortgaged property until the whole advance of Rs. 10,500 shall be repaid in one lump sum.

In accordance with the historical custom in such cases there is expressed to be a "fixed and consolidated jama of Rs. 984-8-3" which after deducting therefrom the fixed payments above mentioned and Rs. 31-7-9 as "establishment charges is to leave a sum of Rs. 708-12-0 as the mortgagees' profit on account of the peshgi money." But in spite of this form it is conceded that the contract as a whole, and, having regard to the later clauses, (subject to the matter of the cross-objection to be mentioned hereinafter) provides that the entire rent and profits of the estate are to be appropriated by the mortgagees and the mortgagees are to enter into possession of the mortgaged property and to hold it as security for the entire peshgi money. The mention of the "fixed and consolidated jama" is merely a relic of the device by which the sin of usury might be avoided, for it is curious that most religions provide means for satisfying the deity with forms while withholding substance. The phrase in general has no legal significance and in this document at any rate no significance whatever. The contract is therefore a usufructuary mortgage. It is true that it was executed before the Transfer of Property Act came into operation, but the principles of Ss. 76 and 77 of that Act with regard to the liability of the mortgagee to account are applicable since they are a mere codification of the law in existence before the Act.

Now the mortgagees failed to carry out certain terms of the contract : (a) They did not pay to the mortgagors the annual payment of Rs. 82 as stipulated and the whole aggregation of those payments is in arrears. (b) One of the specified payments to be made by the mortgagee was the Dak cess payable at the time when the contract was made, but that cess was abolished in 1907 and the mortgagees should have paid the stipulated sum over annually to the mortgagors and this they failed to do. It was the contention of the mortgagor plaintiffs that as the mortgagees retained in their hands annually sums which they should have paid to the mortgagors these sums should be deemed to have been applied annually in the reduction of the capital sum advanced. They also contended that this should have brought about a corresponding reduction in the annual interest, and for this purpose (notwithstanding that the mortgagees had the right to appropriate the whole of the rents and profits) they claimed to treat the fictitious annual sum of Rupees 708-12-0 mentioned as the "profit on account of the peshgi money" as the interest on the loans and at the rate of 9 as. per 100 rupees. In other words they claimed that the mortgagees must account for the moneys coming into their hands from the property (or at least, as Mr. Husnain on their behalf put it, to the extent of the fixed and consolidated jama of Rs. 984-8-3) and as to moneys which they should have handed over to the mortgagors they should account for the same with yearly rests.

Now the liability to account of a mortgagee in possession depends entirely upon whether under the contract he has to hand over from time to time anything of the rents and profits to the mortgagor, for of such money, he is a trustee for the plaintiff until it is paid over. In cases where only a portion, fixed or proportionate of such rents and profits is to be retained by way of interest, the liability to account is clear. Similarly where the whole of the rents and profits are to be retained in reduction of a fixed rate of interest and the mortgagor must pay the balance of the fixed rate from some other source it is clearly necessary to account because the mortgagee is in possession and the mortgagor cannot otherwise know how much excess he may have from time to time to pay. And by virtue of his liability to account from time to time he must, if on any particular occasion he retains some of the plaintiffs' money, apply it to the reduction of the capital. This equitable liability takes precedence of his right under the contract to refuse piecemeal payment of the capital sum lent.

Where however he is entitled to retain the whole of the rents and profits and where, as in this case, his liability to make the stipulated payments to or on behalf of the mortgagor is independent of the amount of such rents and profits as he may in fact receive from the property, there can be no reason to call upon him to account. The failure to pay over the stipulated amounts to the mortgagor is the failure of a debtor and not the failure of a trustee to account satisfactorily for the property of another, and there is no reason to hold him liable to account with yearly rests or to apply the sums which he annually fails to pay in reduction of the capital of the loan. Mr. Husnain's argument that in this particular case by reason of the mention of a "consolidated jama" there is a liability to account for the rents and profits limited to that jama is with all due respect to him erroneous. It is true that the mortgagee is accountable in the sense that he has to pay the money specified, but he is not accountable in the sense that he would have to disclose the sources of the money to be paid by him, for the liability to pay exists under the contract even if the rents and profits actually obtained by the mortgagee are nil. Mr. Mullick contended that in the absence of an agreement to pay interest on sums payable and overdue no interest at all could be debited against the mortgagees, but the debt which the mortgagee has incurred to the mortgagor in respect of the stipulated payments is not to be regarded as a mere series of debts arising out of failure to pay agreed sums. It arises out of a single contract of which the principal ingredient was a mortgage and must be treated on equitable principles.

This was conceded on behalf of the mortgagee; it was agreed for example that the overdue payments from the earliest period of the contract cannot, in taking accounts in a redemption suit, be treated as statute barred. Similarly it is clear that the Court has in such circumstances the right in equity to allow simple interest on such overdue amounts, and this the Subordinate Judge has done at the rate of 6%. It was the case of the mortgagor-plaintiffs that if the accounts were taken with the yearly rests as claimed by them the mortgage debt would be found to have been discharged and a considerable balance would be owing to them from the mortgagees but the Subordinate Judge has applied the right principles and allowing simple interest only has found that the mortgage debt had not been fully discharged and that a small balance was still due. He therefore granted a preliminary decree for redemption on payment into Court by the plaintiffs of the small sum in balance. I will now consider a cross-objection by the mortgagees to the decision of the learned Judge. It appears that the rents of certain tenants were enhanced in the course of the Revisional Settlement. This enhancement was brought about at the instance of the 16 annas maliks including mortgagors and not by the mortgagees. The mortgagors contend that they are entitled to the benefit of this enhancement, (which was clearly collected on their behalf). This contention, which succeeded before the learned Subordinate Judge, was based on a construction of a clause in the contract which has been translated as follows:

> Whatever produce accrues and whatever the zarpeshgidars may bring about, that they appropriate towards the remuneration of their zarpeshgi lease;

and it was argued that this meant that if the produce increased by reason of the effort of some one other than the mortgagee, the increase was not to go to the mortgagees but to the mortgagors. Whereas the true meaning is that all the produce is to go to the mortgagees including any increase which the mortgagees may bring about. The negative proposition suggested by the mortgagors does not arise out of the affirmative provision in the document. In acceding to the mortgagors' contention the learned Judge was, in my opinion, wrong. The cross-objection should succeed and this part of the mortgagor's claim be disallowed They must repay the sums so collected with simple interest at six per cent. On account of certain features of the defence the learned Judge directed that the plaintiffs were entitled to costs of trial and it is not contended by the defendants that this part of his order should be disturbed. In the result the appeal fails, the cross-objection succeeds to the extent I have indicated and the respondents will have their costs in this Court.

Dhavle, J.—I agree. As the zarpeshgi deed was executed in 1880 prior to the passing of T. P. Act, S. 76 (h), which can only be excluded under S. 77 of that Act has no direct application to the case. It

is therefore unnecessary to consider the contention advanced by the learned advocate for the respondents that the zarpeshgi is only an anomalous mortgage within the spirit of S. 98 of the Act, governed by its own terms and by local usage though it is true that before the Amending Act of 1929, S. 58 (d) did not include in the definition of a usufructuary mortgage a mortgage under which the mortgagee is authorised to appropriate in lieu of interest &c. a part only of the rents and profits of the mortgaged property, as the zarpeshgi before us does [excluding for the present the circumstance that the deed provides not for interest, but for munafa (gain or profit) on the peshgi money]. Even before the Transfer of Property Act mortgagees in possession were liable to account on much the same lines as we find in S. 76 (h): see Ghose on the Law of Mortgage in India, Vol. 1, (Edn. 5), p. 594. The account was taken with rests, and the essential point involved in it was that while the surplus of interest, if any, over the available rents and profits in any year was not added to the principal, "for that would result in charging compound interest;" the surplus of net receipts over the receipts due in any period was applied to reduce the principal, this process being carried on from one period to another (usually a year) to the time of judgment. It will be seen presently that the process involved compound interest on such surplus in favour of the mortgagor. Such accounts of rents and profits could, however, be excluded by the terms of the contract as in cases coming within S. 77 of the Act. Our zarpeshgi, specifies Rs. 984-8-3 as the 'fixed and consolidated gross jama' out of which the zarpeshgidars are to pay a fixed revenue and fixed cesses, take fixed establishment charges and a fixed munafa on account of the peshgi money, and pay the balance of Rs. 82 to the executants from year to year.

It proceeds to empower the zarpeshgidars to appropriate whatever produce may be obtained in excess of the fixed jama through or without the instrumentality of the zarpeshgidars. It is plain that the deed only fixes a gross jama in so far as the transaction partook of the character of a lease and that the recurring payment of Rs. 82 to the executants, usually called the haq ajiri, is formally arrived at from the fixed jama without any definite correlation to the actual rents and profits of any year. There can be no doubt that the deed excludes any account of rents and profits on the lines of S. 76 (h), nor indeed do the appellants ask for such an account. I have already referred to the fact that the deed does not provide for any interest as such on the peshgi money; the zarpeshgidars are to have instead a munafa out of the fixed jama and also out of the surplus produce. This was doubtless a deliberate arrangement because, as Mr. Khurshaid Husnain has told us, the mortgagors were Shia Muhammedans. The deed does not require the zarpeshgidars to account for the payments that they were to make out of the gross jama.

This does not, however, entitle them at the time of redemption to insist on "payment of the entire peshgi money in cash in one lump" as provided in the deed, when on their own part they failed to observe the stipulation to pay the haq ajiri (and remission of dak cess) to the mortgagors. No doubt the mortgagors could have recovered the haq ajiri by independent suits, without interest, see 7 P L T 158 (1), within the appropriate period of limitation from time to time. But that was not their only remedy, and in 5 Cal 333 (2), (a case which has been repeatedly followed) it was held that in a redemption suit the mortgagee is not equitably entitled to say that:

> He may keep in his own hands the money due from him to the plaintiff, and at the same time require the plaintiff to pay to him the monies due on his side. . . . .The defendant has by his conduct altered the arrangement under which he held the property, and, as a consequence the plaintiff is entitled now to come in and claim an account from him.

It does not, however, appear that the account was taken with rests, while in such cases as 21 I C 701 (3) and 14 C L J 507 (4) it is quite clear that the mortgagor was credited with the payments that the mortgagee should have periodically made to him, with simple interest. *Parasurama's case* (3) was actually relied upon by the appellants in support of the

1. Nathan Prasad Shah v. Kali Prasad Shah, 1926 Pat 77=90 I C 785=7 P L T 158.
2. Narsingh Narain Singh v. Babu Lukputty Singh, (1880) 5 Cal 333.
3. Parasurama Pattar v. Venkatachalam Pattar, 1914 Mad 661=21 I C 701=1914 M W N 198=25 M L J 561.
4. Ramavatar v. Tulsi Prosad Singh, (1911) 14 C L J 507=11 I C 713=16 C W N 137.

contention that the mortgagee is liable to account for the payments in default, and it is noticeable that the learned Judges actually reduced the interest on the payments in default from 10 per cent to 6 per cent in view of the fact that the mortgagors had allowed a long time to elapse without enforcing their right to receive the purapad every year. The mortgage-deed in that case as in the present also appears to have fixed no definite rate of interest on the mortgage-money. The learned Subordinate Judge has allowed the appellants simple interest at 6 per cent per annum on the amounts due to them from the zarpeshgidars under the zarpeshgi deed. He has pointed out that the mode of accounting adopted by the appellants in the account at the end of the plaint involves compound interest on these moneys with yearly rests.

The learned advocate for the appellants has contested this. But if each periodical payment due from the mortgagee is deducted from the balance of the loan outstanding at the beginning of the year in which that payment falls due, an amount equal to the assumed interest on that sum is set free from the balance of the next year in addition to the reduction already effected on account of what might conveniently be called the instalment due, and in the following year the mortgagor is further relieved on account of this instalment to the extent of the interest on the instalment with one year's interest added. A simple numerical example will perhaps make this clear. Take a loan of Rs. 10,000 secured on property with a fixed usufruct of Rs. 1,000, out of which the mortgagee is to appropriate Rs. 600 in lieu of munafa or interest and pay the mortgagor Rs. 400 as the haq ajiri. If the mortgagee does not pay the haq ajiri, the balance of the loan at the end of the first year will be Rs. 9,600; and as the proportionate munafa or interest on this is less than that on Rs. 10,000 by the interest on Rs. 400, the mortgagee will in effect be debited in the accounts for the second year with one year's interest on the first default of Rs. 400 (besides this second year's default of Rs. 400) so that proceeding on the same lines, in the accounts of the third year he will be debited with two years' compound munafa or interest on the first default and one year's interest on the second default, and so on. Turning now to the two cases on which the learned advocate has relied for an account with yearly rests in respect of the moneys that the zarpeshgidars should have paid to the mortgagors but did not—6 All 303 (5) and 34 I C 899 (6)—it is to be observed in the first place that these were cases in which it was stipulated that the mortgagee was to have interest at a definite rate, while the zarpeshgi deed before us makes it quite clear that the zarpeshgidars were intended to take all the rents and profits subject to the payment of the haq ajiri (&c.) to the mortgagors (besides the revenue to the Government regarding which there is no dispute). In *Jaijit Rai's case* (5), moreover, the mortgagor was held entitled to an account with yearly rests of sums that the mortgagee should have paid but had not, on the principle among others of the last paragraph of S. 76, T. P. Act, as the payments in default were payments which, apart from the mortgage bond, the mortgagee was bound under Cl. (c) of the section to make.

In *Brij Kumar Lal's case* (6) the learned Judges proceeded on the footing that that must be taken to have been done which should have been done and that the mortgagee by withholding payment must be taken to have applied such sum towards the discharge of his own dues on the security. This was taken to be "the nature and spirit of the agreement entered into between" the parties. The decision must therefore be treated as a decision on the terms of the whole agreement which are not found in the report. The zarpeshgi bond before us contains no indication of any agreement between the parties that moneys withheld by the zarpeshgidars were to go to discharge the principal due at the time of default. The appellants get relief in respect of such moneys not on the terms of the zarpeshgi deed but on the principle that at the time of redemption when the mortgagors are required to pay the amount due by them under the zarpeshgi, the zarpeshgidars cannot equitably ask the Court to ignore the payments that they ought to have made to the mortgagors, but that the zarpeshgidars must be debited with them by way of equi-

5. Jaijit Rai v. Gobind Tiwari, (1884) 6 All 303 =1884 A W N 92.
6. Brij Kumar Lal v. Majlis Sahai, 1917 Cal 853=34 I C 899.

table set-off. The failure of the zarpeshgidars to pay the haq ajiri (&c.) seems to me to be no reason for dealing with them as if the contract between the parties or the equities of the case required them to accept repayment of the mortgage advance in dribblets, and thus be saddled with compound interest on them, while entitled themselves to charge no more than the equivalent of simple interest.

B.D./R.K. *Order accordingly.*

---

* A. I. R. 1936 Patna 588

JAMES AND ROWLAND, JJ.

(*Mahant*) *Ramkeshwar Das* — Defendant 1—Appellant.

v.

Baldeo Singh—Plaintiff—Respondent.

Appeal No. 385 of 1935, Decided on 5th August 1936, from appellate decree of Addl. Dist. Judge, Gaya, D/- 28th January 1935.

*** Evidence Act (1872), Ss. 21 and 145—Statement made in document—Document relevant under S. 21 and also under S. 145—Provisions of S. 145 need not be complied with.**

It is only when a document becomes relevant only by reason of S. 145, that before a statement made in it can be used to contradict the evidence of the party, his attention must be drawn specially to the statements which are to be so used. Where however an admission goes to the root of the case and is relevant under S. 21 and its relevancy is not affected by the question of whether the party may or may not have given evidence consistent with the statement contained in it, it is not necessary to observe strictly the provisions of S. 145: 1915 *P C* 7, *Disting.* [P 589 C 2]

S. M. Mullick, *Sarjoo Prasad* and *Kishore Prasad*—for Appellant.

Manohar Lal and *C. P. Sinha*—for Respondent.

James, J.— The appellant is the mahant of a math who on the death of his guru in 1928 found his entry into the math obstructed, so that he was forced into litigation for the assertion of his title. In this litigation he obtained the assistance of Babu Baldeo Singh who looked after his legal work for him. While the litigation continued the mahant executed a number of handnotes; and ultimately after four handnotes had been executed, a new handnote was executed for Rs. 2,100 in respect of the whole liability. The plaintiff sued the mahant for recovery of the amount due on this handnote. He sued also for two loans of Rs. 500 and Rs. 50 which he said had been made to the defendant without acknowledgment. The defendant in his written statement did not admit execution of the handnote; but he said that he had been made to put his thumb impression and signature on five blank sheets of paper under threats from the plaintiff whose position as his karpardaz enabled him to exert undue influence. When the case came on for hearing the Subordinate Judge treated this admission of signature and thumb impressions on blank sheets of paper as admission of execution; and he called upon the defendant to prove that consideration for the handnote in suit had not passed. When the defendant came to give evidence he admitted that in addition to his signature he had written at the plaintiff's instance acknowledgments of loans received on these five pieces of paper which in his written statement he had described as blank. The defendant's evidence to the effect that consideration had not passed was not believed by the Subordinate Judge, who also refused to believe the rebutting evidence which was given on behalf of the plaintiff describing the place and the manner in which the loans had been made; but in an affidavit which had been filed before the District Judge on 15th November 1930 in the course of the probate case the defendant mahant had admitted that he had borrowed Rs. 2,100 from Babu Baldeo Singh and had executed a handnote. This admission was treated by the Subordinate Judge as sufficient evidence of the fact that the loan had been taken and that the handnote had been executed in consideration of it. He therefore decreed the plaintiff's claim so far as it was based on the handnote. For the two verbal loans of Rs. 50 and Rs. 500 respectively he did not believe the evidence which was adduced on behalf of the plaintiff to prove that the loans had been made; and he dismissed that part of the plaintiff's claim.

The defendant appealed to the District Judge and the plaintiff preferred a cross-objection against the dismissal of his claim based on the verbal loans; but both the appeal and the cross-objection were dismissed. Mr. Sushil Madhab Mullick on behalf of the appellant takes exception to the procedure which was adopted by the learned Subordinate Judge in the trial. By his order of 22nd August 1932 he directed that the plaintiff should first adduce evidence regarding the two verbal loans and also regarding the legal necessity for the loans in suit. Another defendant

with whom we are not here concerned was then to give evidence regarding his case that he had not been surety for the two loans of which there was no written acknowledgment. The mahant was then to adduce evidence to prove that consideration had not passed for the handnote; that there was no legal necessity for the loans and in proof of the alleged undue influence and coercion. The plaintiff was then to adduce rebutting evidence on the points raised by the mahant. When the case was taken up the pleader for the mahant applied for time on the ground that his witnesses had not appeared; and when an adjournment was refused he withdrew from the Court. Later in the day he came forward to contest the suit when the Subordinate Judge directed that he should be permitted to cross-examine the plaintiff only regarding the question of legal necessity and the two verbal loans. The plaintiff was directed at the same time to present himself again for cross-examination after the close of the evidence of the mahant.

These orders so far as they placed upon the defendant on the effect of his written statement the burden of proving that consideration for the handnote had not passed were not correct, because in the written statement there had been no admission of the execution of the handnote, but merely an admission that the thumb impression and signature had been given on blank paper under coercion. But the order of the Subordinate Judge was ultimately justified when the defendant himself gave evidence, because he then admitted in cross-examination regarding the five blank papers on which he had given his thumb impression and signature, that he had written on the blank papers that so much had been taken by him as loan from the plaintiff, that is to say, he admitted execution of the handnote in suit, so that the burden was actually cast upon him of proving that consideration had not passed, because in the absence of evidence on the point the presumption would be that the handnote was executed for consideration.

The defendant gave evidence on the point. The plaintiff in due course gave rebutting evidence and was cross-examined on behalf of the defendant. While the defendant was under cross-examination a document was tendered to him, an affidavit which he had sworn in November of 1930. He admitted his signature on this affidavit which was then marked as an exhibit. Mr. Sushil Madhab Mullick argues that the statements contained in this affidavit ought not to have been used as evidence against the mahant unless his attention had been specifically drawn to them when he was in the witness box. S. 145, Evidence Act, provides that the evidence of a witness may be contradicted by the production of a previous statement made in writing; but before such statements can be used to contradict his evidence, his attention must be drawn specifically to the statements which are to be so used. Mr. Mullick draws attention to the decision of the Privy Council on this point in 39 Bom 441 (1). In that case various letters written by the plaintiff had been produced in evidence, in order to contradict the evidence given by the plaintiff at the trial, which had led the High Court of Bombay to believe that the plaintiff in his evidence had committed perjury. Lord Shaw commented on the failure to observe the provisions of S. 145, since these documents had been produced for the purpose of contradicting the evidence which had been given by the plaintiff.

In the present case it does not appear to us that the provisions of S. 145, Evidence Act apply to this admission at all. This is not a document which becomes relevant by the provisions of S. 145, Evidence Act, and would otherwise be inadmissible. It is an admission which goes to the root of the case, which is relevant under S. 21, Evidence Act; and its relevancy is not affected by the question of whether the defendant may or may not have given evidence consistent with the statement contained in it. If it had been a document which had no relevancy apart from the fact that it contradicted statements made by the defendant when he was in the witness-box, it would have been necessary to observe strictly the provisions of S. 145 before the document could be used; but it was not a document of that nature and no irregularity was committed in the manner of admitting it into evidence and in the use which was made of it after it was admitted. Indeed from the discussion of the evidence by the learned Subordinate Judge it would

1. Bal Gangadhar Tilak v. Shrinivas Pandit, 1915 P C 7=29 I C 639=42 I A 135=39 Bom 441 (P C).

appear that the document was actually superfluous. The learned Subordinate Judge has discussed the evidence of the witnesses for the defendant on the question of passing of consideration without attaching any value to the evidence. He afterwards discussed the evidence of the plaintiff's witnesses and came to the conclusion that the plaintiff's account of the time and manner in which the handnote was executed and that consideration was paid was not worthy of credit; but since execution had been actually admitted by the defendant in the course of his evidence the presumption under S. 118, Negotiable Instruments Act, would apply; and if the defendant failed to prove that consideration had not passed the discussion of the evidence on this point which the plaintiff tendered became unnecessary. The District Judge in appeal relied mainly upon this affidavit of the mahant as substantive evidence of the fact that consideration had passed. It is a piece of evidence which may properly be treated in that way; and the judgment of the learned District Judge is not properly open to criticism on that account.

Mr. Mullick next objects to the finding of the learned Subordinate Judge which has been maintained on appeal that the loans for which the handnotes were executed were taken for legal necessity of the math. This point was raised by the defendant himself in his written statement, but no relief against the math was claimed by the plaintiff and there is no mention of the liability of the math in the decree. If the decree should be put into execution against the property of the math, it could apparently not be properly executed by attaching and selling any portion of the math property; and the proper course would be to appoint a receiver of the income of the math so that the decree-holder would in due course obtain the amount of his decree out of the surplus income.

The plaintiff has preferred a cross-appeal in respect of the loan of Rs. 50 which he alleges was taken by the mahant after the handnote had been executed. His ground is that since the bahikhata of the plaintiff's banker was not found to be a false document the Courts below erred in law in refusing to decree the plaintiff's claim. The account book of this so-called banker was proved by a witness who described himself as munib of the firm. The learned Subordinate Judge did not believe his evidence. The learned Additional District Judge on appeal criticised it by remarking that the munib who was examined to prove the entry was not in the service of the firm at the time when the entry was made and the person who made the entry had not been examined. Whether the entry was correct or not it was merely an entry to the effect that the mahant withdrew the sum of Rs. 50 on behalf of the plaintiff. As the Courts below have observed, this would not in itself be proof of the fact that the mahant took a loan from the plaintiff; and the plaintiff's evidence on the point has been disbelieved. There is no merit in this cross-objection, in dealing with which we are concluded by findings of fact. Subject to the remarks which have been made regarding the manner in which the decree should be treated in execution the appeal must be dismissed with costs. The cross-objection is also dismissed with costs.

Rowland, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1936 Patna 590

AGARWALA AND MADAN, JJ.

Jainandan Ram Tewari — Plaintiff—Appellant.

v.

Ruria Uraon and *others* — Defendants—Respondents.

Appeal No. 771 of 1933, Decided on 28th July 1936, from appellate decree of Sub-Judge, Ranchi, D/- 30th May 1933.

Chota Nagpur Tenancy Act (6 of 1908), Ss. 212 and 214 (b)—Scope of S. 214 (b)—Court accepting amount due after expiry of 30 days and ordering sale to be set aside—Such order being without jurisdiction is ultra vires—S. 214 (b) is no bar to civil suit to set aside such order.

Section 214 (b) purports to bar a suit to set aside an order passed under S. 212, but the application of S. 212 is confined to the statutory period of 30 days, and a Court passing an invalid order after that period cannot be said to be acting under that section, and such an order is ultra vires and one passed without jurisdiction and S. 214 is no bar to a civil suit to set aside such an order : 1934 *Pat* 336 and 1926 *Pat* 401, *Rel. on.* [P 591 C 1, 2]

K. K. Banerji—for Appellant.

Madan, J.—This matter comes before this Bench by reference from a single Judge. The facts briefly are that on 17th

December 1931 respondents 4 and 5 brought the holding of respondents 1-3 to sale under S. 208, Chota Nagpur Tenancy Act, and the holding was purchased by the appellant. The 16th January 1932 was the last day for making a deposit under S. 212, Chota Nagpur Tenancy Act, but respondent 2 came forward on 18th January 1932 with the amount due. The rent suit Deputy Collector, in spite of the expiry of the statutory period, accepted the amount and set aside the sale. The appellant accordingly filed the present suit for a declaration that the order of the Deputy Collector setting aside the sale was without jurisdiction and void, for a declaration that his own purchase of the holding was valid and subsisting, and for a permanent injunction restraining respondents 1-3 from interfering with his possession; he also asked that if respondents 1-3 were found to be in possession of the holding he should be restored to possession by evicting those respondents therefrom. Both the first Court and the first appellate Court held that the order of the rent suit Deputy Collector setting aside the sale was ultra vires, but they also held that the suit was barred under S. 214 (b), Tenancy Act. The appellant has therefore filed this second appeal. For the appellant Mr. K. K. Banerji has argued that the order passed by the Deputy Collector was not an order under S. 212. He relies on 13 Pat 641 (1), in which case a deposit was made within the statutory period but was afterwards found to be in deficit to the extent of twelve annas. It was held that in these circumstances the order setting aside the sale was invalid, and Macpherson, J. observed :

> If the period of 30 days from the date of sale allowed by S. 174, Ben. Ten. Act, and by O. 21, R. 89 to the judgment-debtor for making the deposit in Court can be extended at all, it is only when the judgment-debtor has established that he has made a mistake and that mistake is directly due to an act of the Court itself.

Section 174, Ben. Ten. Act, is analogous to S. 212, Chota Nagpur Tenancy Act, and on the strength of this authority I must hold that the order setting aside the sale in this case was ultra vires. It is true that S. 214 (b) purports to bar a suit to set aside an order passed under S. 212, but the application of S. 212 is confined to the statutory period of 30 days, and a Court passing an invalid order after that period cannot be said to be acting under that section. In the reference to this Court it is pointed out that whereas S. 214 (a), Chota Nagpur Tenancy Act, makes an exception in the case of a suit brought on the ground of fraud or want of jurisdiction, no such exception is made in the case of S. 214 (b). Whatever may be the reason for this omission which is probably due to a faulty amendment of S. 214 by the Amendment Act of the year 1920, I do not see how it can affect the argument set forth above, or how S. 214 (b) constitutes a bar to the inherent right of the civil Court to set aside a decree or order obtained by fraud or passed without jurisdiction. This right is also expressly recognized in S. 258, Chota Nagpur Tenancy Act, in relation to orders and decrees passed under that Act, including order passed under Ch. 16, which includes S. 212. In 5 Pat 759 (2), a case under S. 231, Chota Nagpur Tenancy Act, Dawson Miller, C. J. observed :

> The right to sue for the possession of land and the right to ask for a declaration that a sale has been fraudulently confirmed are not rights arising under the Chota Nagpur Tenancy Act. It is true that the Act in some cases takes away the right to sue for setting aside a sale, but it nowhere grants that right although to some extent it limits it.

In the present case I must hold that the order passed by the Deputy Collector was without jurisdiction and was not an order passed under S. 212 of the Act, and that the appellant had his remedy in the civil Court. I would therefore allow this appeal and set aside the order of both the Courts below and decree the appellant's suit in full. The appellant is allowed his costs in the Courts below, but there will be no costs in this Court in which the respondents have not appeared.

Agarwala, J.—I agree.

R.W./R.K. *Appeal allowed.*

1. Lachmi Ojha v. Ram Ran Bijay Prasad Singh, 1934 Pat 336=151 I C 618=15 P L T 307=13 Pat 641.

2. Rameshwar Narain Singh v. Mahabir Prasad, 1926 Pat 401 = 96 I C 529 = 5 Pat 759 = 8 P L T 124.

*** A. I. R. 1936 Patna 591**

AGARWALA AND MADAN, JJ.

Mt. Bibi Marim—Petitioner.

v.

Surajmal and *others*—Opposite Parties.

Civil Revn. Nos. 152 to 155 of 1934, Decided on 14th August 1936.

*** (a) Civil P. C. (1908), S. 115, O. 33, R. 1 and O. 22, R. 3—Application for leave to sue as pauper—One applicant dying during pendency of application—His legal representative is entitled to be brought on record—Court not granting time for substitution of heirs of deceased applicant, acts with material irregularity.**

Where, one of the applicants applying for permission to sue as pauper dies during the pendency of the application, his legal representative is entitled to be brought on record in his place, and to continue the proceedings as a suit by substitution on payment of court-fees, or else by filing a fresh application for leave to sue as pauper. Court not allowing the applicants time for substituting the heirs of deceased applicant, acts with material irregularity: 1928 *Mad* 278, *Ref.* [P 593 C 1]

*** (b) Civil P. C. (1908), S. 115—Action can be taken under S. 115 even without application by party aggrieved.**

The powers of the High Court under S. 115 are wide and action can be taken under S. 115 even without application by the party aggrieved. [P 593 C 1]

Khurshaid Husnain and *D. L. Nandkeolyar*—for Petitioners.

S. M. Mullick, *Jaleswar Prasad*, *A. H. Fakhruddin*, *B. B. Saran* and *Balram K. Sinha*—for Opposite Parties.

Madan, J.—These four Civil Revisions arise from suits brought for setting aside a compromise decree in money suit No. 80 of 1930 as well as certain sales in execution of the decree. The five plaintiffs were two parda ladies, and a minor son, step son and step daughter of one of the ladies, and they brought the suits for a declaration that the compromise in the money suit was fraudulent and without their knowledge, and that the three minors were wrongly impleaded as majors in that suit. The decree-holders, who are also the auction-purchasers were made defendants in the suits, in which the plaintiffs applied for permission to sue as paupers. On enquiry it was reported that the plaintiffs were paupers, but the matter was contested by the defendants, and 16th December 1933 was fixed for hearing by the Subordinate Judge. Meanwhile on the 11th December Nurul Huda a minor plaintiff died, and on the date fixed the applicants asked for time for substitution of his heirs, and also on the ground that owing to their recent bereavement they had been unable to bring their witnesses. The defendants, the present opposite parties, also prayed for time. The Subordinate Judge summarily rejected the petitions for time and then the plaintiffs examined the surviving male minor, who was the only witness available. The Subordinate Judge after taking the evidence of the defendants came to the conclusion that the applicants had properties and were not entitled to sue as paupers, and he therefore dismissed their applications. Against this order this Court has now been moved. The question whether the learned Subordinate Judge exercised a sound discretion in refusing an adjournment owing to the death of one of the plaintiffs, as also whether the applicants, as they now assert, could have produced documentary evidence to prove that the properties found to be with them by the Subordinate Judge had since left their possession, does not arise here, and Mr. Khurshaid Husnain for the applicants confined his argument to the question whether the applicants had a right to apply for substitution of the heirs of the deceased minor plaintiff and should have been granted an adjournment on that account. Mr. S. M. Mullick for the opposite party referred to 33 Cal 1163 (1), which was a case where an applicant for leave to sue as a pauper died during the pendency of his application leaving a minor son. 15 years later, on attaining majority, that son applied for substitution and also for permission to continue the application to sue as a pauper. The Court held that as the application for leave to sue as pauper was a personal right it was not open to the legal representative of a deceased applicant to apply for substitution in his place, the more so as that legal representative might not himself be a pauper. Certain passages in this judgment might be taken to imply that the legal representative was not entitled even to apply for substitution as plaintiff in the original suit on payment of the court-fee, and such in fact was the argument of Mr. S. M. Mullick before us. The Calcutta case is however referred to by the Madras High Court in 88 I C 91 (2), where it was taken to be an authority for the proposition that it was a wrong procedure to apply for substitution in a suit by way of a collateral enquiry into the question of pauperism.

In 51 Mad 697 (3) the same High Court pointed out that serious difficulty might

1. Lalit Mohan Mandal v. Satish Chandra Das, (1906) 33 Cal 1163=4 C L J 234.
2. A. S. Radhakrishna Aiyar In re, 1925 Mad 819=88 I C 91.
3. Kaveri Subbiah v. Bala Tripura Sundara, 1928 Mad 278=110 I C 318=54 M L J 582=51 Mad 697.

arise about limitation if the legal representative of an applicant to sue in forma pauperis is not allowed to be brought on to the record at all, and it was held that it was open to such legal representative to continue the proceeding as a suit by substitution, on payment of the court-fee or else filing a fresh application for leave to sue as a pauper. Accepting this view I find that the Subordinate Judge acted with material irregularity in not allowing the applicants time for substitution of the heirs of the deceased plaintiff in which case it was possible that funds for payment of the court-fee might have been secured.

In Civil Revision No. 154 a further point was raised namely that the whole proceeding had abated as one of the opposite party died during its pendency in this Court, and a petition for substitution was rejected as being out of time. The powers of the High Court under S. 115, Civil P. C., are wide, and it has been held by the Calcutta and other Courts that action can be taken under this section even without application by the party aggrieved. I would accordingly allow all these four applications, and direct the lower Court to give the applicants sufficient opportunity for bringing the heirs of the deceased minor plaintiff on to the record, and then to proceed according to law. If the application for leave to sue as a pauper is ultimately proceeded with opportunity should be given to either side to adduce such further evidence as may be required. I would make no order for costs in this Court.

Agarwala, J.—I agree.

R.M./R.K. *Applications allowed.*

: **A. I. R. 1936 Patna 593**

COURTNEY-TERRELL, C. J. AND DHAVLE, J.

Mt. Shivadulari Kuer—Petitioner.

v.

Bhagwati Charan Sahu — Opposite Party.

Civil Revn. No. 107 of 1936, Decided on 4th August 1936, from order of Dist. Judge, Gaya.

Practice—Service — Slight irregularity in procedure for effecting service does not invalidate entire service—Court should determine whether in spite of irregularity, service has in fact been effected—Court finding that service was effected —Matter of regularity or irregularity of service cannot be re-agitated.

Where the rules of a Court direct that service shall be effected, and lay down the procedure for effecting the service, it cannot be held that the minutest departure from that procedure invalidates the entire service, and it is a matter of fact in every case, within the jurisdiction of the Court below, to determine what the departure is, and whether notwithstanding that departure from the prescribed procedure, the service has in fact been effected. Once the Court has found that the service in fact was effected, the whole matter of regularity or irregularity of service is closed and finished and cannot be re-agitated subsequently: 1934 *Pat* 274 and 1921 *Pat* 145, *Ref.* [P 594 C 1, 2]

Sarjoo Prasad—for Petitioner.

Rai Guru Saran Prasad and *A. N. Lal* —for Opposite Party.

Courtney-Terrell, C. J. — This is an application in civil revision against the appellate judgment of the District Judge reversing the order of the Munsif to whom the petitioner had made a successful application under O. 21, R. 90, Civil P. C., to set aside a sale. It is agreed, having regard to the length of time which took place between the sale and the application to the Munsif, that the application was out of time, but it is contended that that difficulty of time is surmounted by reason of the fact that the sale was altogether a nullity because of the finding of the lower appellate Court on the question of fact as to whether, the notice under O. 21, R. 22 had been served upon the petitioner.

Now the trial Court had held upon the evidence that in fact the story of the service of the proceedings under O. 21, R. 22 was false and that service had in fact been suppressed by the decree-holder. The learned District Judge in reviewing the judgment of the trial Court went into the evidence at length and called attention to evidence which the Munsif had apparently ignored and decided that the Munsif's view of the matter that the service had been suppressed and had not been effected was erroneous. The lower appellate Court decided that the service had in fact been effected and that as to the following of the rules in effecting service such departures from the prescribed course as may have occurred did not affect the substantiality of the service and might be ignored. There is no doubt that the learned lower appellate Court had jurisdiction to decide that the service had been effected and there was no doubt that it had jurisdiction to decide whether

such departures from the prescribed practice had or had not as the case might be, materially affected the question of the substantial nature of the service.

The appellate Court having found that the service had been effected, the case is, in my opinion, at an end, but the argument was pressed here, and ably by Mr. Sarjoo Prasad who attempted to put the case on this basis. He contended that a review of earlier authorities would show that any irregularity in the effecting of the service was equivalent to holding that no service in law had taken place, and it cannot be denied that if no service in law had taken place then the proceedings are void from beginning to end. We have been interested if not entertained by a minute examination of authorities going back over many years. I do not propose to follow the review of those cases in detail but I think the law may be summed up in this way. Where the rules of a Court direct that service shall be effected, where they lay down the procedure for effecting service, it cannot be held that the minutest departure from that procedure invalidates the entire service, and it is a matter of fact in every case within the jurisdiction of a Court below to determine what the departure is and whether, notwithstanding that departure from the prescribed procedure, the service has in fact been effected. One example may be given to illustrate what I mean. O. 5, R. 20, provides that :

> Where a person to be served is not found at his address and the Court is satisfied that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court house and also upon some conspicuous part of the house in which the defendant is known to have last resided or carried on business.

Now the serving officer goes down with the processes and finds that the person upon whom he is directed to effect service is a pardanashin woman ; he is unable to find any person who will take the service to her ; he is unable to find any male relative and thereupon he himself hangs up the service in the house and hangs up the service in the Court-house. We will assume that he has not taken the precaution in between each of his inquiries to run back to the Court and ask for directions that he may proceed with the alternative course to serve the notice on a male relative or hang it up in the house ; subsequently the fact that he used his best endeavours to effect service failing to find a male relative and failing to have access to the person to be served becomes known. A Court may well in such circumstances find that the officer's failure to run back and ask the Court for permission to proceed to the second alternative is an immaterial non-compliance with the directions and that the service was in fact effected. Once a Court has found that the service in fact was effected, as it has in this case, the whole matter of the irregularity or regularity of the service is closed and finished. I regret however to have come to this particular decision in this particular case, for certainly the circumstances of the valuation are suspicious in the highest degree. The property in question was 72 acres of raiyati and kasht lands. The valuation put upon it by the decree-holder was Rs. 100 and the property was in fact sold to him for Rs. 300. Had it been possible at this time to reopen the matter, I would have thought that the question of valuation was sufficient evidence to entitle us te interfere in the sale. Having regard however to the matter of limitation I see no way to do so. In my view the application should be dismissed with costs : hearing-fee one gold mohur.

Dhavle, J.—I agree. Dealing with the service of the processes in the case, the notice under O. 21, R. 22, the notice under O. 21, R. 54, and the notice under O. 21, R. 66, the trial Court held that these "processes of the execution case were not properly served." The question of valuation was then examined, and the learned Munsif stated his conclusions in these terms :

> In this case I have found that the notice under O. 21, R. 22 has not been served on the applicant and therefore the sale is null and void.

When the matter came up in appeal the learned District Judge set out certain facts and said that on those facts it was

> not possible to say that the notice was not served. The utmost that one can say is that the service was irregular. This also is the finding of the learned Munsif who merely says : "I hold that this notice was not properly served."

It has been contended by Mr. Sarjoo Prasad in his very strenuous arguments that the lower appellate Court made a mistake in saying that the learned Munsif had merely found that the notice was not

properly served. I am not impressed by this contention, and I have already set out how the Munsif expressed himself in one way at one place and in another way later on. The learned District Judge was entitled to agree with either of these findings as he thought fit, and he has made his meaning perfectly clear by beginning with the observation that it was not possible to say that the notice was not served. Mr. Sarjoo Prasad has contended that the learned District Judge owed it to this Court as the Court of Revision to make it clear in what respects he found the service irregular. It seems to me that that is a matter of no consequence in the circumstances of the case. The application under O. 21, R. 90 was made much out of time on the footing that the necessary processes had been suppressed, and the learned District Judge emphatically negatived this contention on behalf of the appellant by stating that he had

> not the slightest doubt that the learned Munsif was wrong in finding that the processes in this proceeding were suppressed with the result that the judgment-debtor had no knowledge about the proceeding. At the most, there might have been slight irregularities in the service, but the judgment-debtor undoubtedly knew about the proceedings.

Mr. Sarjoo Prasad has contended that an irregular service is no service at all and that non-service of a notice under O. 21, R. 22 left the executing Court without any jurisdiction to proceed to sell the property. This contention is opposed to two decisions of this Court : 6 P L J 319 (1) and 13 Pat 467 (2). Mr. Sarjoo Prasad has endeavoured to show that these decisions are in conflict with the observations of the Judicial Committee in 42 Cal 72 (3), but I had occasion to deal with those observations in detail in 13 Pat 467 (2). Mr. Sarjoo Prasad has urged that this decision conflicts with the observations of Fazl Ali, J. in 11 Pat 241 (4). The particular passage from the judgment of Fazl Ali, J., on which Mr. Sarjoo Prasad has relied, is:

> I am therefore inclined to think that there was neither a valid notice under O. 21, R. 22 in this case, nor was the notice which was regarded as such by the learned Subordinate Judge properly served. In this view I agree that the appeal should be allowed with costs.

It does not seem to me that there is anything in this definitely contrary to the decision in 13 Pat 467 (2), especially as it was admitted in that case that no notice under O. 21, R. 22 was ever served upon any person: see p. 244 of the report in 11 Pat 241 (4).

R.M./R.K. *Application dismissed.*

1. Das Narayan Singh v. Mir Muhammad Yusuf, 1921 Pat 145=61 I C 823=6 P L J 319.
2. F. E. Chrestien v. Jagdeo Prasad Rai, 1934 Pat 274=149 I C 828=15 P L T 273=13 Pat 467.
3. Raghunath Das v. Sundar Das Khetri, 1914 P C 129=24 I C 304=41 I A 251=42 Cal 72 (P C).
4. Smith v. Kailash Chandra, 1932 Pat 199=138 I C 99=11 Pat 241=13 P L T 323.

A. I. R. 1936 Patna 595

MACPHERSON AND JAMES, JJ.

Rai Brindaban Prasad—Petitioner.

v.

Rai Banku Bihari Mitra and *others*—Opposite Parties.

Civil Review No. 13 of 1935, Decided on 23rd January 1936, from decision of Second Appeal No. 150 of 1932, as reported in 1935 Patna 144.

Civil P. C. (1908), O. 47, R. 1—Suit for recovery of bhaoli rent on basis of takhmina papers—Defendant alleging payment in full—Court allowing plaintiff to withhold village papers and decreeing suit on ground of defendant's failure to produce receipts of payment of rent—Decree confirmed on appeal—Defendant subsequently producing in support of his contention copy of batai khasra filed by plaintiff in another suit and which could not be produced during trial after due diligence—Review held could be granted—Suit being instituted without reasonable cause defendant held entitled to damages—Judge should be cautious in such cases of suits based on takhmina papers.

A landlord instituted a suit for recovery of bhaoli rent for certain years against a raiyat. The suit was based on takhmina papers showing an estimate of landlord's share in the grain produced. The defendant alleged that he had paid the rent in full, that the suit had been maliciously brought because the raiyat had refused to pay nakdi rent at the rate of a certain amount per bigha and was ready to apply for commutation of the rent under S. 40, Ben. Ten. Act. It was also alleged that the takhmina papers were forged. The Court allowed the plaintiff to withhold certain village papers even though they were required by the defendant and decreed the suit solely on the ground that the defendant had failed to produce receipts of the payment of rent. The decree was confirmed on appeal on a technical ground. Subsequently the defendant produced in support of his contention a copy of batai khasra which was filed by the landlord in another suit and which could not be produced by the defendant during trial even after due diligence and he applied for review :

Held: that the review could be granted. The rents were paid and the takhmina papers

were forged. The suit having been brought without reasonable and probable cause the defendant was entitled under S. 68 (2), Ben. Ten. Act, to damages. [P 600 C 1]

Held further: that a practice is prevalent among landlords of failing to grant receipts promptly for produce rent and then suing for the rent if the raiyat seems to be what the landlord chooses to regard as 'recalcitrant' or as one having contemplated an application under S. 40, Ben. Ten. Act. Where the landlords in suits for recovery of bhaoli rents base their claims on takhmina papers and make difficulties in producing village papers and the best oral evidence, the Judge should be cautious in dealing with such cases. [P 600 C 1]

Sarjoo Prasad and *Chaudhry Mathura Prashad*—for Petitioner.

S. M. Mullick and *S. K. Mitra* — for Opposite Parties.

Macpherson, J. — This is an application under S. 151 and O. 47, R. 1, Civil P. C., in respect of our decision in Second Appeal No. 150 of 1932 (1), which arose out of suit No. 2661 of 1929 instituted by the landlord Rajoi against the applicant Brindaban Prasad, raiyat of khata No. 60, for recovery of bhaoli rent in respect of the years 1335 and 1336 F. The plaint in that suit is signed by Jadunath Majumdar, mukhtar-am on behalf of the plaintiffs, Sailendra Nath Bose, trustee to the estate of Rai Banku Bihari Mitra, and Rai Biman Bihari Mitra. While the suit was pending Rai Banku Bihari Mitra and his wife were substituted for his trustee. The claim is Rs. 1888-7-9 being Rs. 1510-12-6 on account of price of grain forming the landlord's share according to the takhmina (eye-estimate) sheet and Rs. 377-11-3 on account of damages, with costs and interest and other reliefs, and the plaint sets out that "in 1335 and 1336-F the defendant grew paddy and rabi crops specified below on the bhaoli kasht lands" and appropriated the hakimi or landlord's share; that there being no alternative a takhmina of the crops produced was prepared on behalf of the plaintiffs in every year and in every season and the takhmina sheet and a hisab or account of the price of the crops were filed as part of the plaint. The holding was stated to be 57 bighas 5 kathas 10 dhurs held on the bhaoli batai system and to produce paddy and rabi. The takhmina papers show 23 bighas 12 kathas 8 dhurs in 19 plots as producing paddy at varying rates with a total of 390 maunds 12½ seers in 1335 and the same area in 20 plots (No. 935 being introduced in different ink) as producing 512 maunds odd in 1336 and are signed by Sheobhajanlal mohurrir, Nandkumar Singh jamadar and Deoki Singh gomasta, while those for rabi are similarly signed and show an aggregate area of 33 bighas 13 kathas 2 dhurs yielding a crop of 207 maunds odd in 1335 and 256 maunds in 1336. The hisabs are signed by Sheobhajanlal and Deoki Singh.

The defence was substantially payment in full and that the suit had been maliciously brought because the raiyat had refused to pay nakdi rent at Rs. 10 per bigha and was ready to apply for commutation of the rent under S. 40, Ben. Ten. Act. It was urged that the takhmina papers were forged and that paddy was produced at 4 or 5 maunds kham and rabi at 2½ maunds kham per bigha and that the paddy lands produced only one crop and rabi only was produced in the rabi lands. The defendant also complained that a commissioner had been sent to the lands at the instance of the plaintiff without his knowledge. Further points were taken later in an additional written statement filed after the amendment of the plaint, among them that the substituted landlords were not entitled to the land as their name was not registered under the Land Registration Act. To give evidence of the quantity of produce the defendant had, on 4th and on 22nd July 1930, called for the production of the village papers from the beginning of 1922 to 1337 F. receipt books, siahas both produce and money rent, khasra batai, jamabandi, jamakharch and sudkars of Rajoi. An excuse was given on behalf of the plaintiffs that the papers were not available as they had been sent to the trustees in Chapra (which could not possibly have been true in respect of most of them) and the Court did not insist upon production. The only witness examined on behalf of the plaintiffs was Deoki Singh who admitted that the batai khasras of his time were at the kachahri of the plaintiffs. He further deposed that he was gomasta from 1335 and rents were due for 1335 and 1336, that the takhmina of the produce was made by himself and Sheobhajanlal who wrote the takhmina and hisabs and danabandi papers filed by the plaintiffs which the witness proved, that no payment had been made and that receipts were granted on payment of rent, and he

1. Brindaban Prasad v. Banku Behari Mitra, 1935 Pat 144=153 I C 1031=14 Pat 352.

further stated that no tenant had divided the produce to him in 1335 and 1336. Three witnesses were examined in support of the defence case and in particular one of them deposed that he had gone to fetch the receipts for the produce divided in 1335 and for that divided in 1336 which had been delayed by the gomasta on the excuse that the receipt book had not come from the head office at Sundarganj and he was twice put off.

The Munsif held that in the absence of receipts payment had not been proved and that the demand for commutation at Rs. 10 per bigha had not been established. As to the produce he did not rely upon the pleader commissioner but taking the rates shown in receipts of previous years, he allowed paddy at 10 maunds kachha and rabi at 2½ maunds kachha per bigha with the deduction for wages and the addition for cess and with damages at 12½ per cent. The appeal by the defendants was dismissed, but in the plaintiff's appeal the Subordinate Judge enhanced the rates to 13 maunds per bigha of paddy and to 5 maunds of rabi with 1 maund of linseed per bigha of rabi on the basis of the commissioner's report without considering the defence evidence that no notice had ever been given to the defence of his crop-cutting experiment. A second appeal was preferred but it could only be argued on the question whether by reason of the provisions of S. 78, Land Registration Act, 1876, the Court was precluded from passing a decree in favour of the plaintiff and it was dismissed. After the dismissal of the second appeal the defendant brought to the notice of this Court that he had argued before the Subordinate Judge that the papers of the plaintiffs which he had called for and which were not produced, would have shown the quantity of the crops and division of them, and he claimed that his statement, as to the quantity of produce should be accepted as in his memorandum of second appeal to the High Court he had set out the grounds (3) and (5):

(3) For that the lower appellate Court has erred in law in fixing an average rate of produce on surmise, particularly when the village papers have been kept back and the decree if any could be passed according to the defendant's admission. (5) For that the Court below ought to have drawn an adverse inference against the plaintiffs on the non-production of their village papers, especially when they were not the recorded proprietors and when even the real patwari was not examined by them.

He further set out that after the disposal of the appeal he had secured new and important evidence on the above points which owing to the conduct of the plaintiffs could not in spite of due diligence be available to him at the trial, namely a copy of the actual batai khasra for 1335 and danabandi papers for the rabi crop of 1335 and for both crops of 1336 F. in respect of appellants' holding. The khasras for the years 1328, 1330, 1333, 1335 and 1336 F. had, it was averred, actually been filed by the landlord in rent suit No. 838 of 1933 against Sheosaran Teli out of whom rent appeal No. 181 of 1934 arose and appellant heard of them and took copy. In the copy the khasra batai for the paddy of 1335 in respect of the plaintiffs' holding No. 60 (it is shown by mistake as No. 70 but is really No. 60 as the plot numbers tally) purports to be in the jurisdiction of Deoki Singh gomasta and shows 23 bighas 8 kathas 1 dhur in 20 plots (including plot 935) as having produced 191 maunds of paddy or an average of about a little over 8 maunds per bigha, giving, after deduction of 10 per cent for wages, and the addition of road-cess, a landlord's share of 88 maunds 33 srs 8 chs exclusive of neg. The whole is signed by Deoki Singh gomasta and the patwari Bhairo Lal and is initialed by the inspector. The contention of appellant is that he used due diligence and that if the batai khasra for the paddy crop of 1335 and danabandi papers for the rabi crop of 1335 and for both paddy and rabi crops of 1336 be now taken into evidence and considered by this Court, the Court must arrive at a different conclusion, since these papers establish the division of the paddy in 1335 and a much lower outturn at all times as well as the fact that the plaintiffs' papers were forged. Appellant claimed that the suit ought to be dismissed with costs.

Upon the application for review being admitted a counter-affidavit was filed by the same Deoki Singh on behalf of the landlords. It entirely fails to give any explanation of the quantities shown in the batai khasra or to give any reason for the failure to produce the village papers in the trial Court. The deponent denies that batai took place, pointing to the fact that whereas appellants had receipts for previous years they had none for the years in suit and sets out the estate pro-

cedure as follows: An officer of the head-office makes a takhmina or eye-estimate of the produce upon which, if the crop is not divided, a suit is brought; if the crop be taken to the khalihan, an inspector from the head-office goes there and by measurement ascertains the landlords' share leaving it to the gomasta to realise it and give a receipt, and the gomasta also gives a receipt to the inspector for record in the office. In the present case, it is stated, the raiyat, after the ascertainment of the landlords' share, removed the entire amount and the deponent reported that rent was due, whereupon the plaintiffs brought the suit on the basis of the takhmina. But this explanation is, in the circumstances of the case, ridiculous, since Deoki Singh, when examined in Court, deposed that he and Sheobhajan Lal made the takhmina and he proved the takhmina papers implying that these papers showed the produce; whereas, of course, even assuming that there had been a takhmina, the batai khasra shows the actual produce ascertained by measurement. He also deposed that the batai khasras of his time were at the kachahri of the plaintiffs, implying that for that holding no batai khasra existed. In a further affidavit on behalf of the defendant-appellant it is pointed out that in fact the servants of the landlord take away the landlord's share and never grant receipts till months later after approval thereof by the amla at the headquarters; the batai papers were deliberately withheld because they show that actual division was made and the landlords' share was received by the landlords through the amla who signed the khasras, and it is denied that takhmina papers were ever prepared in this instance.

At the first hearing we held that these papers constituted new and important matter which the defendant could not with the exercise of due diligence bring on the record at the trial and granted a review of judgment. We called for the original khasra batai of Rajoi from which the copy had been taken, and Mr. Mitter for the landlords engaged to bring the village papers of Rajoi in respect of which the defendant made application in July 1930. Most of those papers have now been produced, and we have admitted them in evidence without objection. We find that the original khasra batai for the paddy of 1335 agrees with the copy produced by the applicant, and in respect of the holding of the appellant it is signed by Deoki Singh gomasta and Bhairolal patwari and initialed by the inspector Tribeni Prasad Singh, and that the other papers also are wholly inconsistent with the claim of the landlord as to the produce of the holding on that and the other occasions in suit.

As all the evidence is before us and as the Subordinate Judge has retired and the Munsif is about to become a Subordinate Judge and as the matter is an old one, it is in the interest of all that we should hear the appeal and determine the issues of fact necessary for the disposal of it which by reason of its failure to call for the evidence required by the defendant were substantially not determined by the lower appellate Court, namely the quantity of the crop and the question of payment, rather than remand the appeal. The discussion on these points may be preceded by considering what the evidence for the landlord amounts to. He filed what purported to be his papers and he secured the evidence of a pleader commissoner as to the outturn of 1337-F. The only evidence adduced by the plaintiff in support of the papers which he filed, was that of his gomasta Deoki Singh. The witness supported the eye estimate as made by himself, but he is completely discredited by the existence of the batai khasra which is the plaintiffs' own document filed by them in another suit to show what the yield was and which is signed by the witness himself. He suppressed the fact that a batai khasra for the holding had been prepared and was signed by himself, the patwari and the inspector. At no stage of the trial did this witness suggest that though there had actually been a batai proceeding, the crop had been removed. Palpably nothing that such a witness states in favour of the plaintiffs' case can be accepted. To establish the plaintiffs' claim, there remain therefore only the estimate of the Commissioner, such admissions as have been made by the defendant and such inferences as can be drawn from the plaintiffs' papers unsupported by oral testimony.

In respect of quantity of produce, first consideration is due to the paddy crop of 1335. It is of course impossible to contend that the yield exceeded the figures

found in the batai khasra. Those figures also establish how unsafe as a basis for decision as to the yield of 1335 is the estimate of the Commissioner as to the yield of 1337-F. or any other year. Mr. Mitter has candidly stated that there is no scope for a rent suit when there is a batai khasra since it is an account of realisation on the threshing-floor. Mr. S. M. Mullick, who also appeared for the landlords, concedes that the claim in the plaint as to the quantity of the paddy was "due to some mistake" and that the quantities shown in the batai khasra must, of course, be accepted. They certainly show the maximum that could be claimed. They also show a yield on substantially the same lines as the yield shown in khasras and receipts of other years. The figures in the batai khasra must therefore be accepted for the paddy of 1335 and on the basis of the figures of 1335 and those in similar khasras and receipts for previous years, which constitute the only safe evidence available as to the paddy produce of 1336, the yield of paddy in that year must be found to be the same as in 1335. The Commissioner's estimate of the crops in 1337, even if made in the raiyat's presence, stands condemned when compared with the actual yield of paddy in 1335 and cannot be relied upon to any extent. With regard to the rabi crops, the only finding that can possibly be arrived at on the evidence is that the quantity of produce in each year is in accordance with the admission of the defendant.

On the question of payment, Mr. Mitter's admission has been given above. Mr. S. M. Mullick makes the suggestion feebly that the batai khasra was not conclusive in the absence of receipts which, he argued, are given in the estate. But Mr. Mitter's admission mentioned above is entirely in accordance with the facts. A batai khasra invariably connotes actual division, and, as has been pointed out, the suggestion of the plaintiffs that the raiyat, a Kayastha too, had forcibly removed the crops was never made until the landlords and their amlas had been caught out. The defendant's evidence closely accords with the probabilities and must be accepted that the division actually took place and that it is the custom in this estate that the receipts are not given at the time of division on some such plea as that they will be forthcoming after approval by the amla at the headquarters or, as a defence witness deposed in this case, simply that the receipt book is not available being at head quarters. It being beyond doubt that the paddy crop of 1335 was divided and that both the village and headquarters staff of the landlord were well aware of the fact, the suit against the raiyat could only have been brought from an ulterior motive. That motive manifestly had reference to the proposed commutation of the produce rent and the rate of commutation which was then in controversy between the parties. It may be noted that commutation has actually taken place on a subsequent application by the raiyat under S. 40, Ben. Ten. Act, the inflated yield decreed in the present litigation being utilised in the Revenue Court to the serious disadvantage of the raiyat in respect of the amount of rent settled on commutation.

The question of division of paddy in 1336 and of rabi in both years is more difficult. The evidence of payment adduced on behalf of the raiyat is cogent enough, especially in the absence of any credible evidence on the part of the landlords. The Courts below have disbelieved the defendant's evidence substantially because of the absence of receipts; but that the absence of a receipt is not a sound ground for discrediting this evidence is, as has already appeared, abundantly clear with regard to the paddy crop of 1335. Receipts are supposed to be given, but they are in fact given at the convenience and at the pleasure of the amlas of the landlord who are in a position to put off the raiyat by such a statement as that the receipt book is at headquarters. When there is any reason to do so, as there was in the present case owing to the dispute as to the rent to be fixed on commutation, the receipt for the bhaoli rent can readily be withheld altogether; that is certainly what took place in regard to the paddy of 1335. On careful consideration it would appear that it also took place, as the witness deposes, with regard to the other produce in suit and that the landlord first put pressure on the raiyat to agree to an inflated rent on commutation and on the raiyat's refusal the takhmina papers were fabricated, and the relevant papers showing actual division of the crop were suppressed and the present suit instituted against the

raiyat for rent which had been paid and at an unconscionable false calculation. Accepting, therefore, the only untainted evidence on record, I would hold that the paddy crop of 1336 and the rabi crops of both years in suit were realised by division and that nothing was due to the plaintiffs when they brought their false suit at monstrously inflated rates of produce. The issue of payment is, therefore, found in favour of the defendant-appellant. Upon this view the appeal is allowed and the suit is dismissed with costs throughout. The suit having been instituted without reasonable and probable cause, the defendant is, under the provisions of S. 68 (2), Ben. Ten. Act, awarded damages of twenty-five per cent. of the whole amount claimed. We trust that Munsifs and appellate Courts in the districts will, in dealing with bhaoli suits and especially those of the district of Gaya, take warning from this case in respect not only of this landlord but of all others who claim on the basis of takhmina papers and make difficulties as to the production of village papers and the best oral evidence. An unwholesome practice has prevailed fairly generally of failing to grant receipts promptly, if at all, for produce rent and then suing for the rent paid if the raiyat seemed to be what the landlord chose to regard as "recalcitrant" or contemplated an application under S. 40, Ben. Ten. Act. The scope of the practice will, it may be tested, become attenuated under the amendment reducing the limitation for suits claiming produce rent. The present case is also a good illustration of grossly inflated demand by the landlord and of an absurd report by a pleader commissioner such as ought not to impose upon a circumspect judicial officer. It is probably one of many cases, distinguished from others only by the fact that the raiyat was in a position to avail himself of the lucky chance whereby the papers of the landlords which the Courts below permitted them to withhold, forgetfully were produced in Court in other litigation to the present confusion of the landlords and their amlas. They have, however, not heard the last of the matter. The village papers will not be returned to the plaintiffs without the special order of this Court.

James, J.—I agree entirely.

D.S./R.K. *Appeal allowed.*

A. I. R. 1936 Patna 600

AGARWALA AND MADAN, JJ.

Chhatra Kumari Debi—Defendant No. 3—Appellant.

v.

Mt. Parbati Kuer and *another*—Plaintiffs and *others*—Defendants Nos. 1 and 4—Respondents.

Appeal No. 647 of 1933, Decided on 11th August 1936, from appellate decree of Addl. Dist. Judge, Muzaffarpur, D/- 20th April 1933.

(a) Civil P. C. (1908), O. 41, R. 27—Appellate Court has power to admit additional evidence if necessary for arriving at decision.

Where the appellate Court finds it necessary to admit additional documentary evidence at the appellate stage for the purpose of arriving at a decision it has ample power under O. 41, R. 27 to do so. [P 600 C 1]

(b) Evidence—Admissibility—Documents—Copies of documents filed by party in suit—Opposite party not raising any objection in trial Court as to their relevancy or denying their accuracy—He cannot object in appeal that there was no evidence of formality of comparing copies with originals.

Where a party does not raise any objection as to the relevancy of copies of documents filed by the opposite party in the trial Court, or deny that they contain a true and accurate statement of the contents of the original documents, it is too late for it to object in appeal that there was no evidence of the formality of comparing the copies with the originals. [P 601 C 2]

T. N. Sahay and *Hareshwar Prasad Sinha*—for Appellant.

B. P. Sinha and *K. Dayal*—for Respondents.

Agarwala, J.—This is an appeal by defendant 3 from a decision of the Additional District Judge of Muzaffarpur modifying a decision of the Subordinate Judge of Motihari. In 1907 the respondents purchased at a sale in execution of a mortgage decree the right, title and interest of the mortgagor, one Chautiria Padamraj, who since died in 1922. As purchasers of the interest of the mortgagor they claimed a sum of money which has been deposited in the treasury as the purchase price of land in village Bharnihar under the Land Acquisition Act. The suit was contested by the Ramnagar Raj, the recorded proprietor of the mauza. The actual document by which the land was granted by the Ramnagar Raj to Chautiria Padamraj has not been exhibited. In the record of rights it was stated that the grant would lapse on the death of the grantee, "Nirbans." It is

the construction of this word "Nirbans" which is the principal question which arises in the litigation. The first Court held that the word "Nirbans" meant "without male issue," and it not being alleged that any male issue survived Padamraj the first Court held against the plaintiff. In appeal the appellate Court reversed this decision holding that Nirbans meant "without heirs." As it is not disputed that Padamraj left a widow surviving him as his heir, the appellate Court reversed the decision of the first Court and decreed the suit in favour of the plaintiff.

In second appeal various questions have been raised by the learned Advocate for the appellant. It is first contended that the appellate Court should not have admitted additional evidence at the appellate stage. From the order sheet it appears that on 22nd December 1932, the plaintiffs applied to the appellate Court for permission to file certain documents. The documents they tendered were copies of certified copies of judgments and decrees in previous litigation between the grantor and grantee in which the term "Chautaria khangi" had been adjudicated upon. The Court directed that the originals of these documents should be sent for. By this it apparently meant the certified copies of the original documents. The certified copies were in the Court of the Subordinate Judge at Motihari. On 29th March 1933 the Court recorded an order that it was necessary for the proper decision of the case that the documents which the plaintiffs sought to be admitted in evidence should be so admitted. The learned Advocate's contention that the Court had no power to do this is plainly negatived by the Court's order that it was necessary for the purpose of deciding the case that the documents should be taken into consideration. It is true that it was the plaintiff who moved the Court to admit these documents but that does not affect the matter. If the appellate Court found it necessary to admit the documents for the purpose of arriving at a decision it had ample power under O. 41, R. 27 to do so.

The next objection of the learned Advocate for the appellant is that some of the documents admitted are copies of copies. The answer to that argument is that the Court sent for the certified copy from the Court at Motihari and it is those certified copies which were in evidence in the case, and not the copies which were originally tendered by the plaintiff and have been sent up with the record of this second appeal. Furthermore, the appellant did not raise any objection as to the irrelevancy of these documents or deny that they contained a true and accurate statement of the contents of the original documents. In that view of the matter, in my opinion, it is too late for them now to object that there was no evidence of the formality of comparing the copies with the originals. The learned Advocate also made a grievance of the fact that the appellate Court had refused to take into evidence documents which the learned Advocate states that the defendant appellant desired to put in as rebutting evidence. The appellate Court observed that the defendant had had ample opportunity of putting in these documents at the trial. The learned Advocate for the appellant has been unable to tell us what the documents were or what their relevancy was. We are, therefore, unable to agree with the learned Advocate that the documents were wrongly rejected in the appellate stage. It was next contended that as the plaintiff in his plaint had alleged himself to be the proprietor of the mauza in dispute it was not open to him to give evidence that his grant was a tenure. The nature of the plaintiff's grant from the Ramnagar Raj was raised by defendant 3 herself in her written statement. It is true that the written statement does not allege that the grant was a chautaria khangi in so many words, but it does state what the requisites of a chautaria khangi grant are, and it describes the grantee as a chautaria. An issue covering this point was raised in the trial Court, and there can be no doubt that the parties litigated with the full knowledge of what the point was that was in issue.

The last contention of the learned Advocate for the appellant was that the plaintiff had not alleged in his plaint that Padamraj had left a widow surviving him. This allegation, however, was made in the written statement which is an admission that Padamraj died leaving a widow. All the points raised by the learned Advocate for the appellant therefore fail and the appeal must be dismissed with costs.

Madan, J.—I agree.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1936 Patna 602

JAMES AND ROWLAND, JJ.

Lilku Mahto and *others* — Defendants —Appellants.

v.

Amar Mahto—Plaintiff—Respondent.

Appeal No. 339 of 1933, Decided on 5th August 1936, from appellate decree of Addl. Dist. Judge, Patna, D/- 4th August 1932.

(a) **Evidence Act (1872), S. 110 — Original entry under ostensible lawful basis—Forcible dispossession—S. 110 can be called in aid of person dispossessed and possession restored.**

Where a person's original entry had an ostensible lawful basis, and he is forcibly dispossessed by a person who is a trespasser, the person dispossessed can call in aid S. 110 and would be entitled to a decree for possession without being called upon to negative the defect in his title: 20 *Cal* 834 (*P C*), *Foll.*; 1917 *Pat* 546; 1927 *Pat* 1 and 1929 *Pat* 601, *Doubted.* [P 603 C 1, 2]

(b) **Possession—Suit for—Possession under alienation by widow—Dispossession by trespasser— Person dispossessed is entitled to restoration of possession.**

Where a person enters into possession lawfully under an alienation made by a Hindu widow, and is dispossessed by a third person, the person so dispossessed is entitled to restoration of possession on the principle that his ostensible title must be presumed to be good title until displaced by some one having a better title and on the principle that the alienation in his favour by the Hindu widow is in fact good and valid unless and until the nearest reversioners elect to treat it as not binding upon them: 34 *Cal* 329 (*P C*); 1927 *P C* 227; 25 *Cal* 1 (*P C*) and 1921 *Bom* 413, *Ref.* [P 604 C 1]

(c) **Hindu Law — Alienation — Widow — Alienation in excess of power is not void but voidable.**

An alienation by a widow in excess of her powers is not altogether void but voidable at the election of the reversionary heirs and is valid and good so long as it is not set aside: 34 *Cal* 329 (*P C*); 1927 *P C* 227; 25 *Cal* 1 (*P C*) and 1921 *Bom* 413, *Foll.* [P 604 C 1]

(d) **Possessory Suit—Trespassers—No presumption under S. 110 in favour of one dispossessed—Whether latter can be restored to possession**—(*Quaere*).

Quaere—Whether a person, who is ab initio a trespasser and in whose favour no presumption under S. 110 can possibly arise, is entitled though out of possession for more than six months to a decree for restoration of his possession as against another trespasser.

[P 603 C 1]

Khurshaid Husnain and *Rajeshwari Prasad*—for Appellants.

B. C. Sinha—for Respondent.

Rowland, J.—The facts leading up to this appeal are that the plaintiff-respondent got a deed of ijara executed in his favour by Mt. Sarpato Kaur, widow of Sheobux Mahto, in whose estate she had the limited interest of a Hindu widow. In her lifetime the defendants-appellants brought a declaratory suit asserting that they were the nearest reversioners of Sheobux and that the deed being without consideration and not for necessity was not binding on them as reversioners after the death of the widow. The Subordinate Judge decreed their suit finding in favour of the alleged reversioners on both issues. In appeal (F. A. No. 225 of 1926) a Bench of this Court held that the plaintiffs of that suit were not the nearest reversioners of Sheobux Mahto and that the suit was not maintainable at their instance. Accordingly they dismissed the entire suit. The judgment was pronounced on 6th January 1929. Meanwhile the lady died in March 1927, and the defendants-appellants of the present suit dispossessed plaintiff-respondent in 1928, the judgment of the Subordinate Judge in favour of the defendants-appellants being at that time still in force. In 1929 the plaintiff tried to resume possession but was resisted, and on 14th January 1930 he brought the present suit to recover possession asserting his right to hold possession until repayment of the rehan money and redemption of the rehan.

The Subordinate Judge before whom the suit came for decision, found that the rehan deed of 23rd May 1919 was genuine but not valid and for consideration, and that the defendants had dispossessed the plaintiff at a time when they had in their favour the decision of the Subordinate Judge in the earlier litigation but had in fact no title. He was of opinion that the plaintiff, not himself having title, could not succeed merely on the weakness of the defendants' title unless he brought his suit within six months of the dispossession and in accordance with S. 9, Specific Relief Act. On this view he dismissed the suit. In appeal the Additional District Judge reversed this decision being of opinion that previous possession even without title and even for a period short of a statutory period of 12 years entitled the plaintiff to a decree for possession against a trespasser. Of the decisions relied on by the Additional District Judge the majority either proceed on or

can be supported by the principle of S. 110, Evidence Act:

When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.

There are, however, two decisions which at first sight appear to go further, namely 2 P L J 280 (1) and 5 Pat 765 (2). In both these cases the decision in the plaintiff's favour was apparently based on the fact of his previous possession and not on the inference of the existence of a title drawn from the fact of that possession; but in 11 P L T 34 (3), which cites and follows 5 Pat 765 (2) and other authorities, the decision is ultimately founded on S. 110, Evidence Acts with the observations:

The plaintiff brings a suit in ejectment. It is quite true that he can only succeed by the strength of his own title. He satisfies the Court of the fact that he was in possession of the disputed property before he was forcibly dispossessed. S. 110 assumes that he might be taken to be the owner till the contrary is established. It follows therefore that if the case attracts the operation of S. 110, Evidence Act, the onus must be upon the defendants to show that the plaintiff who has proved that he was in possession before his forcible dispossession is not entitled to the disputed property.

Some of the cases referred to by the District Judge are cases in which the plaintiff at the time of suit had in fact been in possession and in such cases the presumption from S. 110, Evidence Act, was clearly available in aid of the plaintiff. The respondent invites us to read the decisions in 2 P L J 280 (1) and 5 Pat 765 (2) as laying down that a plaintiff who was ab initio a trespasser, and in whose favour no presumption under S. 110 can possibly arise, would still be entitled though out of possession for more than six months to a decree for restoration of his possession as against another trespasser. Whether the learned Judges intended to go so far, and whether that is indeed the law, it is unnecessary to decide in the present case. At any rate, the authorities seem to be clear that wherever S. 110 can be called in aid by the plaintiff the Courts can give effect to it; that is to say, wherever the plaintiff's original entry had an ostensible lawful basis. The Privy Council in 20 Cal 834 (4) dealt with a case in which the plaintiff had shown quiet possession on foot of a conveyance the validity of which was challenged by the defendants who were trespassers. It was held that the plaintiff was entitled to a decree without being called upon to negative the alleged defect in his title. In the present case the respondent had entered into possession lawfully under an alienation made by a Hindu widow who was undoubtedly competent to give possession of the property for her lifetime. Such an alienation, as was pointed out by their Lordships of the Judicial Committee in 34 Cal 329=34 I A 87 (5), is not absolutely void but is prima facie voidable at the election of the reversionary heir, who may affirm it or treat it as a nullity. Again in 52 Bom 1 (6) their Lordships of the Judicial Committee observed:

It is settled law that an alienation by a widow in excess of her powers is not altogether void but only voidable by the reversioners.

In 24 I A 164 (7) their Lordships observed:

that the patni was not void; it was only voidable; the Raja might elect to assent to it and treat it as valid. Its validity depended upon the circumstances in which it was made. The learned Judges of the High Court appear to have fallen into the error of treating the patni as if it absolutely came to an end at the death of the widow.

This decision was applied in the Bombay High Court in 45 Bom 105 (8). Macleod, C. J. considered the question regarding the nature of the widow's alienation to be concluded by the above decision. He said:

It is perfectly valid until it is set aside. In other words it is only voidable, not void. The question is who are the persons who are entitled to dispute the validity of such a grant. Clearly the reversioners.

He went on to hold that a third party (in the case before him a mortgagee) had no locus standi to resist the claim of a person who on the face of it had a good title granted by a Hindu widow, and the only person who can dispute the validity

1. Sahodra Kuar v. Gobardhan Tiwari, 1917 Pat 546=39 I C 458=2 P L J 280.
2. Bodha Ganderi v. Ashloke Singh, 1927 Pat 1=98 I C 779=5 Pat 765.
3. Ranjit Singh v. Johri Siugh, 1929 Pat 601=119 I C 906=11 P L T 34=8 Pat 351.
4. Ismail Ariff v. Mahomed Ghouse, (1893) 20 Cal 834=20 I A 99=6 Sar 305 (P C).
5. Bijoy Gopal Mukharji v. Krishna Mahishi Debi, (1907) 34 Cal 329=34 I A 87 (P C).
6. Ramgowda Annagowda v. Bhausaheb, 1927 P C 227=105 I C 708=54 I A 396=52 Bom 1 (P C).
7. Raja Modhu Sudhan Singh v. Rooke, (1897) 25 Cal 1=24 I A 164=7 Sar 194 (P C).
8. Sitaram v. Khandu, 1921 Bom 413=59 I C 480=45 Bom 105=22 Bom L R 1155.

of such a grant is the reversioner, and Heaton, J. agreeing said:

Not only does a widow convey her life-interest, but she conveys something that may become a permanent interest, unless it is claimed by somebody competent to claim it. The next reversioner, for example, on the widow's death, can get an alienation declared to be no longer of any validity. But anyone dealing with a widow, and taking her interest in the property, does acquire an interest in that property, and acquires an interest that does not automatically cease to exist merely because the widow dies. It may come to an end as the result of proceedings taken by the reversioner, or possibly in other ways, but it does not automatically cease. Indeed it continues until it is put an end to in some regular and legal way.

Therefore it seems to me that the plaintiff-respondent was entitled to succeed as of right, the defendants not being entitled to put him to the proof that the transfer in his favour was effective beyond the life time of the widow. The appellants have referred to the findings arrived at both in the earlier litigation and by the Court of first instance in this litigation that the plaintiff did not establish that his ijara deed was for consideration, still less that it was for necessity; and it has been argued that on those findings the plaintiff cannot claim any higher position than that of a trespasser. The answer is that for the reasons above given, this was a question of fact which the defendants in this action were not entitled to raise. The findings are mere obiter dicta and have no legal consequence. The plaintiff was entitled to succeed both on the principle that his ostensible title must be presumed to be a good title until displaced by some one having a better title and on the principle that the alienation in his favour by a Hindu widow is in fact good unless and until the nearest reversioners elect to treat it as not binding on them. I would dismiss the appeal with costs.

James, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1936 Patna 604

WORT AND AGARWALA, JJ.

Deo Narain Sahu and *others*—Defendants—Appellants.

v.

Ganesh Ram and *another*—Plaintiffs and *others*—Defendants—Respondents.

Appeal No. 16 of 1933, Decided on 17th August 1936, from decision of Addl. Sub-Judge, Palamau, D/- 12th September 1932.

Civil P. C. (1908), O. 41, Rr. 22 and 33—Cross-objection nothing more than old appeal by cross-objector — Cross-objector having no community of interest with appellant—Cross-objection is not maintainable—O. 41, R. 33 does not allow such objection.

A cross-objection under O. 41, R. 22 is not maintainable where the objector-respondent has no community of interest with the appellant and where the cross-objection is nothing more than an old appeal which was dismissed as being out of time. O. 41, R. 33 does not allow an objection of this kind to be made but merely because the Court is in the position of doing justice between the parties: 1935 *All* 134; 1934 *Pat* 134 and 1928 *Cal* 832, *Rel. on.* [P 605 C 1, 2]

J. N. Sahay & G. P. Das—for Applts.

Mahabir Prasad, Manohar Lal, Harians Kumar, Rajeshari Prasad, D. N. Varma and *K. K. Banerji*—for Respondents.

Wort, J. — This is an appeal in an action on a bahi-khata account in which the plaintiffs claimed Rs. 14,682-14-0 being principal and interest. The plaintiffs succeeded in the Court below against Mohon Lal, Moti Lal, Ramautar Sahu, Deo Narain Sahu and Ugrah Narain Sahu, who were held to be members of a joint Hindu family business. It would appear that the last three persons, I mention, who are defendants 3 to 5 and are appellants before this Court, were joined at the instance of the first two defendants, namely, Mohan Lal and Moti Lal, and as regards those defendants, that is to say defendants 3 to 5 who are the appellants, and the plaintiffs, the appeal is disposed of on the terms of a compromise now presented. As regards defendants 1 and 2, who are respondents with the plaintiffs, the appeal of defendants 3 to 5 is withdrawn. The terms of the compromise are that the decree of the trial Court against defendants 3 to 5 is set aside and the decree is modified accordingly and that the appellants will bear their own costs throughout. It is asserted in the petition of appeal that the compromise is for the benefit of the minor appellant, namely, defendant 3, which it clearly is, as he has been dismissed from the action. We have to deal however with the other defendants 1 and 2, and their position is this: they filed an appeal against the decree of the Court below which was out of time, and on 21st September 1933 the application by them to this Court, to have the time extended under S. 5, Lim. Act, was dismissed. The learned Judges who dealt with that application made this observation:

No case has been made out by respondents 3 and 4 under S. 5, Lim. Act, for condoning delay in filing the memorandum of appeal which however will be treated as a memorandum of cross-objection;

and then the learned Judges went on to deal with the question of costs. The effect of that order clearly was to dismiss the appeal of defendants 1 and 2, and as indicated by the order they have filed a cross-objection. It is contended by Mr. Mahabir Prasad on behalf of the respondent-plaintiff that the cross-objection does not lie. Mr. Varma who appears on behalf of defendants 1 and 2, the cross-objectors, relies upon O. 41, R. 22, Civil P. C., which is to the effect:

Any respondent, though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him in the Court below, but take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the appellate Court within one month from the date of service on him or his pleader.

Now it is quite clear that whatever defendants 1 and 2 may call their cross-objection, it was nothing more than an appeal. Their objection is not to the relief which the appellants, namely, defendants 3 to 5, are claiming in the appeal, but their objection is to the decree which has been pronounced in favour of the plaintiff-respondents. I am quite clearly of the opinion that the cross-objection so called under those circumstances is not contemplated by O. 41, R. 22. This matter has been dealt with by this Court in 15 P L T 42 (1). Dhavle, J. in circumstances not dissimilar to those in the present case, made this observation in discussing the effect of O. 41, R. 22, and O. 41, R. 33:

I would, therefore, hold that the plaintiffs-respondents are not entitled, as a matter of right, to urge their so-called cross-objection against those respondents who were defendants 2 to 6 in the suit. But objections of this kind, not coming under O. 41, R. 22, have been entertained under O. 41, R. 33, in cases of an exceptional kind.

I do not know whether it is necessary in the case to decide the effect of O. 41, R. 33, but if it were I am clearly of the opinion that O. 41, R. 33, does not allow an objection of this kind to be made but merely places the Court in a position of doing justice between the parties, that is to say, if the effect of the decision at which the Court arrives is to affect the rights of a person who is not a party to the appeal, yet relief may be granted to that person so long as that person was a party to the action in the first instance. I am clearly of the opinion, I repeat myself, that O. 41, R. 33, does not justify a cross-objection of this description. I think it is best expressed in a decision of the Allahabad High Court in 57 All 580 (2), "a cross-objection," so it is said,

cannot be permitted by respondent against another where the effect of the cross-objection, if successful, cannot be adverse to the appellant to any extent.

To some extent in this case it might have been adverse to the appellant as defendants 1 and 2, if they had been allowed to pursue their cross-objection, might have persuaded the Court to dismiss them from the action and allow the present appellants-defendants 3 to 5 to stay on and thus become liable for the debt. But to that extent only could it be said that their objection was adverse to the appellant. It was further stated in the decision to which I have just referred that a cross-objection is not maintainable where the co-respondent has no community of interest with the appellant and the cross-objection proceeds on the same grounds as the appeal. As I observed in the commencement of my remarks, that whatever this might be called it was nothing more than the appeal which was filed by the appellant-defendants 1 and 2 which was dismissed. Again in 32 C W N 863 (3), there is this observation at the end of the judgment :

The defendant has filed cross-objections in this appeal in respect of plots other than plot B. But we are told that the defendants had filed a separate appeal in respect of those plots which was dismissed by the Court under O. 41, R. 11, Civil P. C. The cross-objection therefore cannot be heard.

In my judgment, as I have already stated, the cross-objection in the present case is nothing more than the old appeal which was dismissed and therefore in my opinion does not lie. The cross-objection is therefore dismissed.

Agarwala, J.—I agree.

R.M./R.K. *Order accordingly.*

1. Mt. Chanda Bibi v. Mohanram Sahu, 1934 Pat 134 = 153 I C 412 = 15 P L T 42 = 13 Pat 200.

2. Husain Yar Begam v. Radha Kishan, 1935 All 134 = 155 I C 89 = 57 All 580 = 1935 A L J 145.

3. Sourindra Nath Basu v. Nirmal Chandra Banerji, 1928 Cal 882 = 117 I C 693 = 32 C W N 863.

A. I. R. 1936 Patna 606

COURTNEY-TERRELL, C. J. AND DHAVLE, J.

Nimaicharan Das and *others*—Defendants—Appellants.

v.

Surendra Nath Ghosh—Plaintiff—Respondent.

Letters Patent Appeal No. 17 of 1935, Decided on 20th July 1936, from decision of Fazl Ali, J., D/- 14th March 1935.

Bengal Tenancy Act (8 of 1885), Ss. 106 and 109—Suit for rectification of entry in record of rights does not bar suit for declaration of title and possession.

A suit under S. 106 for rectification of the entry in the khatian does not bar a subsequent suit for declaration of title and possession as the two suits are based entirely on different causes of action. Only a suit based on the same cause of action as suit under S. 106 that is barred by S. 109. [P 605 C 2]

P. Misra—for Appellants.

G. P. Das—for Respondent.

Courtney-Terrell, C. J.—This is a Letters Patent appeal from a decision of Fazal Ali, J., sitting in second appeal. The plaintiff brought a suit against the defendants for declaration of title and confirmation of possession. The defence raised was, firstly, that the property was debuttar and could not be sold in execution of the personal decree against the marfatdar and further that the suit was barred by reason of the provisions of S. 109, Ben. Ten. Act, there having been a decision under S. 106 of the said Act in a suit brought for rectification of entry in the record of rights. There was also a plea of limitation. The facts simply stated are that in the year 1908 the plaintiff's father, in execution of a decree which he had obtained against the father of defendants 1 to 3, had purchased the property in question. The father of defendants 1 to 3 against whom the decree was obtained, was marfatdar of a deity. The plaintiff obtained delivery of possession. In 1910 the Revisional Settlement khatian was published and the deity was still nevertheless recorded in possession. Therefore the plaintiff's father sued under S. 106, Ben. Ten. Act to correct the entry in the khatian. That suit was dismissed because it was not brought in time the defence being a point of limitation. In the current Settlement which was published in the year 1927 the name of the deity was again recorded as being in possession. The plaintiff having filed an objection under S. 116, Orissa Tenancy Act, which was dismissed because he could not prove his possession, as I have said, began this suit in 1928.

Two points were substantially raised before the learned Judge from whose decision this Letters Patent appeal lies. The learned Judge held that this suit was not barred under S. 109, Ben.Ten. Act, by reason of the earlier proceedings under S. 106 of the Act, because the two suits were based upon entirely different causes of action. Under S. 106 the suit was for rectification of the entry in the record of rights whereas the present suit was one for declaration of title and delivery of possession. The next point that was raised was the point held in favour of the defendants by the District Judge in first appeal. He had held that in the pleadings the plaintiff had not originally raised the plea of title by adverse possession. An examination of the pleadings—and indeed the learned advocate for the appellant before the learned Judge admitted—showed that the plea of adverse possession and title under that plea was distinctly raised. Furthermore, the issue was distinctly before the Munsif and I agree with the learned Judge of this Court that the Munsif was fully entitled to go into that plea and decide the case of adverse possession as he did in favour of the plaintiff. Secondly, I agree with the learned Judge of this Court that S. 109 does not create any bar to this suit by reason of the earlier suit under S. 106, not being in respect of the same matter. Both the points, therefore, taken before us in favour of the appellants fail and in my opinion this Letters Patent appeal must be dismissed with costs.

Dhavle, J.—I agree. If (as is not disputed) the learned District Judge had not made an error of record and had not proceeded on the footing that the case of adverse possession had not been set up by the plaintiff in his plaint, it seems to me, having regard to his finding about possession, that he would have come to the same conclusion as the trial Court, namely continuous possession of the plaintiff notwithstanding attempts made by the defendants to interfere with that possession.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1936 Patna 607

JAMES AND SAUNDERS, JJ.

Sarat Chandra Das Mahapatra and *another*—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Nos. 539 to 548 of 1935, Decided on 2nd December 1935, from order of Dist. Magistrate, Balasore, D/- 16th August 1935.

Orissa Tenancy Act (2 of 1913), S. 67 (3), (8) —Subdivisional Officer taking proceedings under S. 67—Orders made are by revenue officer—District Magistrate or High Court cannot revise such order under criminal revisional jurisdiction — Proper remedy is under S. 67 (8).

Orders passed by a Subdivisional Officer in proceedings taken under S. 67 (3) are passed by a revenue officer. Neither the District Magistrate nor the High Court can interfere with those orders in their criminal revisional jurisdiction. The proper remedy for the aggrieved party is to proceed under S. 67, sub-s. (8): 9 *C W N* 816, *held no longer good law*; 1916 *Pat* 174, *explained.* [P 607 C 2; P 608 C 1]

G. P. Das and *G. C. Das*—for Petitioners.

James, J.—On 11th December 1934 a number of raiyats petitioned the Collector of Balasore alleging various acts of oppression against their landlord and his tahsildar. The Collector referred the petition to the Subdivisional Officer for enquiry and report. The Subdivisional Officer, on 21st May 1935, reported to the Collector that the tenants were not obtaining receipts prepared in the form prescribed by S. 65, Orissa Tenancy Act, and that the landlord was therefore liable to be fined under S. 67 (3) of the Act. The Collector on 5th June remarked on this report that the Subdivisional Officer was competent to dispose of the matter, and remanded the proceedings to him for passing final order in the case. He cited Government Notification No. 4878 of 19th June 1916, which is a notification issued under S. 3 (4), Orissa Tenancy Act, whereby all Subdivisional Officers are empowered inter alia to discharge the functions of a Collector under S. 67, Orissa Tenancy Act. The Subdivisional Officer, on receiving these orders, completed his proceedings and fined the landlord under S. 67, Orissa Tenancy Act. The landlord then moved the District Magistrate for the exercise of his revisional powers under S. 435, Criminal P. C., praying that the record of the proceedings should be forwarded to the High Court under S. 438 of the Code with a recommendation for revision of the order made under S. 67, Orissa Tenancy Act, by the Subdivisional Officer. The District Magistrate dismissed the application, pointing out that the Subdivisional Officer had disposed of these cases as a Revenue Officer, and that if the petitioners were aggrieved they should have appealed to the Collector under sub-s. (8) of S. 67, Orissa Tenancy Act.

Mr. G. P. Das, on behalf of the petitioners, argues that an order made by a Collector under S. 67, Orissa Tenancy Act, is made in a criminal proceeding, and that therefore the High Court has jurisdiction to revise that order in suitable cases. He quotes the decision of Mullick, J., in 1 P L J 149 (1), a case in which a suit for malicious prosecution had been instituted against persons who had made a complaint before a Collector under S. 58, Ben. Ten. Act. All that is decided in that case is that a complaint of that kind is such a complaint as would give rise to an action for damages for malicious prosecution if it should be made without just and reasonable cause. But in deciding that case Mullick, J. quoted a decision of the Calcutta High Court in 9 C W N 816 (2) wherein the order of a Subdivisional Magistrate imposing a fine under S. 58, Ben. Ten. Act was set aside by the High Court. The Sessions Judge making his reference in that case had expressed some doubt whether the Magistrate had jurisdiction in the matter; but the High Court decided that the Magistrate had jurisdiction to try the landlord for the act specified in S. 58 (3), Ben. Ten. Act, namely failure to prepare and retain counterfoils in rent receipts. In the Bengal Tenancy Act, as it then stood, sub-s. (3) ran as follows :

> If a landlord without reasonable cause fails to prepare and retain a counterfoil or copy of a receipt or statement as required by either of the said sections, he shall be punished with fine which may extend to fifty rupees.

The Bengal Tenancy Act was amended in 1907, when the existing sub-s. (3) was substituted for the original sub-section. The amended sub-section makes it clear that the fine, if it is to be imposed, is to be imposed by the Collector; and

1. Naik Pandey v. Bidya Pande, 1916 Pat 174 =34 I C 149=1 P L J 149.
2. Emperor v. Mohant Ramdas, (1905) 9 C W N 816=2 Cr L J 532.

that the appeal lies to the Commissioner of the Division which, subject to any order passed on revision by the Board of Revenue, is to be final. Since the passing of Bengal Act 1 of 1907 which amended the sub-section a Magistrate has not had jurisdiction to act under S. 58, Ben. Ten. Act. The rule in 9 C W N 816 (2) determining the question of whether a Magistrate can take action under S. 58, Ben. Ten. Act, is no longer law, because its basis was destroyed by the legislation of 1907. The learned District Magistrate acted rightly in declining to make any reference to the High Court. We have no jurisdiction to revise the order of the Subdivisional Officer. He pointed out rightly that the proper remedy of the petitioners lay in the appeal provided by sub-s. (8) of S. 67, Orissa Tenancy Act. We cannot interfere in these cases and the petitions must be dismissed.

Saunders, J.—I agree.

B.D./R.K. *Petitions dismissed.*

A. I. R. 1936 Patna 608

VARMA, J.

Rai Hari Prasad — Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 366 of 1936, Decided on 7th August 1936, from order of Addl. Sess. Judge, Gaya, D/- 11th July 1936.

Criminal Trial—Abetment—No evidence of actual words used in abetment — Conviction is unsafe.

In the absence of definite information about actual words used by an accused in abetting an offence, other circumstances relied by the prosecution against the accused lose much of their force, and it is unsafe to convict an accused person of offence of abetment. [P 610 C 1]

S. N. Sahay, D. L. Nandkeolyar and *P. N. Gour*—for Petitioner.

Asst. Govt. Advocate—for the Crown.

Order.—This is an application on behalf of one Rai Hari Prasad who was convicted by a Magistrate of the First Class of Gaya under S. 147 read with Ss. 109, 353, read with Ss. 109 and 379, read with S. 109, I. P. C., and sentenced to undergo rigorous imprisonment for three months under S. 147 read with S. 109, no separate sentences having been passed under the other two sections.

On appeal the conviction under S. 379 read with S. 109 was set aside, as the Public Prosecutor conceded before the learned Additional Sessions Judge that no case under S. 379 read with S. 109 was made out. The application in revision is therefore against the conviction under S. 147 read with S. 109 and S. 353 read with S. 109 and the sentence of rigorous imprisonment for one month and a fine of Rs. 100, in default two months' further rigorous imprisonment which was awarded by the Court of appeal. The case of the prosecution was that in village Kurkihar there is a joint Hindu family consisting of Muna Singh, Dasrath Singh, Jichha Singh and Alakhdei Kuar. One Jamuna Prasad Singh filed a suit against these people and got a decree, and in execution of the decree sold up their lands in that village and got dakhaldehani over the land. After dakhaldehani Jamuna Prasad Singh sold the lands towards the end of November to the petitioner's wife Mt. Krishna Devi. About that time the members of the family of Muna Singh had raised an objection before the civil Court on behalf of Alakhdei Kuar for saving the property and crops from the decree-holder and his successor in interest. Rai Hari Prasad about that time began to cut paddy on those fields, and in order to protect his labourers from any opposition from Jichha Singh, had arranged to send a few armed men to the field. Then began the preliminary tactics which preceded the date of occurrence. On 29th November 1935, Muna Singh lodged a sanha (Ex. 6) about the likelihood of a breach of the peace in connexion with certain fields between the informant and Rai Hari Prasad whereupon a constable was deputed to prevent a breach of the peace. Then we find another sanha (Ex. 8) lodged on 1st December 1935, by the chaukidar of this village Kurkihar, as a result of which the Sub-Inspector started with a constable to take preventive measures. Cutting of paddy went on peacefully on the 1st December, and nothing untoward happened on that date; but it appears that Muna Singh, as a desperate measure went to consult a lawyer at Gaya on whose advice apparently it was decided to file a petition before the Deputy Superintendent of Police on behalf of Alakhdei Kuar. The petition (Ex. 4) was filed before the Deputy Superintendent of Police who sent it on to the

Inspector of Police. The Inspector went to the spot with Mr. Ashutosh Verma, a lawyer of the family of Muna Singh, and Kameshwar Prasad, a lawyer's clerk. When they reached the village an occurrence took place, which was the subject-matter of another prosecution. It appears that the case of the prosecution in that case was that Jichha Singh was chased by seven or eight people armed with lathis and that Jichha Singh sought the protection of the Inspector from these persons. That case was tried by the same Magistrate who convicted the accused in that case, but on appeal the convictions were set aside. I had occasion to look into that judgment because the lower appellate Court in the judgment in the present case says that he has summarised the facts because he has dealt with it more fully in the previous judgment. The incident that ended in the present conviction arose after the first one, and that was after the inspector had asked the lathis in the hands of several persons to be taken away. The lathis were collected and put in charge of one chaukidar. It appears that after the lathis were taken away the men of Rai Hari Prasad went empty-handed to the Kacheri, and the prosecution story is that after they gave out their version of how they lost their lathis Rai Hari Prasad instigated them to commit a riot as a result of which the lathis were snatched away from the hands of the chaukidar. All the accused pleaded not guilty to the charge; but we are concerned with the defence set up by Rai Hari Prasad. His case was that he was falsely implicated in the case at the instance of some of his old enemies. The rest of his defence is apparent from his written statement in which certain arguments are advanced against the prosecution story. In view of the conclusions which I have arrived at after hearing Mr. Sahai on behalf of Rai Hari Prasad, and Mr. S. M. Gupta on behalf of the Crown and going through the record of the case, I think it necessary to give in extenso the charges which have been framed against Rai Hari Prasad.

First—That you on or about the 2nd day of December 1935 at Kurkihar, P. S. Wazirganj, District Gaya, abetted by instigating Kesheo Missir and others in the commission of an offence under S. 147, I. P. C., namely, being members of an unlawful assembly the common object of which was to commit an offence under S. 353 as detailed in the second head of charge below, and (ii) by means of show of criminal force to compel Parbhoo Singh, chaukidar, to do what he was not legally bound to do, viz., to give up the lathis which were in the custody, and force was used by some of them in furtherance of the common object aforesaid and thereby committed an offence punishable under S. 147/109, I. P. C., and within my cognizance.

Secondly—That you, on or about the 2nd day of December 1935, at Kurkihar abetted by instigating Kesheo Missir and others in the commission of an offence under S. 353, I. P. C., viz. assaulting (gesture, knowing it to be likely that it would cause persons present to apprehend that criminal force was about to be used to them) public servants, namely, Babu Naubat Prasad Singh, Inspector, S. I. Babu Baikunt Singh, constable, Basudeo Singh, Prabhu Singh chaukidar in consequence of their acts in the lawful discharge of their duties as such public servants, viz. prevention of the breach of peace, and thereby committed an offence punishable under S. 353/109, I. P. C., and within my cognizance.

Thirdly—That you, on or about the 2nd day of December 1935, at Kurkihar, P. S. Wazirganj, Gaya District, abetted by instigating Kesheo Missir in the commission of an offence under S. 379, I. P. C., viz., committing theft of the seized lathis from the lawful possession of Prabhu Singh, chaukidar, and thereby committed an offence punishable under S. 379 read with S. 109, I. P. C., and within my cognizance. And I hereby direct that you be tried by this Court on the said charges.

Now, dealing with the first charge, one does not get any idea as to what the prosecution story was and as to how Rai Hari Prasad instigated or abetted the offence of rioting. This is of importance inasmuch as the finding of the Court of appeal below does not disclose the exact words which are alleged to have been spoken by Rai Hari Prasad and the exact expression used by him which have been taken to amount to an instigation of the offence of rioting. It was a result of this that I was obliged to look through the evidence to find out what the prosecution case really was. On this point the evidence of three witnesses examined on behalf of the prosecution is of importance. The evidence of Ishar Singh (P. W. 5), Ramprasad Singh (P. W. 6) and of of Saligram Singh (P. W. 7) has been referred to in the judgment of the lower appellate Court in the following terms:

Other witnesses have come forward and have deposed to having heard Rai Hari Prasad giving orders. All these persons are alleged to be on inimical terms with Rai Hari Prasad and not worthy of belief.

The Court of appeal disposed of their evidence by saying that :

Some of these people have been sued by Rai Hari Prasad as a zamindar and this by itself cannot make their evidence absolutely unreliable, although the value may be less.

Looking at the evidence of these persons, I find that the words attributed to Rai Hari Prasad are to be gathered from the statement of Ishar Singh (P. W. 5):

> Rai Hari Prasad told them that they ought to have assaulted the Inspector and directed them to snatch back the lathis which were seized by the Sub-Inspector and to assault him.

Ramprasad Singh (P. W. 6) says:

> The malik ordered them to take back all the lathis and to assault whoever he might be.

A similar statement is made by Saligram Singh (P. W. 7). But curiously enough although the occurrence took place on the 2nd December these witnesses were not examined before the 6th December, and from the evidence of the Sub-Inspector it appears that neither P. W. 5 nor P. W. 6 had mentioned before him the fact that the Rai Saheb had ordered to assault whoever the person might be. The fact that there has been litigation in the past between these persons, who directly connect Rai Hari Prasad with the instigation of the riot, may or may not by itself be enough to discard the evidence altogether; but when we have clear indications that they are trying to improve the story which they have already given out, one can safely infer that these litigations have made them witnesses on whose credibility it is not safe to rely. In the absence of any definite information as to what the words actually used by Rai Hari Prasad were, the other circumstances referred to by the learned Judge upon which he has relied to base his conviction, lose much of their force. In the absence of any definite reliable evidence as to the exact words used by him, it is not safe to convict him for abetment of the offence. In view of the submissions made by the counsel for the petitioner that the name of the accused does not find place in the first information report, I looked at the original first information report to which I find attached a translation evidently made at the time when the appeal was being heard. The translation does not give any idea as to the real nature of the entries in the first information report. The first information report does not mention the name of Rai Hari Prasad as one of the accused. But as we proceed with the narrative of Parbhu Singh chaukidar towards the end of the information while describing what the rioters did after they had snatched away the lathi from the chaukidar, he says that Kesho Missir twisted his hand and took away all the lathis and gave them to Saudagar Kahar, Prasad Singh, Chulhan Singh, Mehdi Singh, Matukdhari Singh, Bhuan Kahar, and when the constable who was about 8 to 10 paces ahead came back running, then these people began to brandish their lathis, saying "ke malik ka hukum lathi chhin leneka hai", and then they became ready to commit a riot. The expression which is quoted above has been written between two lines in smaller letters. The statement, as it stood without this addition, was complete in itself. Evidently this expression implicating the malik was an afterthought. This is the only thing in the first information report apart from the fact that the accused were the servants or followers of Rai Hari Prasad which connects the latter with this particular riot, and coming as it does in the shape of an afterthought, the weight of the evidence of the three witnesses upon which the lower Court has relied, is lessened still further. The finding of the lower appellate Court about the taking away of the lathis is as follows:

> It is also proved that Kesho Missir took the lathis from the chaukidar and this process necessarily meant force on the chaukidar.

Later on he says:

> The lathis were taken by the Sub-Inspector and given to him. So practically the lathis were in the possession of the police officers, who had come there on duty to preserve the peace and the appellants took away the lathis from their possession by show of criminal force and this is sufficient to bring them under the charge of having committed assault on a public servant.

The story that the hand of the chaukidar was twisted, evidently does not find place in the findings of the lower appellate Court. In the result, without expressing any opinion with regard to the guilt of the other co-accused whose case has been admitted and is now numbered Criminal Revision No. 377 of 1936, the materials upon which the lower Court has based the conviction of the present petitioner, are, in my opinion, not enough to warrant a conviction. At any rate, it may be one of those instances in which, when two parties are fighting, each party attempts to rope in the biggest man on the other side. I feel on the materials before me that the petitioner is entitled to the benefit of doubt and is therefore acquitted. His bail bond will be can-

celled and the fine, if paid, will be refunded.

B.D./R.K. *Conviction set aside.*

A. I. R. 1936 Patna 611

FAZL ALI AND LUBY, JJ.

Gobardhan Sahu — Plaintiff — Appellant.

v.

Lalmohan Kharwar and *others*—Defendants—Respondents.

Appeal No. 883 of 1933, Decided on 2nd October 1935, from appellate decree of Judicial Commissioner, Chhota Nagpur, D/- 23rd March 1933.

Chhota Nagpur Tenancy Act (6 of 1908), Ss. 87 and 258—Decision of Judicial Commissioner in suit under S. 87—Subsequent suit for possession will not be barred even though incidentally it may have to be shown that entry in Record of Rights is not correct.

There is a clear line of distinction between those cases where the suit is instituted for the purpose of varying, modifying or setting aside a decision under S. 87 and those where the suit has been instituted for a relief which could not be granted under that section, but in granting which the Court may have to find that the entry in the Record of Rights is not correct even though it may be based on a decision under S. 87. There is no provision in the Act to the effect that the presumption of correctness which attaches to an entry in the Record of Rights becomes irrebuttable after a decision under S. 87. If, therefore, the entry can be held to be incorrect the decision under S. 87 upon which the final entry may have been based may also be shown to be wrong. The mere fact, therefore, that some of the issues in a suit may be the same as the issues before the Revenue Officer in a suit under S. 87 will not be enough to bar the former suit if it is clear that the scope of the suit is different from the scope of the suit before the Revenue Officer and the suit has been instituted for obtaining such reliefs as the Revenue Officer was not competent to grant: 1921 *Pat* 218 and 1928 *Pat* 244, *Rel. on.* [P 613 C 1, 2]

Raghosaran Lal—for Appellant.

N. K. Prasad II—for Respondents.

Fazl Ali, J.—Gobardhan Sahu appeals against the judgment dated 23rd March 1933, of the Judicial Commissioner of Chhota Nagpur in rent appeal No. 48 of 1931, whereby the learned Judicial Commissioner dismissed with costs the rent suit which he had brought against Lalmohan Kharwar (or Bhogta) and others, defendants, now respondents. The appeal is valued at Rs. 26 odd. The appellant is a co-sharer landlord of village Meral and collects his own share of the rent separately. The other co-sharer landlords are his relatives Kewal Sahu, Ramdeo Sahu and others. In the rent suit with which we are now concerned he sued 40 defendants, including the present respondents who are 7 in number, for rent of the years 1335 to 1337 F. S. Eleven of the defendants paid up the rent claimed, and the plaintiff filed a petition of satisfaction as regards his claims against them. Only 7 of the defendants, i. e., the present respondents, contested the suit claiming that they were not tenants but tenure-holders.

The lands in question were entered as the respondents' raiyati holdings in the Record of Rights which was finally published in 1918. After that the respondents brought a suit under S. 87, Chhota Nagpur Tenancy Act, to have themselves recorded not as tenants, but as tenure-holders. The suit was dismissed by the trying Court, but was decreed on appeal by the Judicial Commissioner in March 1920. The defendant appealed to this Court, and the resulting decision is reported in 6 P L J 634 (1). It was held therein by Das and Ross, JJ., that no appeal lay to this Court because :

A decision under S. 87, Chhota Nagpur Tenancy Act, is not a decree ; it is a decision, and there is no appeal to the High Court under the Civil Procedure Code from a decision.

The judgment was delivered by Das, J. who observed further that :

It was argued by Mr. Ram Lal Dutt that the learned Judicial Commissioner had no business to decide a question of title. But I do not think that he has in fact decided any question of title. No doubt in deciding whether the entry in the Record of Rights is correct or incorrect he had incidentally to discuss the question of title but his decision on the question of title is only incidental ; it is nothing more than that. His decision really is a decision on the question of possession.

In December 1921, a civil suit was filed by Kewal Sahu, Ramdeo Sahu and others, against Lalmohan Kharwar (or Bhogta) and others, for a declaration of their title to the land in question and for confirmation of their possession. In the plaint of Kewal Sahu, etc., the previous history of the dispute is told. The Sahus claimed that their ancestors had purchased a 12 annas mokarri interest from the landlord as long ago as 1821. The Bhogtas were originally the 16 annas mokarridars, but had sold 12 annas to the landlord before

1. Foujdar Sahu v. Nema Bhogta, 1923 Pat 135 =65 I C 285=6 P L J 634.

1821. The remaining 4 annas share of the Bhogtas was subsequently acquired by the Sahus who got delivery of possession in 1848. A suit was brought by Jbari Bhogta to recover possession of the 12 annas share which had been sold to the landlord, but the suit was dismissed. In 1884 the Sahus acquired the landlord's interest in the property. In 1908 there was some litigation between two branches of the Sahu family. After that litigation had terminated, the branch to which Gobardhan Sahu belongs was left in possession of 10 annas share which they have continued to hold to this day. The original mokarridars (the Bhogtas) had left the village after disposing of their share and resided for many years in Surguja State ; but when the settlement operations commenced in Palamau District they came back and laid claim to a 4 annas mokarri share. Their claim was dismissed by the Settlement Officers, who found that Lalmohan and his father were not mokarridars but were in possession of a small quantity of land as tenants on payment of rent to the Sahus. The Bhogtas then brought the suit under S. 87, Chota Nagpur Tenancy Act, which was dismissed by the trying Court but was decreed by the Judicial Commissioner on appeal in March 1920.

The civil suit brought by the Sahus in 1921 ended in a compromise in 1923, by which the Bhogtas admitted the Sahus' claim and the suit was decreed in accordance with the compromise. The rent suit with which we are at present concerned was decreed against the contesting defendants, i. e., the present respondents, by a rent suit by a Deputy Collector on 29th June 1931. But on appeal by the defendants the learned Judicial Commissioner has dismissed the suit with costs of both Courts, on the ground that Gobardhan Sahu had failed to establish a relationship of landlord and tenant between himself and the Bhogtas. He held that the suit filed by the Sahus in 1921 was entertained without jurisdiction, being barred by S. 258, Chota Nagpur Tenancy Act, and that the decree passed in that suit on compromise was therefore invalid. In his opinion the suit in which the compromise decree was passed was a suit to vary, modify or set aside the decision and decree of the Judicial Commissioner under S. 87 and was therefore barred by S. 258 of the Act.

The question to be determined in this appeal is whether the view taken by the learned Judicial Commissioner is correct. S. 258, Chota Nagpur Tenancy Act, provides that no suit shall be entertained in any Court to vary, modify or set aside either directly or indirectly any (decision) order or decree of any Deputy Commissioner or any Revenue Officer in any suit under S. 87 (and certain other sections of the Act) except on the ground of fraud or want of jurisdiction. S. 87 occurs in Ch. 12 of the Act, a chapter relating to the Record of Rights and settlement of rents, and provides that *in proceedings under this chapter a suit may be instituted . . . . for the decision of any dispute regarding any entry which a Revenue Officer has made of any omission which he has made from the record.* This section further specifies certain classes of disputes which might be the subject-matter of a suit under the section. The words italicized above are important and must be noted because they show that the scope of the suit under S. 87 is a limited one.

In the first place such a suit is a suit to be instituted before the Revenue Officer and when instituted it becomes part of the proceedings under Ch. 12, and secondly it must be a suit for the decision of a dispute regarding an entry made in or omission from the record. A brief reference to some of the main provisions of Ch. 12 will further elucidate the purpose for which S. 87 was enacted. As we have already stated Ch. 12 relates to "the Record of Rights and settlement of rent" and S. 81 therefore appropriately enumerates some of the chief particulars that are to be recorded in the Record of Rights. The sections which follow S. 81 show the anxiety of the framers of the Act to ensure that the Record of Rights was correctly prepared and to give it a certain degree of finality. Ss. 86 to 90 give a chance to the party aggrieved to question the correctness of the entries in the Record of Rights and enable the Revenue Officer to frame issues relating to disputes between the parties and decide them, to revise certain orders and decisions and to correct any entry in the Record of Rights which may have been made under a bona fide mistake. Ss. 91, 92 and 93 provide that no suit shall be instituted within certain periods specified in these sections with regard to matters

which are the subject of the Record of Rights.

It is however to be noted that these sections merely prohibit the institution of suits within a certain period and not absolutely, and there is nothing either in Ch. 12 or in any of the other Chapters of the Chota Nagpur Tenancy Act to justify the view that a party can be debarred from instituting a suit in the civil Court to establish his title to and recover possession of his property merely because of there having been a proceeding under S. 87 with regard to such property. There are no doubt provisions in the Act which are intended to give finality to the proceedings instituted under Ch. 12 and to make the Record of Rights strong evidence of facts stated therein; but these provisions simply mean that no proceedings other than those mentioned in Ch. 12 can be entertained for the cancellation of the Record of Rights or to re-open those disputes which have been settled between the parties during the preparation of the Record of Rights with the primary object of maintaining a correct Record of Rights. As has been frequently pointed out, the Record of Rights does not by itself create or extinguish title, but it is only a piece of evidence; and the provisions made in Ch. 12 are intended to make it as perfect and immune from attack as possible. The language used in S. 87 itself will show that a Revenue Officer cannot under that section entertain a suit for recovery of possession and it seems to us therefore that the Legislature could not have intended that the decision given in a suit under S. 87 should bar a suit instituted to recover possession or claim some other reliefs which the Revenue Officer could not grant.

Now, if S. 258 is construed in the light of the foregoing discussion, it follows as a matter of inference that a suit for possession will not be barred even though incidentally it may have to be shown in that suit that the entry in the Record of Rights is not correct and the consequence of such a suit may be to some extent to vary, modify or even indirectly set aside a decision, order or decree of a Deputy Commissioner. We think that there is a clear line of distinction between those cases where the suit is instituted for the purpose of varying, modifying or setting aside a decision under S. 87 and those where the suit has been instituted for a relief which could not be granted under that section but in granting which the Court may have to find that the entry in the Record of Rights is not correct even though it may be based on a decision under S. 87. There is no provision in the Act to the effect that the presumption of correctness which attaches to an entry in the Record of Rights becomes irrebuttable after a decision under S. 87. If therefore the entry can be held to be incorrect, the decision under S. 87, upon which the final entry may have been based, may also be shown to be wrong. The mere fact therefore that some of the issues in a suit may be the same as the issues before the Revenue Officer in a suit under S. 87 will not be enough to bar the former suit if it is clear that the scope of the suit is different from the scope of the suit before the Revenue Officer and the suit has been instituted for obtaining such reliefs as the Revenue Officer was not competent to grant. Of course sometimes to overcome the bar of S. 258 a suit which is essentially a suit for setting aside an entry in the Record of Rights may be instituted in the garb of a title suit, but the Courts will always look to the essence and not to the form of the suit. We are glad to find that the view which we have expressed here is supported by at least two previous decisions of this Court to which we ought briefly to refer. In 1921 Pat 218 (2) Dawson Miller, C. J. dealing with the scope of S. 258 observed :

> Section 258 of that Act provides that no suit shall be entertained in any Court to vary, modify or set aside either directly or indirectly any order or decree of any Deputy Commissioner or Revenue Officer in any suit or proceeding under inter alia S. 87. The present suit is not brought for the purpose of setting aside Mr. Kingsford's decree, and although the section no doubt had the object of securing to some extent finality for such decrees, the section does not say, as it might have done, that no Court shall try any issue already decided by such a decree so as to bar a defendant in a suit brought against him from raising the issue.

Again, in 7 Pat 388 (3), Wort, J. dealing with the application of S. 258 with reference to a decision under S. 89, observed :

> The words 'directly or indirectly' in the section, in my judgment, apply to the machinery

2. Protap Udainath Sahi Deo v. Ganesh Narain Sahi, 1921 Pat 218=70 I C 232.
3. Govind Nath Sahi Deo v. Mahesar Nath Sahi Deo, 1928 Pat 244=118 I C 135=7 Pat 388=10 P L T 854.

used for the purpose of altering the decision and not to the result, that is to say, assuming for the moment that the plaintiffs succeed in this suit they will have a declaration which in its effect contradicts the record; but that does not directly or indirectly alter the decision of 1910. No proceedings can be brought other than those allowed by the Act to change that decision directly or indirectly. But the record remains there and in my judgment they have not directly or indirectly altered it.

Now, on a reference to the plaint of Suit No. 52 of 1921 we find that the reliefs claimed in that plaint were as follows :

(a) That it be declared that the plaintiffs have title as set forth above by deed, decree of Court, partition, etc., as also by adverse possession for several 12 years in the property specified in Sch. A of the plaint ; (b) that the plaintiffs' possession over the said property be confirmed, but in case it be held by the Court that in consequence of the said order of the Judicial Commissioner or for any other reasons the plaintiffs are to be considered out of possession, then the plaintiffs be put in possession of the property ; (c) that permanent injunction as also a temporary injunction till the disposal of this suit be issued restraining the defendant from interfering with or disturbing or seeking to interfere or disturb the plaintiffs' possession of the property in suit or seeking to obtain possession of any portion of the property ; (d) that defendants 5 to 11 only be declared to be in possession of the land of Sch. B as tenants under the plaintiff at the rental entered in the Road Cess paper.

It seems to us clear that the Revenue Officer could not have entertained any suit under S. 87 for reliefs (a), (b) and (c), and the only prayer in the plaint which can be open to objection in view of S. 258 is prayer (d). We have already stated that the Revenue Court could not entertain a suit for recovery of possession, and as was pointed out by Das, J. in his judgment to which we have already referred, the previous decision of the Revenue Officer under S. 87 between the parties to this appeal was merely a decision on the question of possession and not on the question of title. That being so, the plaintiff was not debarred from establishing his title in a civil Court. In fact the petition of compromise filed in the suit of 1921 recites

that the present suit has been instituted on account of the adverse decision on appeal of the case under S. 87, Chota Nagpur Tenancy Act, and also as there was no second appeal allowed in law after that decision.

In this view, as well as because it is conceded that the present case will be governed by the old Act as it stood previous to the amendment of Ss. 87 and 258 in 1920, it is unnecessary to discuss the effect of that amendment. We are however clearly of the opinion that the civil Court was competent to deal with the suit instituted by the plaintiff in 1921 and the compromise arrived at in that suit was valid and binding upon the parties. Even assuming that prayer (d) in the plaint standing by itself offends against the provisions of S. 258 we do not see how the compromise can be held to be not binding on the parties. The plaint of the suit must be read as a whole, and if the Court was competent to try the suit, it was also competent to record the compromise. The particular clause of the compromise which is said to be objectionable runs thus :

That some of the plots within the aforesaid share, which has been entered as raiyati of some of the defendants as shown in the schedule attached to the petition, shall remain in their possession and that they, the defendants, shall retain possession over them as raiyats on payment of rent.

It is said that this clause created a new tenancy and so the compromise required registration under S. 17, Registration Act. The argument again pre-supposes that the compromise decree, so far as this clause of the petition of compromise is concerned, was without jurisdiction, but even if we assumed this, we could not accept the contention that it required registration. We find that the compromise was arrived at before the amendment of the Registration Act in the year 1929 and therefore under S. 17, Cl. (vi), it was not necessary to register the decree passed on the basis of the compromise. It is true that S. 17 (2) (vi) must be read subject to Cl. (1) (d), but in our opinion the disputed clause of the compromise did not amount to a lease or an agreement to lease but to a mere recognition of an existing right and therefore did not require registration. We think therefore that the judgment and the decree of the learned Judicial Commissioner should be set aside, and as none of the other issues were pressed in this Court we direct that the decree of the trial Court is to be restored. The appellant will get his costs in all the Courts.

D.S./R.K. *Decree set aside.*

A. I. R. 1936 Patna 615

MACPHERSON AND FAZL ALI, JJ.

(*Maharaja*) *Pratap Udai Nath Sahi Deo*—Decree-holder—Appellant.

v,

Baraik Lal Sahi and *others*—Judgment-debtors—Respondents.

Appeals Nos. 302 and 316 of 1934, Decided on 20th January 1936, from appellate orders of Offg. J. C., Chota Nagpur, D/- 29th September 1934.

(a) Chota Nagpur Tenancy Act (6 of 1908), S. 182—'Any other prescribed Court', meaning (*Quaere*).

Quaere. — Whether decree can be executed by civil Court as distinguished from Revenue Courts contemplated by the Act: 1914 *Cal* 611, *Doubted.* [P 615 C 2]

(b) Civil P. C. (1908), S. 38—Only passing decree or obtaining one on transfer gives jurisdiction.

A civil Court has no jurisdiction to execute a decree which is neither passed by it nor transferred to it. [P 616 C 1]

(c) Chota Nagpur Tenancy Act (6 of 1908), S. 181—Decree transferred to civil Court—Limitation applicable to execution application is S. 181 and not liberal limitation obtaining on civil side.

Where a decree is passed in a suit for rent under the Chota Nagpur Tenancy Act, even though it is transferred to civil Court for execution, the operation of the more liberal provisions as to limitation obtaining in civil Court cannot be attracted. The execution application is governed by S. 181. [P 616 C 1, 2]

(d) Chota Nagpur Tanancy Act (6 of 1908), Ss. 208, 210 (3)—Act is complete code in itself.

The Act, like Bengal Act 1 of 1879, is a complete code in itself, and it contemplates that all decrees passed by the Deputy Commissioner in suits for arrears of rent are decrees passed under the Act irrespective of the manner in which such decrees may be executed. If the decree cannot be executed under S. 208, the decree-holder may with the permission of the Deputy Commissioner proceed against any other property moveable or immoveable of the judgment-debtor, a special procedure adapted from the Code of Civil Procedure being prescribed S. 210 (3) for executions in which the decree-holder is not entitled to the highly favourable procedure of S. 208. [P 616 C 1]

B. C. De—for Appellant.

Macpherson, J.—In appeal No. 302 the Maharaja of Chota Nagpur assails the decision of the Judicial Commissioner affirming the finding of the Munsif of Ranchi that the application made by the appellant in 1934 for execution of his decree in a suit for rent obtained on 26th November 1925, in the Court of the Deputy Collector of Ranchi, was barred by limitation under the provisions of S. 181, Chota Nagpur Tenancy Act. The decree was passed against defendants in a suit for the rent of the tenure consisting of village Fulsuri and half of Hurhuri. When execution under S. 208, Chota Nagpur Tenancy Act (hereafter designated the Act), was taken in the Court in which the decree was passed, the application was rejected on the ground that as all persons interested in the tenure had not been parties to the suit, the provision was not applicable. Thereupon, instead of applying under S. 210 (2) of the Act, the decree-holder applied to the Deputy Commissioner of Ranchi for the transfer of the decree for execution to the Munsif of Ranchi. This application was apparently made in view of an obiter dictum in 18 C W N 170 (1) to the effect that it was open to a decree-holder whose decree could not be executed as a rent decree to have it executed by the ordinary civil Court as a decree for money against the judgment-debtor; and that could be done if a proper application is presented to the civil Court competent to execute such a decree. S. 182, Chota Nagpur Tenancy Act, lays down :

A decree or order passed by a Deputy Commissioner under this Act may be executed either by his own Court or by any other prescribed Court.

Notification No. 2704 T. R., dated 21st October 1909, prescribes that a decree or order passed by the Deputy Commissioner may be executed either by his own Court or by any Court to which the Deputy Commissioner of the district transfers the application for execution. The Deputy Commissioner of Ranchi doubted, not without reason, whether the Court (other than his own Court) referred to in the notification included the Court of a Munsif, meaning thereby a civil Court as distinguished from the revenue Courts contemplated by the Act and rejected the decree-holder's application for transfer to the Munsif. The decree-holder then presented his application for execution direct to the Court of the Munsif and on his fourth application presented in 1934 the order now impugned was passed rejecting his claim that in the civil Court he was entitled to a limitation of twelve years. The question of jurisdiction was not con-

1. Chandra Nath Tiwari v. Pratap Udai Nath Sahi Deo, 1914 Cal 611=23 I C 105=18 C W N 170.

sidered. The appeal must fail on various grounds. The most obvious of them is that the Munsif had no jurisdiction. The Deputy Commissioner of Ranchi had not transferred the decree to the Court of the Munsif. The Munsif of Ranchi is indeed ex officio a Deputy Collector, but it was never contended that the decree had been transferred to him as Deputy Collector and the proceedings in execution were in fact conducted throughout on the civil side and not on the revenue side. Now under S. 38, Civil P. C.:

> A decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution.

Manifestly the Munsif of Ranchi had even as a civil Court no jurisdiction to execute a decree which he had not passed and which had not been transferred to him. Apart from that the Deputy Commissioner appears, as already indicated, to have jurisdiction under the notification to transfer only to Courts under the Act. Again on the question of limitation S. 181 lays down :

> No application for the execution of a decree or order passed by the Deputy Commissioner under this Act shall be entertained unless such application be made within three years from (a) the date on which the decree or order is signed.

It was contended that a decree is not passed under the Act unless it is what is sometimes called 'a rent decree', that is such a decree as is capable of execution under S. 208. But there is no basis for an interpretation that a decree is not passed under the Act unless it is capable of execution by the special method set out in that section. The Act, like Bengal Act 1 of 1879, is a complete code in itself and it contemplates that all decrees passed by the Deputy Commissioner in suits for arrears of rent are decrees passed under the Act irrespective of the manner in which such decrees may be executed. If the decree cannot be executed under S. 208, the decree-holder may with the permission of the Deputy Commissioner proceed against any other property moveable or immoveable of the judgment-debtor, a special procedure adapted from the Code of Civil Procedure being prescribed by S. 210 (3) for executions in which the decree-holder is not entitled to the highly favourable procedure of S. 208. Finally as the decree was passed under the Act (though it is one not entitled to the most favoured procedure in execution), the application in 1934 was clearly barred under S. 181. Even if the decree could have been executed in a civil Court by transfer, it seems doubtful whether operation of the more liberal provisions as to limitation obtaining therein would have been attracted. The appeal fails and is dismissed.

Appeal from Appellate Order No. 316 *of* 1934.

Mr. B. C. De for the same appellant stated that respondent 1 is dead and he would ordinarily proceed against the others, but that if the decision in M. A. 302 of 1934 is against him, he will not press the appeal. Appeal No. 302 has been dismissed. This appeal is accordingly dismissed ex parte without costs.

Fazl Ali, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1936 Patna 616

WORT, AG. C. J. AND DHAVLE, J.

Khartar Shah and *another*—Decree-holders—Appellants.

v.

Shyamlal Singh and *another*—Judgment-debtors—Respondents.

Appeal No. 38 of 1933, Decided on 14th April 1936, from order of Sub-Judge, Jamtara, D/- 12th November 1932.

Civil P. C. (1908), S. 11 and O. 21, R. 58—Execution proceedings—Objection by *A*—Court positively deciding *A* to be representative of judgment-debtor—Decision held res judicata—Whether it was incumbent on *A* to take action contemplated by O. 21, R. 58 when case was subsequently struck out partly satisfied on compromise petition of parties was beside point.

The doctrine of res judicata applicable to execution proceedings does not rest on S. 11, Civil P. C., and distinctions are sometimes made between positive decisions and mere dismissals for default. So where in execution proceedings the question to be determined was whether *A* was representative of the judgment-debtor and not a question of whether the property had been properly attached ; and the Court positively decided that *A* was representative of the judgment-debtor, the question being under S. 47, Civil P. C., was, in the absence of the reversal by way of appeal, res judicata. This being so the question whether it was incumbent on *A* to bring an action contemplated by O. 21, R. 58 when subsequently to the decision the case was struck out partly satisfied on the compromise petition of the parties, was beside the point : 1924 *Cal* 744 and 1930 *Pat* 390, *Disting.* ; 1934 *All* 267, *Ref.* [P 618 C 2; P 619 C 1, 2]

S. M. Mullick and *S. C. Mazumdar*—for Appellants.

G. P. Das—for Respondents.

Wort, Ag. C. J.—This matter came before this Court on 27th February 1934,

and was heard ex parte, that is to say, in the absence of the respondent. The Chief Justice and my brother Dhavle on that occasion held that the former decision of the Court in the execution case was res judicata. The matter was reinstated for the reasons which I have indicated and the respondent is now represented by Mr. Sushil Madhav Mullick. In my judgment the matter is a relatively simple one and is determined on equally simple considerations, the chief of which is the question of the order of sequence of the petition of the respondent which was dated 29th November 1928, and the order of the Subordinate Judge of Jamtara made in Execution Case No. 12 of 1928 and bearing the same date. The substance of the matter is stated in great detail by the learned Judge in the order to which I have referred, but it is necessary perhaps to mention one or two facts for the purpose of the determination of the question which arises in this appeal. A money decree had been obtained on 23rd March 1926, against one Shyam Lal Singh for a sum of Rs. 7,581 and on 22nd May 1928, an execution case was started. An objection was taken out by the judgment-debtor or his representative. I put it in that form purposely and for a reason which will in a moment appear. On some date prior to that, that is to say on 10th January 1923, Shyam Lal Singh had executed what was called a deed of assignment in favour of the present respondent Thakur Madhusudan Singh for the purpose of paying off the debts of the assignor and after that purpose had been effected to return the property to the assignor. It is not necessary perhaps to mention it but I propose just to refer to the fact that in March of 1927 Madhusudan Singh found it necessary to bring an action against the assignor by reason of the fact that he had been refused possession.

Ultimately the objection case to which I have made reference, which was taken in the execution case on 22nd May 1928, was decided on 29th November 1928, a date to which I have already referred, against the respondent, and the effect of that decision was that Madhusudan Singh was the representative of the judgment-debtor. It is necessary perhaps to notice the questions to which the learned Judge in deciding that objection case addressed himself. One was that the decree was against Raja Shyam Lal Singh alone and not against Thakur Madhusudan Singh; the second was, Thakur Madhusudan Singh is not the representative of Shyam Lal Singh, and the third that the decretal amount is not a charge on the properties assigned by Raja Shyam Lal Singh to Thakur Madhusudan Singh. They were questions, as I say, to which the learned Judge addressed himself and which were the substance of the objections that were taken by the present respondent. Now if the deed of 10th January 1923 was in a sense a conveyance of the property to Thakur Madhusudan Singh with an undertaking as a part of the consideration to pay off the debts of the assignor, I have little hesitation in coming to the conclusion that the learned Judge in deciding the objection case against the respondent was wrong. It is difficult in other words to see how Madhusudan Singh could possibly be described as representative of the judgment-debtor, but anything which I say with regard to that matter for the reasons which will presently appear, and by reason of the conclusion to which I arrive, is quite irrelevant. The fact remains that the case was decided against the respondent. In those circumstances the question arises whether the matter which was determined by the Subordinate Judge in the objection case is res judicata. It was so held I have stated by the judgment of this Court on 27th February 1934, and there has been no argument by the respondent who is now represented which would show that the conclusion arrived at in his absence was wrong. Mr. Sushil Madhab Mullick refers us to the provisions of O. 21, R. 58 and O. 21, R. 63, more particularly the latter. The provisions of O. 21, R. 63. are well-known. They are:

> Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive.

On going back to O. 21, R. 57, it is provided that:

> Where any property has been attached in execution of a decree but by reason of the decree-holder's default, the Court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date,

and upon the dismissal of such application the attachment shall cease. Now on 30th

November 1928, the Subordinate Judge made this order:

> Sale not held. Case struck out partly satisfied on the joint petition of the decree-holder and the three judgment-debtors.

I should have stated a fact which I omitted to state earlier, namely, that on 30th November 1928, in pursuance of a compromise entered into between the parties the respondent had paid to the decree-holder a sum of Rs. 3,000. As a result of the order to which I have referred and by reason of the effect of O. 21, R. 57, the attachment would cease, and it is the contention of Mr. Mullick that once attachment ceased there would be no occasion for him to bring an action which he otherwise would have done to establish his right to the property. In connexion with this a decision of the Calcutta High Court in 51 Cal 548 (1) is relied upon. There Rankin, J. as he then was, and Page, J. referred to the argument which is now addressed to us by Mr. Mullick and held that the action contemplated by O. 21, R. 58, was maintainable, although brought more than a year after the claim case had been dismissed but in circumstances such as exist in the present case, namely, the attachment had ceased within that year. The answer to the argument based on that decision is that the case referred to dealt with the limited question of whether the action was within time. Another decision to which reference is made is a Full Bench decision of the Allahabad High Court in 56 All 537 (2). The main question which there had to be decided was:

> Whether on the attachment having ceased to exist within the period of one year, from the dismissal of the objection, it is no longer incumbent upon the claimant to file a suit for a declaration of title to the property in order to avoid the conclusiveness of the order in the claim case, and whether the order in the claim case ceases to be conclusive as between the decree-holder and his representative, etc.

That was the question stated for the decision of the Full Bench. The learned Chief Justice there discusses the meaning of the expression "shall be conclusive," but during the course of the judgment he makes this observation:

> It seems to me unnecessary to express any opinion as to whether, if any order is passed against the decree-holder releasing the property from attachment and the decree-holder voluntarily gets his own application dismissed, he would still be entitled to re-agitate, the question on filing a fresh application for execution. It may well be that although there is no bar under this rule, there is a bar on account of some general principle of res judicata.

The circumstances there contemplated were that the attachment order had been passed against the decree-holder releasing the property from attachment and the decree-holder had voluntarily got his own application dismissed. In so far as the decision which is in any way relevant to the discussion before us, there is an indication that the principle of res judicata would apply. It seems to me, as I stated at the commencement of my observations, that the matter depends upon one or two facts. I stated the substance of the objection raised before the Subordinate Judge and it is quite clear that the question he had there to determine was, whether the respondent was the representative of the judgment-debtor and not a question of whether the property had been properly attached. If that question arose, it was only identical to the main question; it could only be decided that the property was rightly attached, if it had been held, as it was held ultimately, that the respondent before us was the representative of the judgment-debtor. In my opinion that matter comes clearly within S. 47, Civil P. C., and, therefore, whether it was incumbent upon the objector to bring an action, an action contemplated by O. 21, R. 58, in my opinion is quite beside the point. So far as the other question, which seems to determine this matter, is concerned, it depends upon whether the order in the objection case was made first or before or at some time when the compromise petition was filed. It is impossible to say that the respondent here has been taken by surprise and we should have imagined that had there been any substance in the case and the order of the Subordinate Judge was made after the compromise had been filed and that the execution objection had been disposed of on the basis of that compromise, we should have had some evidence before us in the nature of the order sheet which would have established that point.

But it would appear, and it seems to me the only conclusion at which we are entitled to arrive in this case, that the order of the Subordinate Judge of 29th

---

1 Najimunnissa Bibi v. Nacharuddin Sardar, 1924 Cal 744=83 I C 233=39 C L J 418=51 Cal 548.

2. Habib Ullah v. Mahmood, 1934 All 267=148 I C 676=56 All 537=1934 A L J 19 (F B).

November 1928, was made by him before the compromise was brought to his notice, presumably on 30th November 1928, the date upon which the order striking out the execution case was made. It is impossible to assume that the Judge did what he ought not to have done in the circumstances, had the fact been that the compromise was brought to his notice and that the execution case was disposed of on those terms which would have obviated the necessity of delivering any order in the matter. If it had been so, the execution case would have been disposed of on the terms of the compromise and it would have been unnecessary for him to come to any determination of the question of whether the respondent was the representative of the judgment-debtor. In other words the order of the Subordinate Judge was made prior to the hearing of the compromise petition before him and that once having made that order and having determined the question under S. 47, Civil P. C., in the absence of the reversal by way of appeal of that order, the matter stands as res judicata. In my opinion the appeal should be allowed with costs and we direct that the sale be confirmed.

Dhavle, J.—I agree. It is not as if the respondent had merely filed an application under O. 21, R. 58, and as if the lower Court found it unnecessary to pass any orders on that application because of the compromise between the parties, as a result of which the execution case was struck off and the attachment itself came to an end. The order passed by the learned Subordinate Judge on 29th November 1928, shows that he also had before him at that time another application made by the respondent under S. 47, Civil P. C. It is true that too much importance ought not to be attached to the particular labels attached to his applications by the respondents ; but from the points laid down by the lower Court for decision in connexion with the two applications of the respondent objecting to the execution, it is perfectly clear that one of the questions raised before him on that occasion was whether or not Thakur Madhusudan Singh was not the representative of Shyam Lal Singh, a question which arose and could only have been dealt with under S. 47 of the Code. The doctrine of res judicata applicable to execution proceedings does not rest on S. 11 of the Code, and distinctions are sometimes made between positive decisions and mere dismissals for default. In the present case there was no mere dismissal for default, but on the contrary the question whether Thakur Madhusudan Singh was not the representative of Shyam Lal Singh which was directly raised by the respondent, was dealt with by the lower Court and decided adversely to the respondent.

It seems to me impossible to ignore the force of that decision whether right or wrong as res judicata on general principles. This is quite irrespective of whatever may be the respondent's position in relation to the proceedings under O. 21, R. 58. When I dealt with this matter on a previous occasion, and this was in the absence of the respondent, reference was made to a decision of this Court in 1930 Pat 390 (3). Reference has been made to that decision on the present occasion also, but as I then pointed out, that decision is entirely distinguishable on the facts because in that case there was no previous order passed by the executing Court constituting res judicata as between the parties. In the present case we have such an order, to say nothing of the undisputed facts that there was a compromise between the parties which was filed in this case and that in accordance with that compromise the respondent paid Rs. 3,000 to the decree-holder and undertook to pay the balance in further instalments. The appeal must therefore succeed with costs, here and below, and the sale stands confirmed.

D.S./R.K. *Appeal allowed.*

3. Jagat Narain Singh v. Sripati Nath Roy, 1930 Pat 390=129 I C 892.

A. I. R. 1936 Patna 619

COURTNEY-TERRELL, C. J., AND SAUNDERS, J.

Satyabadi Sahu and *others*—Judgment-debtors—Appellants.

v.

Mani Sahu—Decree-holder—Respondent.

Appeal No. 12 of 1935, Decided on 7th January 1936, from original order of Sub-Judge, Cuttack, D/- 15th August 1935.

Decree — Adjustment — Judgment-debtor agreeing to do something in future—Application to record adjustment—Decree can be extinguished—Such agreement need not be in writing.

There is no reason why a decree should not be extinguished by a new contract in which the judgment-debtor agrees to do something in the future if the decree-holder chooses to accept the contract in the place of his rights under the decree. By the fresh agreement to do something in future, there is no modification of an old agreement under the decree, it is merely agreed that the decree-holder shall abandon his rights under the decree. There is nothing in S. 92, Evidence Act, and there is nothing in the Contract Act to necessitate that such an agreement should be in writing : 1933 *Mad* 28 and 1935 *Bom* 303, *Rel. on*; 1922 *All* 13, *Dissent*.

[P 620 C 2 ; P 621 C 1]

B. N. Das—for Appellants.

Subba Rao and *H. Sen*—for Respondent.

Courtney-Terrell, C. J.—This is an appeal from a decision of the Subordinate Judge in execution. The respondent had obtained a decree against the appellants on bahi khata account and subsequently there was a compromise by which it was arranged that the appellants should pay a sum of Rs. 11,500. The appellants later applied to the learned Judge to investigate their allegation on their petition that they had entered into an arrangement with the respondent by which the decree was adjusted, the allegation being that a new contract had been entered into between the appellants and the respondent by which it had been agreed that the appellants should for a certain sum of money assign a certain property to the respondent. The learned Judge however declined to call upon the respondent to show cause why the alleged adjustment should not be recorded holding that inasmuch as the contract alleged was to do something in the future that could not be considered an adjustment under O. 21, R. 2. From time to time the Courts of India have given attention to the point noticed in the opinion of the learned Judge and for a time there was a current of decisions in some of the High Courts that a contract to perform something in the future could not be an adjustment within the meaning of O. 21, R. 2. That view however may now be considered obsolete. Certainly I would be unwilling to follow the earlier arguments in some of the High Courts, notably that of Piggott and Walsh, JJ. in 64 I C 990 (1), where one of the learned Judges, but not the other, took the view that contracts to perform acts in the future were not within the meaning of O. 21, R. 2. The same learned Judge expressed the opinion that inasmuch as the contract relied upon was an oral contract and inasmuch as the decree was in writing, the matter was governed by S. 92, Evidence Act, and the evidence of an oral contract to modify a written contract was not admissible. That view was not followed except in one insignificant case and was not followed by the other High Courts in India. Indeed it has been many times expressly dissented from.

In my opinion the clearest and the correct pronouncement of the law is in the judgment of the Madras High Court delivered in 1932 by Reilly and Anantakrishna Ayyar, JJ. in 56 Mad 198 (2), and after a careful review of the authorities the learned Judges point out that there is no reason why a decree should not be extinguished by a new contract in which the judgment-debtor agreed to do something in the future if the decree-holder chose to accept the contract in the place of his rights under the decree. The same view was taken by Broomfield, J. in 1935 Bom 303 (3). In his decision the learned Judge carefully reviews the many earlier authorities on this point and agrees with the view expressed by the decision to which I have just referred. It would appear that the point of view that an agreement to do something in the future cannot be considered as an adjustment coming under O. 21, R. 2 arose out of the earlier decision of Walsh, J. in which he had used the expression that an 'inchoate' agreement could not be an adjustment. By the words 'inchoate agreement' I understand an agreement which has not been completed as an agreement. It is hardly necessary perhaps to deal with the proposition that an incomplete agreement cannot be an adjustment for it is not an agreement at all. There is a very pronounced distinction between the completion of the agreement and the completion of the acts which are to be performed in fulfilment of the agreement as

1. Lachhmin Das v. Baba Kali Kamali Wala, 1922 All 13=64 I C 990=44 All 258=20 A L J 65.

2. Ramanarasu v Venkata Reddi, 1933 Mad 28=141 I C 429=56 Mad 198 = 63 M L J 598.

3. Kalyanji Dhana v. Dharmsi Dhana and Co., 1935 Bom 303=157 I C 646=37 Bom L R 230.

Reilly, J. pointed out in the Madras case to which I have referred, provided there be an agreement in fact. The point that the agreement has got to be carried out in the future is not a point against the agreement and is no point against its being considered as an adjustment of the decree. The point taken under S. 92, Evidence Act, is at the present day hardly worthy of serious consideration. By the fresh agreement we do not find a modification of an old agreement but merely that it is agreed that the decree-holder shall abandon his rights under the decree and there is nothing in S. 92, Evidence Act, and there is nothing in the Contract Act, to necessitate that such an agreement should be in writing.

The case therefore should go back to the learned Subordinate Judge in order that he may call upon the decree-holder to answer the allegation that the alleged agreement was come to. It may be that after investigation the learned Subordinate Judge may find that no such contract was in fact effected, in which case of course he will maintain his original decision. If, on the other hand, he should find that there has been in fact such a contract, then the contract whatever it is, if it is proved, should be recorded as the adjustment of the decree. The case should be disposed of by the learned Subordinate Judge as soon as he can possibly do so. I would allow the appeal with costs.

Saunders, J.—I agree.

B.D./R.K. *Appeal allowed.*

A. I. R. 1936 Patna 621

COURTNEY-TERRELL, C. J. AND SAUNDERS, J.

Keshab Prusti and *others*—Judgment-debtors—Petitioners.

v.

Ananta Mahanty and *others*—Auction-purchasers and Decree-holders—Opposite Party.

Civil Revn. Nos. 85 and 103 of 1934, Decided on 11th December 1935, from order of Collector, Cuttack, D/- 21st August 1934.

Orissa Tenancy Act (2 of 1913), S. 204 (1) (e) and (4)—Sales of holding held in execution of rent decree set aside by Sub-Deputy Collector—Appeal lies to Collector and he has jurisdiction to entertain it.

Where the sales of holdings, held in execution of a rent decree, are set aside by the Sub-Deputy Collector at the instance of some of the defendants in the rent suit, the order being one under S. 204 (1) (c), an appeal lies to the Collector under S. 204 (4) and he has jurisdiction to entertain the appeal. [P 622 C 2]

G. Jagati—for Petitioners.

P. Mahanty—for Opposite Party.

Courtney-Terrell, C. J. — These are two applications in civil revision of the same kind in two rent suits against a number of tenants who were joint defendants, in which decrees were passed. The holdings were sold and an application was made by some of the defendants in each case to set aside the sales on the allegation that the bidding at the sale had been done by persons who were in league with some of their co-defendants and that the sales were accordingly objectionable under S. 227, sub-s. (2), Orissa Tenancy Act, which forbids a judgment-debtor to purchase a holding sold in execution of a decree.

The matter came before the proper tribunal, that is to say the Sub-Deputy Collector who considered the case on its merits and ordered that the sales should be set aside. The purchasers then appealed to the Collector. An objection was taken to the admissibility of the appeal on the ground that no appeal lay and for that purpose reference was made to S. 204, Orissa Tenancy Act. The Collector decided that he had jurisdiction to entertain the appeal and he set aside the order of the Sub-Deputy Collector. Those applications are now made in civil revision of the Collector's order on the ground that he was wrong in his view that he had jurisdiction to hear the appeal. The argument addressed to us is as follows: Reference is made to S. 204, sub-s. (1), which states that there shall be an appeal from an order or decree passed under this Act "otherwise than an order passed after decree and relating to the execution thereof" to the Commissioner or to the Collector. Sub-s. (4) which also deals with the forum to which appeals shall lie is as follows:

> An appeal shall lie against any order specified in Cl. (b) or Cl. (c), sub-s. (1) (except an order which is not appealable under the Civil Procedure Code of 1908) to the Court to which an appeal from the judgment in suit would lie.

This was an order under the above-mentioned Cl. (c), sub-s. (1), and it is contended that whereas no appeal from an order holding that a sale is invalid on the ground that a judgment-debtor has pur-

chased at the sale is permitted by the Civil Procedure Code, there can be no appeal under this Act. That in substance is the argument which has been addressed to us. The answer, in my opinion, is simple. In the first place the whole of S. 204 and in particular sub-ss. (1) and (2) deal not with the class of order which shall or shall not be appealable, but with the tribunal to which appeals shall lie if under the law an appeal lies at all, and further because of the true meaning of the words "except an order which is not appealable under the Civil Procedure Code of 1908." Now by S. 104, Civil P. C., and by O. 43, only those orders which are made appealable under those parts of the legislation, are appealable. It is quite clear that as the Civil P. C. was passed long before the Orissa Tenancy Act, the Civil Procedure Code could not possibly have specified the orders under S. 227, Orissa Tenancy Act.

It is conceded that O. 43, Cl. (j) sets forth every kind of order under the Civil Procedure Code under which a sale may be set aside or under which an application to set it aside may be refused. It is clear therefore that under the Civil Procedure Code there is a provision for an appeal in every case in which a sale is set aside. The order does not include the reasons for setting aside sales, the setting aside of sales may be justified for a variety of reasons according to the circumstances in which the application is made, and the reasons form no part of the order. We have it therefore that under the Civil Procedure Code every order setting aside sales is appealable. That being so, order setting aside sales are appealable under the Civil Procedure Code of 1908, and therefore they are appealable under the Orissa Tenancy Act and do not come within the words in the brackets. The words within the brackets in sub-s. (4) may also be read as indicating that an appeal shall lie against any order unless an appeal is forbidden by the Civil Procedure Code and admittedly there is no clause in the Civil Procedure Code which forbids an appeal from an order made setting aside a sale under S. 227, Orissa Tenancy Act. But in any case sub-s. (4), S. 204 relates to the forum to which an appeal shall lie. In the event of the order being appealable it shall lie to the Court to which an appeal from the judgment in the suit would lie.

Now the suit out of which this execution lay was a rent suit. It lay in the Court of the Sub-Deputy Collector; the appeal lay to the Collector. Therefore the appeal from the order passed after the decree and relating to the execution thereof, as this was, will also lie to the Collector. The Collector's view of the matter was the correct one and his jurisdiction was properly exercised. It is admitted that no other point arises for discussion inasmuch as these are applications in civil revision and the question of jurisdiction is the only one which need engage us. I would therefore dismiss these applications with costs.

Saunders, J.—I agree.

R.M./R.K. *Applications dismissed.*

A. I. R. 1936 Patna 622

AGARWALA AND MADAN, JJ.

Ramsagar Gope and *others*—Accused—Appellants.

v.

Emperor—Opposite Party.

Death Ref. No. 32 and Criminal Appeals Nos. 210 and 217 of 1936, Decided on 24th September 1936, made by Offg. Addl. Sess. Judge, Muzaffarpur, D/- 20th August 1936.

Private Defence — Unlawful assembly attacking accused with dangerous weapons—Accused in defence inflicting fatal injuries on members of that assembly and causing death—Accused entitled to take all necessary measures for private defence—Too accurate a judgment of force to be used is not expected.

The accused, while in possession of land, were attacked by the opposite party with dangerous weapons. While defending themselves the accused inflicted fatal injuries on the persons of the opposite party, which caused their death. Accused were convicted under S. 300, I. P. C.:

Held: so long as accused were confronted by an unlawfal assembly they were entitled to deal with that assembly as a whole, so long as it continued to be dangerous to them. Though the accused inflicted fatal injuries on members of that assembly, yet they themselves had been dangerously attacked and were entitled to take all measures necessary for their own safety and they could not be expected to judge too accurately what was the exact amount of force necessary for that purpose. [P 625 C 2]

Manohar Lal and *Naqui Imam*—for Appellants.

Asst. Govt. Advocate—for the Crown.

Madan, J.—This order deals with a death reference by the Additional Sessions Judge of Muzaffarpur in the case of four

persons Ajodhya Gope, Pardip Gope, Siban Gope and Ramsagar Gope who have been sentenced to death for the murder of Siudhari Gope, Ramdhiraj Gope and Siaram Gope. There is also an appeal by these persons and by Prahlad Gope, Ramagar Gope and Ramjiwan Gope who have been sentenced to transportation for life under S. 302 read with S. 149, I. P. C. in the same connexion. The dispute arose over plot No. 1024, with an area of about 14 Kathas, which is situated in Balisahila which adjoins Kalyanpur where the parties live. Admittedly this plot was the sole landed property of one Tilak Gope who died some time prior to the year 1922. Thereafter there was a dispute between his heirs who belong to four branches of the family. The three murdered men and the witnesses Ramlakhan, Ramlachhan and Arjun belong to one of the branches which is discended from one Jaipal. Of the seven accused persons Ramjiwan, Siban and Pardip belong to the branch of Tufani, brother of Jaipal. Prahlad is the usufructuary mortgagee of the plot under Ramjiwan, and Ajodya, Ramagar and Ramsagar are related to Prahlad. According to the prosecution Siudhari came into possession of the entire plot as he was alleged to have paid the share of sradh expenses of Tilak. Subsequently Ramjiwan paid his one quarter share in those expenses and was given an equivalent share in the plot comprising a separate sub-plot on the north side. The rest of the plot remained in the possession of Siudhari. On 20th March last after sunrise Ramlakhan, Ramlachhan, Arjun and the three persons who were killed were harvesting the khesari crop grown by them in their portion of the plot.

Then the accused persons came in a mob armed with bhalas, gandasas and lathis and attacked them, with the result that the three persons above named were killed and Arjun and Ramlachhan were injured. During the occurrence two chaukidars named Kantlal and Dhanesar arrived on the scene whereupon the rioters fled. A first information was lodged by Kantlal at midday at the thana which is 12 miles distant from the spot. The defence was that Tilak was living with Ramjiwan who was given the entire plot, and afterwards he mortgaged it with Prahlad. On the day of occurrence Ramsagar and some labourers were harvesting khesari grown by the mortgagee when Siudhari and a mob arrived armed with bhalas, gandasas and lathis. Ramsagar was assaulted and then Prahlad came to the spot and was also assaulted. Afterwards other persons came and there was a free fight and people were hurt on both sides. A first information was lodged to this effect by Ramsagar. The Sub-Inspector of Police inquired into both the cases and submitted charge-sheets, and this case has been first brought to trial. The learned Additional Sessions Judge held that Ramjiwan and the mortgagees were in possession of the entire plot, but he convicted the accused, holding that in killing three persons they had exceeded their right of private defence. He accepted the prosecution version of the occurrence as substantially true.

As regards possession, the Additional Sessions Judge's finding is based on the evidence of the two chaukidars and the learned Assistant Government Advocate admitted that these were the most reliable witnesses and that it was difficult for him to challenge the finding on this point. This evidence, which I accept, shows that, whatever may have been the previous history of the dispute, the accused party were in effective possession at the time of the occurrence and had grown the khesari crop. The witnesses to the occurrence fall into two distinct groups, which have not been adequately distinguished by the learned Additional Sessions Judge. The first group consists of those persons who claimed that they were harvesting their khesari on the plot as well as one Raja Raut who says that he arrived during the occurrence. These witnesses have tried to make out that they were attacked while they were wholly unarmed and that they were quite ignorant as to how the persons were injured on the other side. They told a materially different story to the investigating Sub-Inspector and the learned Assistant Government Advocate did not rely on the evidence of these witnesses where it comes into conflict with that of the other group, which consists of the two chaukidars and one Raghunandan Mali who is mentioned as a witness in the first information. From the evidence of these witnesses it is, I think, possible to obtain a satisfactory account of what actually did occur. Raghunandan is a priest who lives at a village called

Hathauri which is near Kalyanpur. He says that he was collecting fees from his jajmans in Kalyanpur on the morning of the day of occurrence, and he does not appear to have any motive for not telling the truth about what he saw. He says that he saw Siudhari and seven or eight other persons on the disputed plot armed with bhalas and gandasas, and he also saw Ramsagar sitting there.

This evidence agrees with the account given in the written statement of the accused, namely, that the trouble arose when Ramsagar went with some labourers to the field and was opposed by the other side. Raghunandan states that Ramsagar was complaining that he had been assaulted, but evidently this assault was not of a serious nature. Shortly afterwards Ajodhya and other persons came armed to the spot, and an altercation arose between the parties. Raghunandan asked them not to fight, but as they were persistent in their attitude he went away. I should observe that according to Raghunandan, Prahald was among the persons who arrived at the spot with Ajodhya, but from the evidence of the chaukidars it appears that Raghunandan must have been mistaken on this point. The evidence of the chaukidars is to the effect that they and Prahlad were sitting at the house of one Rijhan Singh of village Dhanukhi which adjoins Kalyanpur on the further side from the scene of the occurrence. Ramsagar came to the spot and told Prahlad that a mob had gone to the field, and Prahlad and Ramsagar left for the place, which is about one mile distant, being followed by the chaukidars. Shortly after their arrival the fight began which led to the death of three men on the prosecution side. Kantlal is chaukidar of the village where the field is situated, and Dhanesar is chaukidar of a village called Sahila Baijnath. These persons appear to be the most disinterested witnesses in the case, and the prosecution is mainly dependent on their evidence, and the question is whether on that evidence the accused can be adjudged to have been guilty.

Now the learned Additional Sessions Judge, while discussing the question of the right of private defence, concluded that the accused had no such right as they did not take the help of a constable named Gaya Pande who is also a witness in the case. The evidence of the constable is that for some days past he had been deputed to the house of Rajhan Singh in connection with another dispute in which Rajhan Singh was concerned. At the time when Ramsagar arrived there he was not present as he had gone to answer the call of nature. Now the circumstances in which an aggrieved party is bound to have recourse to the public authorities instead of taking his own measures for the defence of his property are not always easy to determine; but at least it is lawful for a person which has seen an invasion of his rights to go to the spot and object. It is also lawful for such person, if the opposite party is armed, to take suitable weapons for his defence. I must hold that in such circumstances Prahlad and Ramsagar committed no offence in going to the field, and the chaukidars' evidence goes to show that when they arrived both sides were about equal in number and were similarly armed. It was argued by the learned Assistant Government Advocate that the evidence of Raghunandan indicates that both parties had gone to the spot determined to fight, and it was therefore immaterial which party was the actual aggressor and neither party had the right of private defence. The evidence however indicates that the parties must have been present on the field for about a quarter of an hour before the chaukidars arrived from Dhanukhi, which is at a distance of about one mile. Up to this time the accused had been entirely in the right, but they had not resorted to the use of force and indeed seem to have shown some amount of forbearance. I do not therefore consider that any inference can be drawn against the accused from their conduct prior to the actual occurrence. It is therefore a vital issue in the case, which of the two sides was the first to commit a breach of the peace after the arrival of Prahlad and the chaukidars. On this point the evidence goes to show that the fight began with an attack on Prahlad himself. The first information and the examination-in-chief of Kantlal are not definite on this point, nor do I find that it arose in the examination of Dhanesar before the committing Magistrate. It is probable that the importance of this point had not been realized at that time, and Dhanesar has explained that he was not questioned about it in that Court. Kantlal however stated in his cross-examination in the Ses-

sions Court that, although he himself was unable to say whether Prahlad was the first man to be injured, he did see Prahlad sitting injured in the field and then he saw the other persons receiving injuries. Dhanesar has stated that when Prahlad went to the field he found three persons assaulting him with lathis. Later on he states clearly that Prahlad and Ramsagar were first assaulted and then the fight went on on both sides. It was suggested for the prosecution that this witness has been induced to change his evidence in favour of the accused, and it does appear that at one time his own son was made an accused in the case although he was not sent up for trial. The difficulty is that if the evidence of the two chaukidars is not accepted on this point, there is no other evidence available to the prosecution, as the evidence of the interested witnesses must be adjudged to be wholly valueless on a point of this kind. Both the chaukidars have stated that they followed Prahlad to the spot at a distance of about 50 yards, and they were therefore in a position to see what took place, and in fact Kantlal claims that he actually intervened and took the weapons of some of the combatants. I therefore see no alternative to accepting the evidence of these witnesses, and find that the occurrence began with an assault on Prahlad. Up to this time the accused were in the right, and I must hold that when the assault began the prosecution party became unlawful assembly and the accused had a right of private defence.

The last question is whether or not the accused exceeded their right of private defence. Now the medical evidence shows that Prahlad received three incised wounds, all of which were described as grievous and might have been caused by bhalas or gandasas. His condition was so serious that his dying declaration was recorded. Ramsagar also received two similar wounds, one of which was grievous. On the other side grave injuries were inflicted and three persons were killed. In the case of Siaram there were six stab wounds, one of which perforated the pericardium and proved fatal. Siudhari had four stab wounds and died of shock resulting from these injuries. Ramdhiraj received one stab wound which was on the heart and was fatal. Arjun and Ramlakhan also received two injuries, each caused by a sharp weapon. The learned Additional Sessions Judge convicted the accused largely because he thought that the injured persons were not proved to have been actual assailants at the time when they received their injuries, and there was therefore no right of private defence as against those persons at that time. I am unable to support this view, as so long as the accused were confronted by an unlawful assembly they were entitled to deal with that assembly, as a whole, so long as it continued to be dangerous to them. It is true that the accused did inflict fatal injuries on members of that assembly, but they themselves had been dangerously attacked and were entitled to take all measures necessary for their own safety, and they could not be expected to judge too accurately what was the exact amount of force necessary for that purpose. The learned Additional Sessions Judge convicted some of the accused with the aid of S. 149 of the Code, on the finding that they had the intention to cause more hurt than was justified; but it is difficult to infer any such intention on the part of the persons who found themselves dangerously attacked. The defence is that the injuries were caused in the exercise of the right of private defence, and most of the injuries were punctured wounds on the front of the body such as might have been caused while the persons attacked were attempting to keep their assailants at bay.

According to Dhanesar, who is the only witness who has attempted to give a clear and detailed account of the occurrence, the three deceased persons were those who were actually assaulting Prahlad with spears; and Prahlad and his companions were entitled to take measures necessary to defeat that attack. Although 'these three persons were all mortally injured, the evidence is consistent with the view that they were injured in the exercise of the right of private defence; and, as I have said, the accused were in the right, and were entitled to take all measures necessary for defending themselves and their companions from an attack with dangerous weapons. As a result I am unable to hold that the accused either collectively or individually were guilty of exceeding their right of private defence, and I accordingly would reject the reference, allow the appeal and acquit the accused.

Agarwala, J.—I entirely agree. Upon the evidence of the chaukidars it is impossible to come to any other conclusion than that the accused were attacked while protesting against the prosecution party interfering with the khesari crop which belonged to the accused and had been grown by them. The fact that they had arms in their hands at the time of making their protest does not, in my view, make any difference, in the circumstances of the case. They had not attempted to use those arms until an attack was made on one of them by three of the prosecution party armed with bhalas. In these circumstances they were entitled to resist that attack with the weapons which they had with them and it is not possible to say that in doing so they exceeded the bounds of legitimate action. I therefore agree that the reference must be rejected, the appeal allowed and the convictions and sentences set aside.

M.D./R.K. *Conviction set aside.*

A. I. R. 1936 Patna 626

ROWLAND, J.

Chandreshwar Prasad Narain Singh and *another.*

v.

Arunendra Mohan Ghose.

Criminal Ref. No. 51 of 1936, Decided on 17th September 1936, made by Addl. Sess. Judge, Patna, D/- 20th August 1936.

(a) Criminal Trial—Revision—Reference to High Court—High Court will not interfere with decisions on facts upon evidence except for special reasons—Principle applies with greater force when proceeding is pending—Proceeding instituted and carried on regularly—Reference on ground of difference on question of credibility of witnesses—High Court would not interfere in revision.

It is not the rule of the High Court to interfere in revision upon reference to it with decisions on facts upon evidence. The objections of making a reference or to interfering in revision are still stronger when the proceeding is a pending proceeding instituted in accordance with law and carried on regularly and in which no error of procedure is suggested to have been committed by the trial Magistrate. [P 627 C 1]

Where a reference was made by the Additional Sessions Judge in a pending proceeding on the ground that he took a different view from the Magistrate on the question of credibility of witnesses :

Held: that that was not a ground on which the High Court would interfere in revision: 1931 *Cal* 619, *Rel. on.* [P 627 C 1]

(b) Criminal Trial—Presumption of innocence—Presumption ought not to be too easily displaced—In considering whether it is displaced or not it may be right to have regard to accused's position in life—But wealth, position or age cannot be said to immune him from consequences of actions if in fact they are criminal.

Every accused person is entitled to be presumed to be innocent till there is evidence of his guilt and this presumption ought not to be too easily displaced; it may be right to have regard to the position in life of the accused in considering whether it is displaced or not but this does not mean that by reason of wealth, position or age any subject is to be deemed to be immune from the consequences of his actions if in fact they are criminal. [P 627 C 1]

Sultan Ahmed, *K. P. Jayaswal* and *S. De*—In support of Reference.

B. K. Sen—Against Reference.

Order.—This is a reference by the Additional Sessions Judge of Patna in a pending proceeding instituted by Babu Arunendra Mohan Ghosh, complainant, alleging offences against four persons who on this complaint were summoned at first under S. 420, I. P. C. The complaint petition also mentioned another S. 406. The Magistrate heard evidence for the prosecution and there was some cross-examination of the witnesses before charge. The Magistrate by a considered order discharged two of the accused against whom he thought that no criminal offence had been made out, and as against the other two he framed charges under Ss. 406 and S. 406 read with S. 114.

The Additional Sessions Judge makes the reference in this pending case on grounds which may be briefly summarised by saying that some of the evidence of the complainant and his witnesses did not appear to the Additional Sessions Judge to be reliable and that while the facts prima facie appeared to establish that there had been an entrustment of the jewels to the accused Raja Chandreshwar Prasad Narain Singh, and while there might have been conversion the conduct of the accused appeared consistent with their having been actuated by no criminal intent and might be capable of an innocent explanation. In so far as the reference is made on the ground that the Additional Sessions Judge takes a different view from the Magistrate on the question of credibility of witnesses, that is ordinarily not a ground on which a High Court will be inclined to interfere in revision. I may refer to the observa-

tions of Rankin, C. J. in 58 Cal 1081 (1):

> It is not the rule of the Court to interfere with decisions on facts upon evidence, except for special reasons and the referring Courts have again and again been asked to make their references subject to this consideration.

Those observations and others like them have been made in cases where a Sessions Judge refers to the High Court the proceedings of a case in which he is dissatisfied with the final result. The objections to making a reference or to interfering in revision are still stronger when the proceeding is a pending proceeding instituted in accordance with law and carried on regularly and in which no error of procedure is suggested to have been committed by the Magistrate before whom those proceedings are pending. The learned Additional Sessions Judge feels a doubt as to facts deposed to by the witnesses because of some discrepancies. But such criticism is premature. It has not been ascertained whether those facts are admitted or denied by the accused, still less whether any rebutting evidence is forthcoming. The evidence of the prosecution witnesses is the only evidence before the Court and at present the facts alleged have not been even denied not to say disproved.

It appears that the principal accused is a zamindar of wealth, rank and position and of advanced age, and the Additional Sessions Judge may have thought that in the case of such a man every presumption ought to be made that can be made against putting a dishonest and criminal interpretation on his acts where it may be possible to hold that he has in fact incurred no more than a civil liability. Every accused person is of course entitled to be presumed to be innocent till there is evidence of his guilt; and the presumption ought not to be too easily displaced; and it may be right to have regard to the position in life of the accused in considering whether it is displaced. That is not to say that by reason of wealth, position or age any subject is to be deemed to be immune from the consequences of his actions if in fact they are criminal. This much however may be said in the present case. There is provision in S. 342, Criminal P. C., for the Court to examine the accused at any stage of any inquiry or trial for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him. In the present case it may be that the Magistrate holding the proceedings would have done well before framing charge to see whether the accused could give an innocent explanation of the facts and for that purpose to examine the accused and ascertain what according to them are the facts and what is the explanation they themselves offer. It is not a question of what explanation the ingenuity of lawyers can invent. Such imaginative suggestions are no substitute for the taking of a statement from the accused himself. So far the accused have neither admitted nor denied in these proceedings the entrustment, the conversion or the cheating alleged by the complainant. That being so, I regard the whole line of argument in favour of quashing these proceedings as preposterous in the literal sense of the term. I mean it is putting in front what should come after, or, as the saying is, placing the cart before the horse. After the accused give an explanation, the question can be considered whether such an explanation can be accepted.

The result is that the reference will be discharged and the record sent back to the Court of first instance for carrying on the proceedings. I may however observe without derogating from the discretion of the Magistrate in the conduct of the proceedings before him that it is still open to him to take an examination of either or both of the accused in accordance with S. 342 of the Code and according to what may appear to him as the result of that examination he may either continue the proceedings in their present form or may cancel, alter or amend the charge under S. 406 or substitute for it a charge under S. 403 or under S. 420 as the case may be, according as he may think fit.

D.S./R.K. *Reference discharged.*

1. Phakir Chand Mondal v. Madar Mondal, 1931 Cal 619=1931 Cr C 803=134 I C 915=32 Cr L J 1237=58 Cal 1081.

A. I. R. 1936 Patna 627

AGARWALA AND MADAN, JJ.

Suraj Dusadh and *others*—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 378 of 1936, Decided on 7th August 1936, from order of Addl. Sess. Judge, D/- 6th July 1936.

Penal Code (1860), S. 147—Charge under—Charge need not contain words 'force or by

show of force'—Word 'rioting' in the charge conveys meaning of force.

In charge under S. 147, I. P. C., it need not include the words "by force or by show of force" because the suggestion of force is contained in the word 'rioting' which is to be included in the charge. [P 628 C 2]

M. Yunus and *K. K. Banerjee*—for Petitioners.

Asst. Govt. Advocate—for the Crown.

Madan, J.—This is an application on behalf of ten persons who have been convicted in connection with an occurrence that took place over a bundh in the river Batray. It appears that this river which flows from south to north is divided in village Hansa by a pucca bundh which is constructed for some distance along the middle of its bed. The water to the right hand side of this bundh is diverted by means of a pyne to village Mathpa, where some of the prosecution witnesses reside. The water to the left side flows on and irrigates the lands of villages further down the river from some of which the applicants come. By an agreement between the parties each party may level the bed of the river at the southern extremity of the pucca bundh in order to facilitate the flow of the water. Shortly before the present occurrence some people from Mathpa put up a bundh which was an extension of the pucca bundh to the south, and the lower appellate Court came to the conclusion that this bundh was probably not in accordance with the agreement and intended to interfere with the right of the applicants to take water by the left side channel. The result was a gathering on both sides and an apprehension of a breach of the peace. The Sub-Inspector visited the spot, and deputed a constable, a daffadar and some chaukidars to prevent a breach of the peace and maintain the state of things as it was; he also submitted a report for action under S. 144, Criminal P. C. On the next morning, however, being 21st October last, a large mob of persons including the applicants is said to have come to the spot armed with various weapons, and to have cut the bundh in defiance of the police whom it threatened to assault, also caused 15 slight injuries to various persons who were present on the other side. On these allegations the applicants were charged under Ss. 147 and 152 read with Ss. 149 and 430, I. P. C. The defence denied the occurrence as alleged by the prosecution but both the Courts found that all the charges were proved against all the applicants and convicted them accordingly. In this Court the chief point of law that was urged related to the charge under S. 147, which is as follows:

That you were members of an unlawful assembly with the common object of cutting the Mathpa bundh in the river Batre and in prosecution of the same common object committed the offence of rioting.

Mr. Yunus contended that on this charge the applicants had only to show that the people of Mathpa had no right to put up the bundh in which case they could not have been found to have been guilty under the charge. He suggested that the charge should have included the words "by force or by show of force," but the suggestion of force is contained in the word "rioting" which is included in the charge, and the charge as a whole must be interpreted to mean that the mob cut the bundh in circumstances making them guilty of rioting. Both the Courts have found, on grounds which cannot be assailed, that the applicants were members of a mob which instead of having recourse to the proper authorities and in defiance of the police, cut the bundh, which had been constructed prior to the occurrence and thereby committed the offence of rioting. It was suggested that the applicants were actually misled by the form of the charge, but this suggestion is not supported by the elaborate written statement which they filed in the lower Court. We are satisfied that the charge was adequate and that the applicants were not misled, and we find no illegality in the conviction for rioting. The sentences also are not excessive. It was argued that the conviction and sentence under S. 430, I. P. C., cannot stand as this offence is stated the common object of the riot charge. Also it is doubtful whether such a conviction is maintainable when it has not been found that the prosecution side had a right to the water which they were taking by means of the bundh. We accordingly allow the application so far as the conviction under S. 430 relates.

It was also argued on behalf of the petitioners Ajab Narain Singh and Mahadeo Panday, who are said to have taken a leading part in the occurrence riding on ponies, that none of the police witnesses say that they saw any person there riding on a pony. The trying Court disbelieved the evidence of the identifying witnesses

as to the part taken by these two applicants in the occurrence, and this finding was not disturbed by the first appellate Court. When the trying Court has disbelieved almost everything that had been said by the identifying witnesses regarding these two applicants, we do not find that there was any sufficient basis for their conviction. The result is that we allow the application of Ajab Narain Singh and Mahadeo Pandey and acquit them under all the charges. The conviction under S. 430 is also set aside against all the applicants. The rest of the application must fail.

Agarwala, J.—I agree.

B.D./R.K. *Order accordingly.*

A. I. R. 1936 Patna 629

MOHAMAD NOOR AND ROWLAND, JJ.

Munga Lal—Defendant—Appellant.

v.

Sagarmal and *another*—Plaintiffs and *others*—Defendants—Respondents.

Appeal No. 1520 of 1932, Decided on 17th February 1936, from appellate decree of Dist. Judge, Monghyr, D/- 3rd August 1932.

(a) Limitation Act (1908), Art. 47—Scope—Title created prior to order under S. 145, Criminal P. C.—Art. 47 is not applicable.

The words "claiming under such person" mentioned in Art. 47, refer to those persons who claim from the person bound by the order under a title created subsequent to the order and not to those who claim under a title created prior to the order under S. 145, Criminal P. C.: 18 *Bom* 348, *Disting.*; 6 *Bom L R* 305, *Foll.*

[P 630 C 2]

(b) Mortgage—Redemption—Piece-meal redemption when allowed—Mortgage created either by statute or by contract inter partes—S. 60, T. P. Act is applicable to all mortgages.

When a mortgagee acquires a portion of the mortgagor's interest in the mortgaged property those who are interested in the remaining portion of it are entitled to claim redemption by payment of their quota only, the principle being that to the extent the interest of the mortgagor and the mortgagee is combined in one person, the mortgage must be taken to have become extinguished. Whether a mortgage is created by contract inter partes, under the T. P. Act, or by operation of law under S. 171, Bihar Tenancy Act, S. 60, T. P. Act will be applicable. If the mortgagee has acquired interest in the mortgaged property piece-meal redemption will be allowed.

[P 631C 1]

P. C. Manuk and *Phulan Prasad Varma*—for Appellant.

P. R. Das, *K. Husain* and *K. N. Lal*—for Respondents.

Mohamad Noor, J.—The suit out of which this appeal has arisen was instituted by the plaintiff-respondents for recovery of one-half share in about fifty bighas of land comprised in khata No. 419 of village Murar. In the settlement record of 1904 this khata was recorded in the name of two tenants Sri Lal and Devi Prasad. Sri Lal is represented by the defendants third party and Devi Prasad and his son are the defendants second party. The plaintiffs are the purchasers of half this khata in execution of their mortgage-decree, dated 14th March 1925, based upon a mortgage executed by Devi Prasad on 10th February 1920. The sale took place on 13th November 1926, and a writ of delivery of possession was formally served on 9th August 1927. But the plaintiffs were not allowed to take possession of the land by the defendants first party who claimed to have purchased on 27th August 1920, the entire land of the khata in execution of their own mortgage decree based upon a mortgage executed by Sri Lal alone on 28th July 1911. A preliminary decree for sale in favour of the defendants first party was passed on 9th November 1919, and made final on 27th August 1920. The plaintiffs have, therefore, instituted the present suit for recovery of possession on the basis of their title.

It is clear from what I have stated that the main controversy between the parties was whether the earlier purchase of the entire holding by the defendants first party should prevail against the later purchase of half of the holding by the plaintiffs. The question depended upon the fact whether Sri Lal who mortgaged the entire holding to the defendants first party was entitled to do so, or whether in fact half of it belonged to Devi Prasad who mortgaged it to the plaintiffs. Now in the suit instituted by the defendant first party to enforce their mortgage Devi Prasad was impleaded as defendant and it was alleged by the defendants first party, plaintiffs of that suit, that Devi Prasad had attested the mortgage which Sri Lal executed in their favour. The question whether Devi Prasad had any interest in the mortgaged property or whether the whole of it belonged to Sri Lal was left undecided at the time of the passing of the preliminary decree, but the suit was dismissed against Devi Prasad. It was after the dismissal of this suit against him that Devi Prasad created the mortgage in

favour of the plaintiffs. The date of the dismissal of the suit was 9th November 1918, and the date of the mortgage as already stated was 10th February 1920.

On the main issue of fact both the Courts below have held that Devi Prasad was owner of half of the holding and that Sri Lal was not entitled to mortgage the whole of it to the defendants first party. It, however, transpired in the course of the trial of the suit that the defendants first party after their mortgage and before the institution of their suit to enforce it had to pay up a decree for rent against the holding and by virtue of section S. 171, Ben. Ten. Act (now Bihar Tenancy Act) had acquired another mortgage on the entire holding in respect of the money so paid for the satisfaction of the rent decree and that in fact they had included this amount of Rs. 280-3-0 in their mortgage suit. The Courts below decreed the plaintiffs' suit for possession subject to the payment of half of the money paid by defendant 1's party for saving the holding from sale together with interest at 12 per cent. per annum from the date of the payment. Defendant 1's party have preferred this second appeal.

The finding of fact about the title to half of the land being in Devi Prasad and therefore in the plaintiffs by virtue of their purchase in execution of their decree on the basis of the mortgage created by Devi Prasad, has not been and cannot be questioned in second appeal. Mr. Manuk however has urged two points in support of the appeal. One is that the suit was barred by limitation under Art. 47, Lim. Act, and the second that the mortgage of defendant 1's party by virtue of S. 171, Ben. Ten. Act, was indivisible and the Courts below were wrong in ordering the payment of half of the money only. It was also mildly contended that by virtue of the sale in execution of the mortgage decree, which included the claim of the money paid towards the satisfaction of the rent decree, the right of redemption of Devi Prasad or his transferee, if any, had become barred. In order to understand the point of limitation urged by learned counsel it is necessary to state some more facts. After defendant 1's party had purchased the property in execution of their mortgage decree there was some difficulty about the possession of the land, and in a proceeding under S. 145, Criminal P. C., to which Devi Prasad, the mortgagor of the plaintiffs, was a party, the criminal Court decided the question of possession in favour of defendant 1's party on 13th June 1922. The present suit having been instituted on 8th June 1928, it was contended that it was barred by the special article of limitation already referred to. This plea of limitation was overruled by the Courts below and in my opinion they are perfectly correct. Art. 47, Lim. Act, prescribes three years' period of limitation for suits

> by any person bound by an order respecting the possession of immoveable property made under the Criminal Procedure Code of 1898, or the Mamlatdars Courts Act, 1906, or by anyone claiming under such person, to recover the property comprised in such order.

It is obvious that the present plaintiffs were not parties to that criminal proceeding, and in fact they could not have been parties to it, which was instituted at a time when they had no higher right than that of a simple mortgagee and as such were not entitled to claim possession of the property. In a proceeding under S. 145 the only question which a Magistrate has to decide is the possession of the disputed property on a certain date. The question of title is outside the scope of that proceeding. At that time the only person who claimed possession adversely to defendant 1's party was Devi Prasad, and not the plaintiffs who were only simple mortgagees. Therefore they are not bound by the order which was passed in that proceeding. The next question is whether they can be taken to be claiming under Devi Prasad who was obviously bound by that order. In my opinion the words "claiming under such person" mentioned in the article refer to those persons who claim from the person bound by the order under a title created subsequent to the order and not those who claim under a title created prior to the order. Any other interpretation will lead to anomalous results. It is obvious that the plaintiffs were not entitled to institute any suit for recovery of possession of the property within three years of the order. As I have said, the order was passed on 13th June 1922, and the plaintiffs purchased the property in November 1926, and the formal delivery of possession was issued in August 1927. In my opinion, the plaintiffs are not debarred from instituting the suit for recovery of possession as their right in the property as mortgagees came

into existence on the date of their mortgage and before the order. They cannot be said to be the persons claiming through Devi Prasad who was bound by that order. The learned counsel for the appellants referred us to a decision in 18 Bom 348 (1), where the observations are to be found at p. 354.

That was a case under the Mamlatdar's Courts Act, but the distinction between that case and the present one is obvious. There the plaintiff derived his title subsequent to the order from a man who was bound by the order. On the other hand there is a clear decision of the same High Court in 6 Bom L R 305 (2) where the facts were exactly similar and it was held that Art. 47 was not applicable. The next point urged was in respect of the order of the Courts below about the payment of only half of the money deposited by the defendants first party for the protection of the holding. No doubt, it is true that a mortgage is indivisible and is spread over the entire mortgaged property, but there are certain exceptions to this rule and one of these exceptions is mentioned in S. 60, T. P. Act. When a mortgagee acquires a portion of the mortgagor's interest in the mortgaged property those who are interested in the remaining portion of it are entitled to claim redemption by payment of their quota only, the principle being that to the extent the interest of the mortgagor and the mortgagee is combined in one person the mortgage must be taken to have become extinguished. Learned counsel contended that in this case the mortgage being based not upon any contract but under the statute the provisions of S. 60, T. P. Act, do not apply. S. 171, Ben. Ten. Act, only provides that the payment of money to save a holding or tenure from sale will create a mortgage by the operation of the law in favour of the man who pays it. But the rights and liabilities of the mortgagor and mortgagees will have to be governed by the law which applies to mortgages in general, and in my opinion under the circumstances of the case the plaintiffs were entitled to redemption on payment of only half of the money paid by the defendants first party.

It is true that the present suit was instituted as a suit for recovery of possession pure and simple and was not a suit for redemption, but there is nothing in law which prevents a Court from ordering possession on redemption if in the course of the trial it is found that the defendant is entitled to remain in possession of the property as a mortgagee till the mortgage is redeemed. Under these circumstances the Courts are entitled to grant a decree for possession subject to the plaintiffs redeeming the property by payment of the mortgage money. Several cases have been referred to by learned counsel, but none of them, in my opinion, is to the point. Under a clear provision of S. 60, T. P. Act, itself the mortgage has become split up by the defendant first party purchasing half of the holding and the plaintiffs are entitled to the decree in the form in which it has been given to them by the Courts below. I have said that it was mildly urged by learned counsel that the sale having taken place by virtue of a statutory mortgage on the whole of the property the right of redemption has become barred. The obvious answer to this contention is that in the mortgage suit of the defendants first party Devi Prasad, who had the right to redeem, was exonerated and the suit was dismissed as against him. His right of redemption was not lost, and the plaintiffs are entitled to redeem. These were the only points urged in the appeal, and none of them has any merits. I will dismiss this appeal with costs.

Rowland, J.—I agree.

B.D./R.K. *Appeal dismissed.*

1. Bapu Mahadaji v. Mahadaji Vasudeo, (1894) 18 Bom 348.
2. Amu Dada v. Dhondo Raghunath, (1904) 6 Bom L R 305.

A. I. R. 1936 Patna 631

VARMA, J.

Sheogobind Rai—Plaintiff—Appellant.

v.

Deonarayan Ahir and *others*—Defendants—Respondents.

Appeal No. 1363 of 1933, Decided on 27th August 1936, from appellate decree of Sub-Judge, 1st Court, Arrah, D/- 2nd September 1933.

Evidence—Admissibility — Admission of document—Party must get fair chance to produce evidence—Documents in possession of another Court—Requisition sent for these documents through trial Court—Refusal to take those documents on record by trial Court—Case should be remanded by appellate Court.

Where the question is as to whether the documents should or should not be taken in evidence by the appellate Court, one has to distinguish between two things : one, a request to the appellate Court to take in evidence documents rejected by the trial Court, and the other is a complaint that a party had not had a sufficient opportunity before the trial Court to produce all the evidence. In deciding such questions the only thing to be seen is whether the parties have had a fair chance of placing their cases before the Court or not. [P 633 C 2; P 634 C 1]

Where the documents sought to be adduced in evidence were not in the possession of the party but were in the possession of another Court and the party had to take the help of the trial Court in order to have those documents before the Court, but under such circumstances the trial Court refused to admit those documents:

Held: that the party wanting to produce them did not put up his case and so appellate Court should remand the case to get those documents filed : 1930 *Pat* 603, *Ref.*

[P 633 C 2; P 634 C 1]

Hareshwar Prasad Sinha, *Harians Kumar*, *Tarkeshwar Nath* and *R. J. Bahadur*—for Appellant.

D. N. Varma and *Rameshwar Prasad* —for Respondents.

Judgment.—The plaintiff is the appellant in this case. The suit was filed for a declaration that 1.50 acres of land covered by takhta No. 49 situate in mouza Nawar belonged to the plaintiff, and for recovery of possession of the land together with mesne profits. His case was that defendants 2 to 6 settled 23 bighas 6 kathas of land, including the disputed land, with the plaintiff at a rental of Rs. 17, and they also settled a similar area on a similar rent with defendant 1. The landlords, i. e. defendants 2 to 6, filed a rent suit (117 of 1927) against the plaintiff and defendant 1 jointly for recovery of arrears of rent of both the holdings of the plaintiff and defendant 1 at a rental of Rs. 101 and that suit was dismissed for default. There was another suit by them (375 of 1930) against the plaintiff and defendant 1 for recovery of arrears of rent for the years 1334 to 1337 Fs. at the same rate as was demanded in the previous rent suit. In the latter suit defendant 1 pleaded that his holding consisted of 43 bighas 4 kathas with a rental of Rs. 90 and that the plaintiff's holding (that is the plaintiff in this suit) was an area of 3 bighas 8 kathas covered by khata No. 60. That suit was disposed of on a compromise by defendant 1. Under the compromise the landlord plaintiff withdrew the suit against the present plaintiff and the possession of the present plaintiff was interfered with by defendant 1. It led to a proceeding under S. 145, Criminal P. C., which was disposed of and then defendant 1 dispossessed the plaintiff from the area of 2 bighas 8 kathas.

Defendants 1 to 4 alleged that defendant 1 took the settlement of 43 bighas 4 kathas and the plaintiff took settlement of 3 bighas 8 kathas separately and not as alleged by him, that he was in possession of half of 43 bighas odd. The learned Munsif dismissed the suit and the plaintiff went in appeal before the lower appellate Court. The lower appellate Court has confirmed the decision of the learned Munsif. Hence this second appeal. The only point urged in this appeal is that a certain number of documents which the plaintiff wanted to have brought before the trial Court were not taken into evidence by the trial Court and the lower appellate Court refused to take them in evidence at the appellate stage, or to remand the case to the trial Court for taking those pieces of documentary evidence into consideration and deciding the case after that. A few dates are important. The suit was filed on 30th November 1931. The petition for taking the documents in evidence was filed with certified copies of those documents on 25th August 1932. The order of the learned Munsif was: "Call for the papers as prayed for," the prayer being to call for certain papers from the District Judge's record room at Arrah. This shows that the learned Munsif did not think at that stage that the petition was filed very late. The Munsif who sent for the papers did not continue in seizin of the case because it appears from the order sheet (O. 16 of the trial Court) that the case was transferred to another Munsif, who ordered, on 10th December 1932, that the case would be taken up on 4th January 1933. On 4th January 1933 the defendants filed hazari.

The plaintiff filed a petition for time, but that petition was rejected on the ground that he should have taken steps for having the records before the Munsif at an earlier date. When the petition for time was rejected the plaintiff naturally filed hazari and the suit was taken up. After the day's work was over, on 4th January 1933, it appears that the Munsif agreed to let the plaintiff have a rubakar issued that day at the plaintiff's own risk. On the 5th January the plaintiff stated that the documents were ex-

pected that night and he wanted permission to file them as evidence, but by that time the evidence was already closed. On 6th January 1933 the plaintiff filed another petition stating that the documents had been despatched from the record-room of the District Judge of Arrah and he was expecting them on that day. Arguments were heard on that day, but the documents were not taken in evidence. As to what happened on 6th January 1933 clearly appears from the affidavit that has been filed by the plaintiff's advocate and a copy of which has been served on the other side and about which there is no counter-affidavit. In para. 20 the plaintiff alleges that the documents were received by the office of the Munsif on 6th January 1933 and were actually placed before the Munsif during the course of the argument but that he was pleased to reject the prayer for taking them into evidence.

After the judgment of the trial Court the plaintiff-appellant went in appeal to the lower appellate Court and one of the grounds taken before the lower appellate Court was that the documents sent for from the record-room of the District Judge of Arrah should have been taken into evidence and that the lower appellate Court should either take those documents in evidence itself or send back the case on remand to the trial Court for taking those documents in evidence. While dealing with that point the lower appellate Court evidently looked at the certified copies and came to the following conclusion :

> I find that those documents are not very material for the purpose of determining the question whether the disputed land is within the separate holding of the plaintiff or of defendant 1. Therefore I do not see any necessity of admitting those documents in evidence.

Then the learned Subordinate Judge goes on to deal with other pieces of evidence on the record, both oral and documentary. He has not however disposed of the other question as to whether the case should be sent down on remand to the lower Court for admitting those documents in evidence. Evidently he was considering the question whether the documents should be accepted by him on appeal. From this statement of facts it is clear that the plaintiff moved the learned Munsif for sending for the original document. The learned Munsif did not consider his petition frivolous or belated on 25th August 1932 and therefore he sent for the documents as prayed for. Although I was told several times by the learned advocate for the respondents that the appellant ought to have taken some further steps, I am not yet clear in my mind as to what the steps were that the plaintiff ought to have taken, once the letter had been despatched by the Munsif of Buxar to the District Judge's office at Arrah. The learned Munsif could very easily have rejected the application on the first day on account of that application having been filed late. Now O. 13, R. 2, Civil P. C., distinctly lays down that :

> No document filed at a date subsequent from the date mentioned in R. 1 shall be received at any subsequent stage unless good cause is shown to the satisfaction of the Court for the non-production thereof.

Evidently the cause shown was not unsatisfactory. The next rule of importance is that the Court may at any stage of the suit reject any document which he considers irrelevant or otherwise inadmissible after recording the ground for such rejection. The learned Munsif did not take the documents into evidence, because according to his idea they did not come before him in time. The lower appellate Court evidently looked at the documents and came to the conclusion that they were not material, but does not say that they were irrelevant or inadmissible. In a way the learned Subordinate Judge has given his opinion about the evidentiary value of those documents without having them on the record.

Various cases have been cited before me as to whether the documents should or should not be taken in evidence by the appellate Court. In the present case we have to distinguish between two things : one a request to the appellate Court to take in evidence documents rejected by the trial Court, and the other is a complaint that a party had not had a sufficient opportunity before the trial Court to produce all the evidence. Whatever may be the position with regard to the power of an appellate Court to take evidence at the appellate stage, so far as the facts of this case are concerned, there is no doubt that the trial before the trial Court has not been a fair one because the parties have not been allowed to put their respective cases properly before it. The strongest case cited by Mr. D. N. Varma for the respondents is one reported in

1924 Pat 517 (1). In that case a document which was rejected was sought to be filed and one of the Judges of this Court sitting singly ordered a remand. In the Letters Patent appeal against that decision of a Single Bench it was held that this Court should not have interfered with the discretion of the appellate Court in refusing to take additional evidence. The document in question was a letter from a certain person which was in possession of a party who sought to produce it at the appellate stage.

The learned Munsif had rejected that evidence on the ground that that evidence was produced at a late stage of the case. The first appellate Court agreed with the Munsif. The Single Judge ordered a remand, but in appeal under the Letters Patent it was held that when the discretion had been exercised, it should not have been interfered with in second appeal. In the present case the position is different as will appear from the narration of facts I have given. The documents sought to be adduced in evidence were not in the possession of the party. They were in the possession of the Court and they had to take the help of the trial Court in order to have those documents before the Court. As against that there is a later decision of this Court, 1930 Pat 603 (2), that if the trial Court remanded a case for evidence to be taken which was not allowed to be put in, that was not a matter which should be interfered with in revision. All these decisions are however on facts and circumstances of those cases. The whole thing to be seen is whether the parties have had a fair chance of placing their cases before the Court. In this particular case I am of opinion that the plaintiff did all that he could in order to produce those papers.

I would therefore allow this appeal to this extent : that the case will be sent back to the trial Court so that the plaintiff may be in a position to have the documents in question placed before the Court. The trial Court will take the documents into consideration and dispose of the case in accordance with law. It may be necessary for the respondents to produce some rebutting evidence in the case. They should not be debarred from doing that. There will be no order as to costs. Leave to appeal under the Letters Patent is refused.

P.D./R.K. *Case remanded.*

1. Mt. Taibunnissa Begum v. Jagdip Panday, 1924 Pat 517=78 I C 489.
2. Reazuddin Mian v. Sibnarain Saha, 1930 Pat 603=129 I C 82.

A. I. R. 1936 Patna 634

ROWLAND, J.

Sri Mahabirji and *others*—Plaintiffs—Petitioners.

v.

Ramnath Kasarwani — Defendant — Opposite Party.

Civil Revn. No. 146 of 1936, Decided on 26th August 1936, from order of Sub-Judge, First Court, Arrah, D/- 13th December 1935.

(a) Evidence—Admissibility of documents—Waiving necessity of formal proof, and objection to inadmissible evidence—Difference between—Objection to inadmissible evidence can be taken in appellate Courts.

There is a clear distinction between waiving the necessity for formal proof of a document, an objection which, if raised in the trial Court, might have been made good by the opposite party and objecting to the admission of evidence which the law forbids to be received. In the latter case acquiescence in the Court below is no bar to raising the objection in a superior Court : 1921 *Pat* 61, *Rel. on.* [P 635 C 1]

(b) Registration Act (as amended in 1929), S. 49—Unregistered instrument is admissible to prove collateral purpose not required to be effected by registered document.

An unregistered document affecting immoveable property may be received as evidence of collateral transaction not required to be effected by registered instrument : 35 *Bom* 438, *Ref.* [P 635 C 2]

Hareshwar Prasad Sinha—for Petitioners.

Saiyid Naqui Imam—for Opposite Party.

Order.—This is an application by the plaintiff who sued to recover house rent in respect of premises admittedly held by the defendant under the plaintiff. The defence was that the rate of rent was lower than that stated by the plaintiff, also that on the 8th July, 1933, four years' rent had been paid in advance to the plaintiff's agent Ramkumar Lal, in evidence of which payment the defendant produced a receipt, Exhibit C. The plaintiff did not admit this receipt to be genuine, and at the hearing he cross-examined the defendant and elicited from him that the payment was made on receipt granted on the 8th July 1933, the date which the receipt bears, in Arrah. The plaintiff then asked the

permission of the Court to rebut this evidence of the defendant by calling for the attendance register of the criminal Court at Sasaram which it was said would show that on the date of the alleged payment and receipt Ramkumar Lal was not in Arrah at all but was in Sasaram working as a typist in the criminal Court. The Small Cause Court Judge refused this application on the ground that it was made at a late stage. The plaintiff contends that the application should not have been refused for that reason in the circumstance of this case, explaining that if the application had been made earlier the defendant would have become aware that it was not safe for him to allege a payment made in Arrah on that date and he might have framed his evidence to agree with the entries in the attendance register. That may be so; but I cannot say that the Small Cause Court Judge committed any error of procedure in refusing to allow the plaintiff an opportunity of adducing rebutting evidence at a late stage of the case.

The other point taken is that the receipt, Exhibit C, was inadmissible in evidence being a document requiring registration under S. 17, Registration Act, and also coming within the definition of a lease under the Transfer of Property Act and purporting to create title in immoveable property. The opposite party urged as a preliminary objection that the document had been admitted as evidence in the Court below and an objection to its admissibility should not be allowed to be taken in revision. I do not think the preliminary objection can be sustained in face of the decision in[1] 1 P L T 702 (1). There is a clear distinction between waiving the necessity for formal proof of a document, an objection which, if raised in the trial Court, might have been made good by the opposite party and objecting to the admission of evidence which the law forbids to be received. In the latter case acquiescence in the Court below is no bar to raising the objection in a superior Court. The document itself recites letting of the house by the plaintiff to the defendant on a monthly rent of Rs. 10 as well as the fact of payment of Rs. 480 on account of rent. Had this been a suit in which the existence of the tenancy was in question, I should have no hesitation in holding that this paper was inadmissible to prove the existence of the tenancy. It is equally inadmissible to prove the existence of the tenancy. It is equally inadmissible to prove the rate of rent, because four years' rent being acknowledged it must be taken to be a document creating a tenancy for more than one year. The rate of rent, however, was established by other evidence to have been Rs. 10 at an earlier date, and there was no satisfactory evidence of letting at any higher rate.

Then the question arises whether the defendant is debarred from using this document not to prove any right of his in immoveable property but to prove a cash payment. The respondent relies on the proviso to S. 49, Registration Act, as amended in 1929. An unregistered document affecting immoveable property may be received as evidence of a collateral transaction not required to be effected by registered instrument. This amendment appears to have been made with a view to settle the conflict of decisions as to the cases in which documents prima facie requiring to be registered could or could not be used. Under the law, as it stood before the amendment, it had been held by the majority of the High Courts that an unregistered document could be used for certain collateral purposes. In particular, in 35 Bom 438 (2), it was held that an unregistered sale-deed, though it could not be relied on as passing any title to the property, could be used as proving a cash payment made at the time of its execution in a suit to recover the money. Prima facie it would seem that the new proviso in S. 49 recognizes and authenticates this interpretation of the law. But for the petitioner it is contended that the proviso refers only to proving a collateral transaction not required to be effected by registered instrument; and in the present case the receipt being for Rs. 480 does require registration under S. 17 (1) (c) as a non-testamentary instrument which acknowledges the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or

1. Mt. Sumitra Koer v. Ram Kair Chobey, 1921 Pat 61=57 I C 561=5 P L J 410=1 P L T 702.

2. Sambhu v. Nama, (1911) 35 Bom 438=12 I C 862=13 Bom L R 867.

interest. This might be applicable if the payment shown in the receipt was a premium for a lease; but I do not think that it is intended to apply to a mere payment of rent.

In the result I think that the receipt was admissible in evidence for the purpose of proving the cash payment and the application in revision must fail. The opposite party will get his costs: hearing fee two gold mohurs.

B.D./R.K. *Revision dismissed.*

A. I. R. 1936 Patna 636

ROWLAND, J.

Sarup Lal—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 441 of 1936, Decided on 11th September 1936, from order of First Class Magistrate, Darbhanga, D/- 13th June 1936.

(a) Bihar and Orissa Prevention of Adulteration Act (2 of 1919), Ss. 3, 10—Proceedings alleged to have been irregular by reason of absence of complaint by local authority—Irregularity is cured by S. 537, Criminal P. C.

Where proceedings under the Bihar and Orissa Prevention of Adulteration Act are alleged to have been irregular, by reason of an absence of complaint by a local authority or an authorized person required by S. 10, S. 537, Criminal P. C., provides sufficiently to cure that irregularity. [P 636 C 2]

(b) Bihar and Orissa Prevention of Adulteration Act (2 of 1919), S. 10—Prosecution under the Act—Question that prosecution was started without order or consent of local authority or that the Act has not been brought into force in the area by Government notification should be raised and determined in Courts of facts—They cannot be raised in revision.

In proceedings started under the Bihar and Orissa Prevention of Adulteration Act, the questions that the prosecution was started without the order or consent in writing of the local authority or that it has not been shown that the Act has been brought in force in the local area by a notification of the Local Government are questions which ought to be raised and determined before the Courts of facts and cannot be raised in revision. [P 636 C 2; P 637 C 1]

(c) Bihar and Orissa Prevention of Adulteration Act (2 of 1919), S. 4 (b)—S. 4 (b), Excep. (ii)—Before applying S. 4 (b) Court must determine whether foreign matter has been added fraudulently—Mere presence of foreign matter in small quantity is not necessarily offence.

Before applying S. 4 (b), in a prosecution under the Act, what the Court has to determine is that foreign matter or ingredient has been added fraudulently to the food. The mere presence of some foreign matter in small quantity is not necessarily an offence inasmuch as Excep. (ii) to S. 4 specially excludes the case where without fraud any extraneous matter has in the process of collection, preparation or conveyance become mixed with the food. The Court has to decide whether the admixture of the foreign matter is so large that it cannot be explained otherwise than by fraud. [P 637 C 2]

Syed Mehdi Imam—for Petitioner.

Asst. Govt. Advocate—for the Crown.

Order.—The petitioner was a salesman in a grocer's shop who was prosecuted and fined Rs. 30 under S. 3, Cl. (1), Bihar and Orissa Prevention of Adulteration Act of 1919, on the allegation that he sold suji which was not genuine. The Health Officer of Rosera Municipality went to the shop and purchased a sample of suji which, as provided in the Act was divided into parts each part being sealed separately and one part being sent to the Chemical Analyst for examination. The Chemical Analyst reported on the sample submitted to him that the suji in his opinion was not genuine. The Magistrate fined the accused and the appellate Court upheld the order. In appeal it is contended firstly that a prosecution is forbidden by S. 10 of the Act to be instituted without the order or consent in writing of the local authority or of a person authorized by the local authority in this behalf and that there is no such authority. This was a question of fact which ought to have been raised and determined in the Court of first instance. It would have been well if the trying Magistrate had of his own initiative examined the question whether there was the proper sanction for the initiation of the proceedings and recorded a finding. This would have avoided the necessity of a controversial discussion at a later stage and before a Court not having equal facility of access to the materials for determining whether the sanction is in order or not. But in revision, if there is an absence of a complaint by the local authority or an authorized person, and if the proceedings are irregular for that reason, S. 537 provides sufficiently to cure the irregularity. It is said that there is on the record a letter from the Chairman of the Rosera Municipality, but the local authority is the "Municipal Commissioners" and it does not appear whether the Commissioners authorized the Chairman or Seonandan Singh, whose name

appears as complainant, to prefer a complaint under S. 10.

It was next contended that the proceedings are bad because it is not shown that the Bihar and Orissa Prevention of Adulteration Act has been brought into force by a notification of the Local Government in the Rosera Municipality. This again is a question which ought to have been raised and determined before the Court of facts. In the appellate Court the question appears to have been raised, but the pleader for the appellant stated at the time of argument that he was not pressing that point because he found that there was no merit in this contention inasmuch as it was pointed out by the other side that the operation of the Act was extended to the area. It would have been well if the notification extending the Act to the area had been cited in the appellate Court's judgment. The question has again been raised in revision, but it seems to me that the appellate Court's observations amount to a finding of fact.

The third point taken goes more to the merits. It is pointed out that "not genuine" is an expression defined in S. 4 of the Act. Food is deemed to be not genuine in three classes of cases. There is no finding by either of the Courts below under which of these classes the sample of suji examined was taken to be "not genuine." The Courts below have also had no regard to Excep. (ii) to S. 4. In my opinion this argument is not without substance. The first class of food which is deemed "not genuine" is food which is not the same as it purports or is represented to be as for instance if linseed oil is sold as mustard oil; but the Magistrate has not said that he thinks that the sample sold was not suji. The second class is food in which any matter or ingredient has been added fraudulently to increase the bulk, weight or measure, or to conceal the inferior quality. Probably if the Magistrate gave any attention to the matter at all it would be with reference to this provision that he might have held this sample to be "not genuine." The Chemical Analyst's report showed that it was not hundred per cent suji. There was found in it gluten 7·15 %, ash 0·54 %, moisture 11·2 % and on microscopic examination foreign starch grains were found under the microscope in fair number. The Chemical Analyst does not seem to have based any adverse opinion on the presence of moisture or on the presence of ash or on the presence of gluten.

There is no reason to suppose that the gluten represented any foreign body. Gluten is described in Chambers's English Dictionary as the nitrogenous part of the flour of wheat and other grains insoluble in water. So that the only ground on which it can have been held that the suji was not genuine was the presence of foreign starch grains in fair number. Now when this is the case what the Court has to determine before applying S. 4 (b) is that some matter or ingredient has been added fraudulently. The mere presence of some foreign matter in small quantity is not necessarily an offence. The exception specially excludes the case where without fraud

> any extraneous material has in the process of collection, preparation or conveyance unavoidably become mixed with the food.

The Courts below have not applied their mind at all to the question of whether the admixture of foreign starch grains was so large that it could not be explained otherwise than by fraud or to the question whether in transit, etc., other grains had innocently and unavoidably become mixed with the wheat in the suji. That being so I think that the case must go back to the Court of first instance for proper findings. When he has the case before him it may be convenient if the Magistrate on this occasion records findings on the other questions to which I have referred as to the extension of the Act to the Municipality and as to whether there was proper authority for the presentation of the complaint.

R.M./R.K. *Case remanded.*

A. I. R. 1936 Patna 637

WORT AND JAMES, JJ.

Bajrangi Raut and *others*—Defendants—Appellants.

v.

Lala Janki Parshad — Plaintiff and *others*—Defendants—Respondents.

Appeal No. 985 of 1935, Decided on 22nd September 1936, from appellate decree of Sub-Judge, Muzaffarpur, D/- 26th May 1933.

(a) Bengal Alluvion and Diluvion Regulation (11 of 1825), S. 4, Cl. 2—River between villages suddenly changing course — No custom proved that river should be taken as boundary between villages — Land being

clearly recognizable shall remain the property of its original owner.

A river running between two villages suddenly changed its course. The land which was gained by such change was annexed to the land of *L* who claimed it on the ground of custom, that the river was the boundary between the villages. The custom was not proved:

Held: that land being clearly recognizable should remain the property of its original owner and *L* could not claim it. [P 639 C 1]

Held further : apart from the question whether the evidence relied on for its proof justified a finding as to its existence, the custom alleged was so unreasonable as not to be provable in law : 13 *M I A* 467, *Rel. on.* [P 639 C 1]

(b) Custom—Proof of.

Unreasonable custom is not considered provable in law : 13 *M I A* 467, *Rel. on.* [P 639 C 1]

K. P. Jayaswal, *S. K. Mitter* and *Ram Chandra Prasad*—for Appellants.

Hareshwar Prasad Sinha and *Parsuram Prasad Varma*—for Respondents.

Wort, J.—This is an appeal by the defendants in an action with regard to 3 bighas 15 kathas 19 dhurs of land. The defendants were in possession. The plaintiff claimed possession on the footing of a custom to the effect that the river Lakhandei was taken to be under all circumstances the boundary between the plaintiff's village and the defendants' village. The plaintiff's village is Semra and the defendants' Bhabaprasad. Now, in order to come to a conclusion, it is essential to note the manner in which the plaintiff put his case before the Court.

In the plaint he contended in the first instance that the land in dispute accreted to his village; then, later on in his plaint by para. 5, he alleged the custom to which I have already referred. The learned Judge in the Courts below, in my opinion, quite clearly decided the case on the footing of the custom. Issues were settled and the first issue was to this effect :

Whether there is any custom of usage by which the middle of the river Lakhandei has been fixed to be the boundary between the two adjoining villages Semra and Bhabaprasad.

Then deciding the second issue which was :

Whether the river Lakhandei had suddenly changed its course in the year 1902 as alleged by defendant or had gradually shifted and the lands form accretion to plaintiff's village,

the learned Judge made this observation:

In view of my finding in the previous issue, the determination of this issue is quite immaterial, because the custom will prevail, whether the river changed its course gradually or suddenly.

The learned Judge in the trial Court as well as the learned Judge of the appellate Court decided that the custom has been established. Various documents were relied upon, principally maps, which showed that invariably the river Lakhandei did in fact form the boundary between the two villages. Although there is a reference in one part of the judgment of the trial Court to the fact that the course of the river was different from time to time, there is no clear finding by either of the Courts below that during the period covered by the documentary evidence which was relied upon by the Judge that the river had so changed its course. The only definite finding that we have is the one to which I have already referred, namely that the river changed its course suddenly in the year 1902. I have very grave doubts whether a finding as to the custom based on evidence of that description to which I have referred can possibly stand. But there are other considerations which in my judgment dispose of the appeal. The learned Judges of both the Courts appear to have been of the opinion that Regn. 11 of 1825 applied to the case. That regulation is nothing more than a declaratory enactment of the law in England as it stood at the time. In 13 M I A 467 (1), Lord Justice James is reported to have stated at p. 474 :

> The principle of law, so far as relates to accretion has, to some extent, been made part of the positive written law of India and it is on the operation of such positive written law that the defendants' case is based.

Later on in the course of the judgment he makes an observation which in my opinion is material to this case :

> Their Lordships are therefore of opinion that the property now being capable of identification by means of that Tanabundee and otherwise, the property having been the property of the plaintiff when it was submerged, never having been abandoned or derelict, having now emerged from the Ganges, is still his property.

If I understand the observation aright the learned Lord Justice was merely stating the exception to the rule laid down in Regn. 11 of 1825 to the effect that where land was identifiable the rule

1. Lopez v. Muddun Mohun Thakoor, (1869-70) 13 M I A 467=14W R 11=5 Beng L R 521 (P C).

did not apply. It is also clear from the observation in the case to which I have referred that the Regulation applied only to alluvial land. Now, the plaintiff's case was, in para. 3 of his plaint that there was a gradual accretion. But that title acquired by accretion was in my judgment clearly made to depend upon the existence of this custom, and the custom alleged was a custom that wherever the bed of the river was found that was the boundary between the two villages. A perusal of the judgment of the Judge in the Court below will bear this out. The learned Subordinate Judge in the Court below in deciding the second point, the second point being 'whether the lands in suit gradually accreted to the land in the plaintiff's village' makes this observation :

> This point is also decided in favour of the plaintiff as there cannot be any doubt that on account of the shifting of the river Lakhandei from its former position namely the position which it had at the time of the cadastral survey and in which the disputed lands were recorded in the name of the defendants, (it) shifted to its present position by which the disputed lands went to the other side of the village Bhabaprasad.

Now, it is clearly indicated in that observation that what the Judge was depending upon was the decision on the first point, namely whether the custom had been established, and it was upon that that the plaintiff's case depended as I have already observed. I have no hesitation in saying that it was not a case covered by Regn. 11; it was not a case of diluvion at all, but it was a case which depended upon the position of the river as the boundary of the two villages. Cl. 2 of S. 4 may be noticed in this connexion. The Judge in the trial Court had come to the conclusion that the river had suddenly changed its course in 1902 and observed that in a river of the size of Lakhandei a gradual accretion was not to be expected. The decision of the appellate Court on point 2 did not reverse that conclusion. The judgment of both Courts in my judgment proceeded on the footing of this alleged custom; and quite apart from the question whether the evidence relied upon for its proof justified a finding as to its existence, I am clearly of the opinion that the custom alleged was so unreasonable as not to be provable in law. The appeal therefore succeeds and the suit must stand dismissed with costs both in this Court and in the Courts below.

James, J.—I agree.

P.R./R.K. *Appeal allowed.*

A. I. R. 1936 Patna 639

ROWLAND, J.

Emperor

v.

Raghunandan Saran Das

Criminal Ref. No. 49 of 1936, Decided on 31st August 1936, from reference of Addl. Sess. Judge, Darbhanga, D/- 28th July 1936.

Criminal P. C. (1898), S. 133—Procedure to be followed explained—Person to whom order is addressed must first be questioned regarding existence or denial of public right—Inquiry under Ss. 138 and 139 should follow afterwards— Person denying public right must adduce evidence—But in enquiry under Ss. 138 and 139, it is for prosecution to lead evidence and for the other party to answer it.

The procedure in cases under Chap. 10—S. 133 and following—is constantly causing difficulty to the Courts. The pitfall which most frequently leads to error is the omission to observe that when an order under S. 133 has been made with reference to an obstruction in a public way and the person to whom the order has been addressed appears before the Magistrate, the Magistrate must before proceeding to the inquiry contemplated by Ss. 137 and 138 question the person as to whether he denies the existence of any public right in respect of the way or place. At this stage it is clearly for the person so proceeded against to adduce evidence in support of his denial of a public right of way and the Magistrate ought to make a finding whether the existence of a public right is denied or not, and if it is denied whether there has been produced or not reliable evidence in support of the denial. If the existence of a right of way is not denied or if there is no reliable evidence in support of the denial, the Magistrate should then proceed to the inquiry under Ss. 137 and 138 and in this inquiry it is for the Crown to lead evidence and the person proceeded against to answer it. [P 640 C 1]

Hareshwar Prasad Sinha, Rajeshwar Prasad and *P. Jha*—In support of Reference.

Govt. Advocate—Against the reference.

Order.—This is a reference by the Additional Sessions Judge of Darbhanga forwarding the proceedings of a case under Ch. 10 (Ss. 133 and following), Criminal P. C. in which the Sessions Judge is of opinion that the proceedings of the District Magistrate of Darbhanga subsequent to 15th April 1936, which was the date of the preliminary conditional order under S. 133, are contrary to law and

require revision. The procedure in cases under Ch. 10 is constantly causing difficulty to the Courts. The law is explained in 4 Pat 783 (1). The pitfall which most frequently leads to error is the omission to observe that when an order under S. 133 has been made with reference to an obstruction in a public way and the person to whom the order has been addressed appears before the Magistrate, the Magistrate must before proceeding to the inquiry contemplated by Ss. 137 and 138 question the person as to whether he denies the existence of any public right in respect of the way or place. At this stage it is clearly for the person so proceeded against to adduce evidence in support of his denial of a public right of way and the Magistrate ought to make a finding whether the existence of a public right is denied or not, and if it is denied whether there has been produced or not reliable evidence in support of the denial. If the existence of a right of way is not denied or if there is no reliable evidence in support of the denial, the Magistrate should then proceed to the inquiry under Ss. 137 and 138, and in this inquiry it is for the Crown to lead evidence and the person proceeded against to answer it. The nature of these proceedings does not appear to have been fully understood in the Courts below and for this reason alone I think I should have to set aside the order passed and direct that the proceedings be resumed from the point at which they became irregular, that is to say, when the accused appeared in answer to the conditional order of 15th April 1936. The proceedings of the District Magistrate are however defective in another respect also, namely, in refusing a request of the accused for transfer of the case to another Court. The circumstances were these: When the accused, as we may call him (though the expression is not strictly accurate), appeared on 24th April, he asked the District Magistrate himself to consider the documentary evidence which he brought with him, although the District Magistrate in his order of 15th April had directed the accused to appear before the Sadar Subdivisional Officer. Later, when the District Magistrate was holding the inquiry under Ss. 137 and 138 the accused in a petition dated 12th May 1936, prayed that the case might be referred and transferred to some other Court "as it is based and founded on your honour's personal observation." The District Magistrate apparently being influenced by the fact that on an earlier date the accused had asked to argue his case before the District Magistrate personally, ordered: "The case cannot be transferred."

I do not think that the request of the accused to be allowed to show his papers to the District Magistrate on 24th April can be construed as meaning that he wished the entire case to be handled by the District Magistrate himself. On its face once the correct procedure is understood it appears to be no more than a request that the preliminary scrutiny of evidence under S. 139-A should be done by the District Magistrate. This could well have been done without prejudice to the question who should conduct the inquiry under Ss. 137 and 138. This petition, therefore, should not be taken to prejudice the right of the accused to move to have that later inquiry placed before another Magistrate in pursuance of the rights which an accused ordinarily has in all criminal proceedings under S. 191, Criminal P. C., when a Magistrate has taken cognizance of a case on his own knowledge or information. In the result the reference is accepted, the order set aside, and the record will be sent back for the proceedings to be resumed from the stage at which they became irregular and conducted in accordance with law.

B.D./R.K. *Order accordingly.*

1. Thakur Sao v. Abdul Aziz, 1926 Pat 170=91 I C 41=27 Cr L J 9=4 Pat 783=7 P L T 136.

END

S. N. DAR, B. A. LL. B.,
Valid High Court,
SRINAGAR (Kashmir)

P. K UNIVERSITY LIB.
K. DIVISION
Acc No. 75664
Date 16.1.70

THE JAMMU & KASHMIR UNIVERSITY
LIBRARY.

DATE LOANED

Class No. [redacted] Book No. [redacted]

Vol. _____ Copy _____

Accession No. [redacted]

THE JAMMU & KASHMIR UNIVERSITY
LIBRARY.

DATE LOAND

Class No. Book No

Vol Copy

Accession No.

THE JAMMU & KASHMIR UNIVERSITY
LIBRARY.

DATE LOANED

Class No. [redacted] Book No. [redacted]

Vol. _____ Copy _____

Accession No. [redacted]